

**LICENCE APPEAL
TRIBUNAL**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**



**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**

Date: 2018-01-15

Tribunal File Number: 17-000480/AABS

Case Name: 17-000480/AABS v PAFCO

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

Y. L.

Applicant

and

PAFCO

Respondent

DECISION

ADJUDICATOR: Deborah Neilson

APPEARANCES:

For the Applicant: Wei Guo, counsel for the Applicant

For the Respondent: Ryan Kirshenblatt, counsel for the Respondent

Fuzhou and Mandarin interpreter: Charles Shen

HEARD: June 8, 28 and 29, 2017

I. OVERVIEW

- [1] The applicant, Y. L., suffered injuries on August 31, 2016, when he was struck by a car while riding his bicycle. He applied to the respondent for various statutory accident benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (“*Schedule*”), including income replacement benefits. The respondent denies that he qualifies for income replacement benefits. The respondent claims that the applicant was not employed on the day the accident happened.
- [2] The applicant claims he was working as a cook in the kitchen at [a restaurant] at the time of the accident. The respondent relies on documents issued from the restaurant as proof that the applicant was laid off/terminated a few days prior to the accident. The applicant claims that his employer made a mistake on the documentation. The applicant also claims that the calculation of his income replacement benefit should include cash payments made to him. The respondent denies that the applicant was ever paid in cash by the restaurant.
- [3] The applicant submitted an application for dispute resolution services to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”). The parties attended at a case conference before the tribunal, but were unable to settle the dispute. The matter proceeded to a hearing in-person before me.
- [4] The applicant had also initially sought a determination on whether he was entitled to reimbursement for \$34.97 in prescription expenses. The parties advised me at the start of the hearing that this was no longer in issue.

II. ISSUES

- [5] To qualify for IRBs, s.5(1)1 of the *Schedule* requires that the applicant must be employed at the time of the accident or, if not employed, he must have been employed for at least 26 weeks during the 52 weeks before the accident, or he must have been receiving Employment Insurance benefits at the time of the accident. The applicant must also suffer a substantial inability to perform the essential tasks of that employment because of the accident injuries within 104 weeks of the accident. The parties agree that the applicant was not receiving Employment Insurance benefits at the time of the accident and had not worked for at least 26 weeks during the 52 weeks before the accident. The parties also advised that I did not need to make a determination on whether the applicant suffered a substantial inability to perform the essential tasks of a cook.
- [6] The applicant alleges the restaurant initially paid him in cash for some of the workweeks and his last two days, in addition to his paycheque, and that these amounts should be used in calculating the IRB and that the cash payments support that he was still employed on the day of the accident. The respondent denies that the applicant was paid any cash. If he was, the respondent says holiday or vacation pay should not be considered in making the calculation.

- [7] If I find the applicant is entitled to IRBs, I must also determine the amount. IRBs are calculated using 70% of the applicant's pre-accident weekly gross income.¹ The weekly gross income is calculated by taking the applicant's gross earnings in the 4 weeks prior to the accident, multiplying that figure by 13, and then dividing it by 52.²
- [8] The issues I am required to determine can be are as follows:
- A. Was the applicant employed on the date of the accident, as required by subsection 5(1)1.i of the *Schedule*?
 - B. If the answer to the above issue is yes, what is the amount of weekly income replacement benefits the applicant is entitled to receive – was he paid in cash?
 - C. Is the applicant entitled to interest on any overdue payment of benefits?

III. RESULT

- [9] I find the applicant was not employed on the day of the accident. This means he is not eligible for income replacement benefits.

IV. ANALYSIS

- [10] I heard evidence from the applicant, QL (the head chef and kitchen manager of the restaurant), YZ (a supplier to the restaurant and a friend of the applicant) and JS (the operations manager for the restaurant) in support of the applicant's claim that he was employed on the day of the accident. For the following reasons I give that evidence little to no weight and find the witnesses at times not credible.
- [11] The respondent relies on the testimony of Lazina Patel, a claims representative for the respondent who was responsible for adjusting the applicant's claims, and the following documents for proof that the applicant's last day of work was August 28, 2016:
- a. OCF-2 Employer's Confirmation of Income form prepared by JS for the respondent on September 18, 2016, that states the applicant was employed by The restaurant from August 1 to August 28, 2016 and earned \$440.00 per week;
 - b. Record of Employment prepared by the accountant for The restaurant on January 12, 2016, that states the applicant was employed from August 15 to 28, 2016 and earned \$915.20 for 72 hours of work; and

¹ see s.7(2)1(i) of the *Schedule*

² See s. 4 (5) of the *Schedule* which states that if, under the *Income Tax Act* (Canada), a person is required to report the amount of his or her income, the person's income before an accident shall be determined for the purposes of calculating the IRB without reference to any income the person has failed to report contrary to that Act or legislation.

- c. A T4 Statement of remuneration for 2016 issued by the restaurant that states the applicant earned \$915.20.
- [12] The applicant and his witnesses testified that the applicant was still employed on the day of the accident and that a mistake was made on the documents about when his last day of work was. The applicant claims that he was on his way to work when the accident happened.
- [13] The respondent submits that the testimony of the applicant and his witnesses is not consistent with the documents that state his last day of work was August 28, 2016 and the following documents:
- a. Copy of the front of a paycheque payable to the applicant for \$746.53 after deductions dated August 30, 2016 for the pay period from August 15 to 28, 2016;
 - b. Applicant's bank statement showing the August 30, 2016 pay cheque was deposited on September 2, 2016;
 - c. The applicant's signed statutory declaration dated October 17, 2016; and
 - d. Copy of the front of a paycheque payable to the applicant for \$34.54 after deductions dated December 18, 2012 for vacation pay for the period from August 15 to August 28, 2016.
- [14] The respondent claims the oral evidence of the applicant and his witnesses is inconsistent with the documentary evidence and breaks down the inconsistencies in the following areas or topics:
- a. How the applicant was rehired at the restaurant;
 - b. Why he was paid in cash for the first two weeks and last two days he worked;
 - c. What days was he scheduled to work; and
 - d. Why did the record of employment and the OCF-2 Employer's Confirmation of Income state his last day of work was August 28, 2016?
- [15] For the most part, I agree with the respondent that the oral evidence of the applicant and his witnesses is inconsistent and is not reliable for the following reasons:

a. How the Applicant was Rehired

[16] The applicant testified that he had worked as a kitchen helper at the restaurant from approximately January 2014 to May 2015. He quit working because he went back to China for a kidney stone operation. His evidence was corroborated by QL. QL testified that the second time the applicant started working for the restaurant; he came to the restaurant and asked QL for a job. This is different from the applicant's evidence that QL phoned him in July 2016 and asked him to come back to work. This discrepancy in the evidence could be explained by the language barrier and does not have much bearing on my determination that the applicant started to work for the restaurant again in August 2016.

b. Cash Payments

- [17] The applicant's salary was \$440.00 per week according to the OCF-2, the applicant, QL and JS. They all testified that he was paid in cash without any deductions for his first two weeks of employment at the restaurant. The applicant claims he was then paid by cheque for the following two weeks, then paid in cash for the last two days of work and lastly by cheque for his holiday pay. The applicant stated he did not know why he was paid in cash other than for tax purposes. QL, the kitchen manager, stated it was because the applicant was on probation, and JS said it was because QL told her they needed to pay the applicant in cash. I find that the applicant was not paid in cash because the testimony of all the witnesses as why he was paid cash and the oral evidence on timing in light of the documentary evidence is contradictory. No explanation was provided by the applicant.
- [18] The applicant stated he was paid the total of 4 weeks' pay at one time and that his pay was provided by JS to QL, who then gave it to YZ, who delivered it to the applicant in his home. The applicant stated his pay was in a sealed envelope that contained \$880.00 in cash and the August 30, 2016 paycheque for \$746.53.
- [19] JS, the operations manager, testified that the applicant was hired while she was in China from the end of July to September 8, 2016. She did not know he was hired until she returned from China. She then stated that she received a call while she was in China and was asked, presumably by QL, if she could process the applicant's pay. She said it would have to wait until she came back from China. She advised QL that she was unable to arrange his pay with the accountant until she returned.
- [20] JS said that after she returned from China, she obtained \$880.00 from petty cash, which she put into an envelope together with the payroll cheque for the period from August 15 to 28. She gave the envelope to QL to give to the applicant and reported the petty cash to the accountant.

- [21] QL said that he had to wait for JS to return from China to pay the applicant. He obtained the applicant's pay in an envelope from JS and then gave it to the applicant's friend, YZ, to deliver to the applicant because the applicant was not at work on payday. QL did not know what was in the envelope.
- [22] YZ said that after the accident, QL asked him to deliver an envelope to the applicant at the end of August or the beginning of September 2016 and he did so the same day. He delivered the envelope to the applicant at his home. He saw the applicant remove both a cheque and cash from the envelope.
- [23] According to the testimony of the witnesses, the cash was given to the applicant with his paycheque and after J.S. returned on September 8, 2016 from China. However, although a copy of the back of the cheque was not provided, I find that based on the applicant's bank statement, that the paycheque dated August 30, 2016 was deposited by the applicant on September 2, 2016. I also make a finding of fact that the cheque was issued on August 30, 2016, or 9 days before JS claimed she issued the cheque and put it in an envelope with the cash from petty cash. I find the bank statement is compelling evidence showing the cheque was deposited on September 2, 2016, which means that the applicant received the cheque on or before September 2, 2016 or before JS returned from China. This timing is inconsistent with the oral evidence and I prefer the documentary evidence over the oral evidence because it was made in the course of business and is more reliable.
- [24] I do not accept JS's, YZ's and the applicant's evidence that the applicant was paid cash for the last two days of work. The applicant claimed that at the end of September 2016 he received a cash payment of \$146.00 for his two last days of work and in the same envelope, there was a cheque for his vacation pay of about \$30.00. The applicant submits this evidence is corroborated by YZ's testimony that he provided another envelope to the applicant in October 2016 that had cash in it. The applicant's evidence is not to be believed because the vacation paycheque is dated December 18, 2016 and states that it is paid on days worked from August 15 to 28, 2016. I was provided with no evidence that the cheque was backdated. Nor was a bank statement produced to show that the cheque was deposited before December 2016. The evidence of the applicant and his witnesses about being paid cash for two more days of work after August 28, 2016 is unreliable for reasons that will be explained further. I find the cheque date is more reliable and, therefore find as a matter of fact that the cheque was issued on December 18, 2016.
- [25] QL's explanation that employees are paid in cash while they are on probation is not consistent with the applicant's evidence. He stated that he was paid by cheque for all the time he worked at the restaurant in 2014 and 2015.
- [26] The respondent submits that JS's evidence that she paid the applicant in cash is also inconsistent with the adjuster, Ms. Patel's evidence. She testified that she

spoke to JS over the phone on October 24, 2016. JS told Ms. Patel that payments by the restaurant are all made by cheque and the employees are not paid in cash. Ms. Patel recorded the conversation in her adjuster's notes. When questioned about that conversation, JS could not recall speaking to Ms. Patel or any conversation she had with Ms. Patel. She did not recall telling Ms. Patel that she needed to check with the owner of the restaurant to determine the applicant's last day of work and whether he was still employed with the restaurant, or that she had to confirm the applicant's pre-accident employment with the accountant.

- [27] I find that Ms. Patel's evidence is reliable as her evidence is consistent with her adjuster's notes, which were made contemporaneously with her conversation with JS. I find it difficult to believe that JS is unable to recall speaking with Ms. Patel. She had no problem recalling that she filled out the OCF-2 Employer's Confirmation of Income form and instructed the accountant to issue a Record of Employment at the request of both the applicant and his counsel. I find that JS's poor memory together with her failure to explain the inconsistencies in her testimony at the hearing and her statement to Ms. Patel that employees are not paid in cash makes her evidence unreliable.
- [28] I also find JS's evidence about paying cash to the applicant for two more days of work after August 28, 2016 is not reliable because of her evidence about the payroll. JS stated that once someone is put on payroll, paycheques are automatically issued. JS testified that the last pay period was August 28, 2016 and she did not put the applicant on payroll because she thought she could just pay him cash for the two days he worked beyond April 28, 2016. However, these conflicts with her evidence that JS had already been put on the payroll and the fact that a cheque was issued to him in December 2016 for vacation pay. If the applicant was already on the payroll, which he must have been to obtain the August 30th paycheque, JS would have had to ask the accountant to take him off the payroll before the end of the second pay period on September 11, 2016. She would have had to put him back on payroll to issue the vacation pay in December 2016. This does not seem feasible. If it was, I would have expected that the restaurant would have issued a corrected record of employment that reflected that the applicant was employed for three more days beyond August 28, 2016 and paid for two days beyond that. I also would expect that the restaurant would correct the T4 slip to show the total pay made to the applicant. Both documents are required to be filed with the Federal Government. There was no evidence that the restaurant notified the Government of the error or attempted to correct the documents.
- [29] The applicant submits that the reason the restaurant has not corrected the ROE and the T4 is because the restaurant would get into trouble with the Federal Government for issuing pay without deducting and remitting to the taxes to the Government. I reject the applicant's submission. I agree with the respondent that it makes no sense for the restaurant to pay its staff under the table in order to save on paying the employer's portion of taxes. The restaurant's tax deduction for

wages is far greater than any savings it may see from not paying its portion of an employee's taxes.

c. What Days was the Applicant Scheduled to Work

- [30] QL stated the applicant usually worked 5 days per week, six hours per day in a split shift from 10:30 a.m. to 9:30 p.m. According to QL's evidence, this means the applicant worked about 30 hours per week.
- [31] The applicant testified that he worked 6 days per week. In his statutory declaration dated October 17, 2016, he stated that he worked 36 to 40 hours per week 5 days per week.
- [32] The applicant did not offer any explanation for why his statutory declaration and his testimony were inconsistent. However, I find the inconsistency is explained by QL who stated that his staff may work more than 6 hours per day at times, but they are not required to work 7 days per week. I draw an inference that the staff may often work 6 days per week.
- [33] Where I have concerns is with the lack of documentary evidence of the applicant's schedule. QL said that he made up a schedule for the kitchen staff, which consists of 6 people. The schedule changes week to week depending on whether there are special events scheduled. QL wrote up a schedule for August 2016, but a copy was not produced. When asked about it, QL did not provide any coherent reason for why it was not produced.
- [34] JS stated she was responsible for preparing a payroll chart based on the staff's hours that she gives to the accountant. She did not do this for the first two weeks of the applicant's employment but did for his last two weeks. No payroll chart was produced for the applicant's last weeks of work in 2016.
- [35] The respondent has asked that an adverse inference be drawn since those documents were not produced. I have drawn an adverse inference because I accept the evidence that a scheduling sheet exists and that a payroll chart exists and that the applicant was put on the payroll at some point in order to be paid by cheque for two weeks work plus vacation. The documents would have confirmed whether the applicant was scheduled to work beyond August 28, 2016. The applicant was ordered to produce a complete copy of the applicant's employment file including scheduling sheets and sign in sheets. I draw an adverse inference that the scheduling sheet was not produced because it would not have supported the applicant's claims that he worked two days after August 28, 2016 or was scheduled to work on August 31, 2016.
- [36] The schedule and the payroll chart are both relevant, especially because JS's testimony was that the applicant worked on August 31, 2016, the day of the accident. I find that the applicant did not work on August 31, 2016 because that was the day of the accident. The applicant submits that he worked on August 29

and 30, 2016, but the accountant retained by the applicant based his report on the information that the applicant did not work on those days. The applicant submits that the evidence that he was paid for two days of work following August 28, 2016 supports that he worked for 2 days beyond August 28, 2016. I cannot rely on the evidence that the applicant was paid in cash for those two days because there are too many inconsistencies that would have been clarified by the scheduling or the payroll sheet.

d. Whether the Date on the Record of Employment and the OCF-2 Employer's Confirmation of Income is an Error.

- [37] JS testified that she made a mistake on the OCF-2 Employer's Confirmation of Income for in stating that the applicant's last day of work was August 28, 2016. She did not prepare the applicant's ROE, but she gave the information to the accountant to prepare it. This means she advised the accountant the applicant's last day of employment was August 28, 2016. JS claimed that the ROE was also mistaken and that the applicant worked on August 30 and August 31, 2016. She claimed that she thought she could just pay the applicant for his last two days in cash, but this was an error on her part.
- [38] JS's explanation however, is not consistent with the applicant's evidence that his was on his way to work on August 31, 2016 when the accident happened, which means he could not have worked on August 31, 2016. Nor is JS's evidence consistent with the paycheques the applicant received. I have already determined that JS's evidence about the applicant being paid cash is unreliable. Further, the documents that would have supported JS's evidence, the payroll chart and QL's schedule for the kitchen were not produced.
- [39] JS stated that she did not realise there was any error until she wrote a letter at the applicant's lawyer's request dated April 28, 2017. In her letter, JS stated that the applicant worked for the restaurant on August 30 and August 31, 2016 and was paid cash for those two days. I find the contents of the letter are not reliable for the reasons previously given. JS was supposed to call Ms. Patel back with what information she was able to obtain from others to confirm the pre-accident pay and the last day of work. However, this was information that JS said that she provided to the accountant. The inconsistencies in her evidence make her evidence about an error on the documents and how she made her error unreliable.

A. EMPLOYED ON THE DATE OF THE ACCIDENT

- [40] Given my findings of fact, I am unable to accept the evidence of the applicant and his witnesses that he was employed on the day of the accident. I accept that he was not at the restaurant to accept the paycheque issued on August 30, 2016 and he could not have worked on August 31, 2016 because he was in the hospital that day. Because I have found that the applicant was not paid cash, I am unable to find that he worked for the restaurant beyond August 28, 2016. If he was still an employee of the restaurant on the day of the accident, he would have still been on

the payroll and a cheque would have been issued for any days he worked during the pay period of August 29, 2016 to September 11, 2016. As he was not issued a paycheque beyond August 28, 2017, he was not issued holiday pay for any days beyond August 28, 2016. I find he was no longer on the payroll as of August 29, 2016. Otherwise, the applicant should have been able to produce the payroll submissions of JS and the kitchen schedule from QL to substantiate his and their evidence. I have drawn an adverse inference that the schedule for the kitchen staff and the payroll charts were not produced because they would have confirmed the applicant was no longer employed after August 28, 2016.

- [41] The applicant claims he was on his way to work when the accident happened. I accept that he was riding his bicycle to the restaurant, but it is more probable that he was on his way to pick up his paycheque than to work. Because of the inconsistencies and unreliable testimony, the applicant has not proven on a balance of probabilities that he was employed by the restaurant on the day of the accident. The applicant is, therefore, not qualified to receive IRBs.

B. AMOUNT OF INCOME REPLACEMENT BENEFIT AND INTEREST

- [42] Since I have found that the applicant does not qualify for IRBs, I need not consider what the amount of IRB payable is. As there are no IRBs owed to the applicant, no interest is payable.

V. ORDER

- [43] The applicant does not qualify for income replacement benefits as he has not proven on a balance of probabilities that he was employed on the day of the accident. The applicant's claim for income replacement benefits is dismissed.

Released: January 15, 2018

Deborah Neilson, Adjudicator