



Civil Resolution Tribunal

Date Issued: December 1, 2022

File: AB-2022-002420

Type: Motor Vehicle Injury

Category: Accident Benefits

Civil Resolution Tribunal

Indexed as: *Berlinguette v. ICBC*, 2022 BCCRT 1298

BETWEEN:

ROBERT BERLINGUETTE

APPLICANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Leah Volkers, Tribunal Member

INTRODUCTION

1. This dispute is about entitlement to income replacement benefits.
2. The applicant, Robert Berlinguette, was in a motor vehicle accident on February 25, 2022. Mr. Berlinguette is an industrial carpenter and was off work as a result of the

accident. Mr. Berlinguette says the respondent insurer, Insurance Corporation of British Columbia (ICBC), underpaid him for income replacement benefits. Mr. Berlinguette claims \$8,600 in income replacement benefits.

3. ICBC says it calculated Mr. Berlinguette's income replacement benefits as required by the *Insurance (Vehicle) Act* (IVA) and associated regulations. ICBC denies it owes Mr. Berlinguette any further income replacement benefit compensation.
4. Mr. Berlinguette is self-represented. ICBC is represented by an authorized employee.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over accident claims brought under section 133 of the *Civil Resolution Tribunal Act* (CRTA). Section 133(1)(a) of the CRTA gives the CRT jurisdiction over the determination of entitlement to accident benefits.
6. CRTA section 2 states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
7. CRTA section 39 says that the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.
8. CRTA section 42 says that the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

Failure to offer additional coverage

9. In his submissions, Mr. Berlinguette alleged that ICBC was “neglectful” in failing to ensure he knew about additional insurance coverage available for people who earn over \$100,000 per year. He says he thought he was “fully covered”, and was not informed about the option of additional insurance coverage until he was involved in the accident. He says ICBC does not require its insurance agents to provide this information when people are renewing their insurance. This claim was not included in Mr. Berlinguette’s application for dispute resolution.
10. I find ICBC did not have fair notice of Mr. Berlinguette’s additional claim raised only in argument to allow ICBC to adequately respond. Therefore, I find this additional claim is not properly before me in this dispute. Even if Mr. Berlinguette had included this additional claim in his application for dispute resolution, the CRT does not have authority under its accident claims jurisdiction to address it, but it may fall within the CRT’s small claims jurisdiction, subject to the CRT’s small claims monetary limit. Given all the above, I make no findings on these allegations in this dispute.

ISSUE

11. The issue in this dispute is whether Mr. Berlinguette is entitled to a higher income replacement benefit than already paid and, if so, how much.

BACKGROUND, EVIDENCE AND ANALYSIS

12. In a civil claim such as this, as the applicant, Mr. Berlinguette bears the burden of proof on a balance of probabilities, meaning “more likely than not”. While I have reviewed all of the parties’ evidence and submissions, I have only addressed the evidence and arguments to the extent necessary to explain my decision.
13. The parties agree that Mr. Berlinguette was in an accident on February 25, 2022 in Maple Ridge, British Columbia, and is entitled to income replacement benefits.

14. ICBC undisputedly paid Mr. Berlinguette \$14,958 in income replacement benefits between March 4, 2022 and July 11, 2022. Mr. Berlinguette says he returned to work on July 20, 2022. Mr. Berlinguette does not argue he should be paid beyond July 20, 2022, but says that the amount of income replacement benefits ICBC paid him between February and July 2022 was unfair and too low. Mr. Berlinguette says ICBC improperly calculated his entitlement to income replacement benefits and paid him less than he is entitled to. He says ICBC owes him an extra \$400 per week for 22 weeks, which totals an extra \$8,800 in income replacement benefits. I note this amount is \$200 more than the amount listed in his application for dispute resolution. Mr. Berlinguette did not explain this discrepancy.
15. ICBC disputes this and says it has overpaid Mr. Berlinguette income replacement benefits as required under the applicable legislation. ICBC says Mr. Berlinguette was only entitled to \$13,742.86 in income replacement benefits between February 25, 2022 and July 11, 2022, and so has overpaid Mr. Berlinguette by \$1,215.14. ICBC is not seeking reimbursement of the alleged overpayment in this dispute.
16. Part 10 of the IVA, Enhanced Accident Benefits and Limits on Actions and Proceedings, applies to accidents that occur on and after May 1, 2021, which includes Mr. Berlinguette's accident.
17. In determining an insured's entitlement to income replacement benefits, IVA sections 131 and 133 require ICBC to calculate and determine the income replacement benefits for full-time earners and temporary and part-time earners, in accordance with the regulations. The applicable regulation is the *Income Replacement and Retirement Benefits and Benefits for Students and Minors Regulation* (IRB).
18. IRB section 2(1) says that subject to the IRB, the income replacement benefit to which an insured is entitled to under IVA Division 6 of Part 10, which includes IVA sections 131 and 133, is an amount equal to 90% of the insured's "net income", determined on a yearly basis in accordance with this regulation.

19. IRB section 28(1) says the “net income” of an insured is the gross yearly employment income (GYEI) of the insured, less income tax, employment insurance premiums, and Canadian Pension Plan contributions that are payable, and subject to certain exceptions.
20. At the time of the accident, Mr. Berlinguette was working as an industrial carpenter and forklift operator. His employer provided a completed “certificate of earnings” form to ICBC after the accident. The certificate of earnings form indicated that Mr. Berlinguette started his employment on April 19, 2021, and included the following information:
- a. He worked a shift cycle of 20 days on, 8 days off,
 - b. He was paid hourly,
 - c. In a 28 day shift cycle, he worked 230 hours. He was paid 120 hours at \$40 per hour, and 110 hours overtime at \$60 per hour.
 - d. In addition to his hourly wages, he was paid:
 - i. \$1.98 per hour for health and dental benefits,
 - ii. \$2.40 per hour for pension,
 - iii. 10.8% in vacation pay.
 - e. His gross wages (including vacation pay) in the past 52 weeks were \$51,113.28.
21. An email from Mr. Berlinguette’s employer enclosing the certificate of earnings said that Mr. Berlinguette worked April 19, 2021 to May 31, 2021, and was then laid off when the project completed. The employer said Mr. Berlinguette was re-hired on November 16, 2021, and was slated to work until mid-April 2022 when the project was to be completed. It is undisputed Mr. Berlinguette was unable to return to this job after the accident.

22. ICBC calculated Mr. Berlinguette's income replacement benefit as a "temporary earner". IVA section 113 defines a "temporary earner" as an insured who, at the time of the accident, holds regular employment on a temporary basis. IRB section 1 defines "temporary basis" as an insured who is employed but not on a part-time or full-time basis. "Part-time basis" means the insured is employed for less than 28 hours per week. "Full-time basis" means the insured is employed 28 hours or more in each week of the year before the accident. Mr. Berlinguette started his employment on April 19, 2021, so he was not employed for a full year before the accident. So, I find Mr. Berlinguette was a "temporary earner".
23. IRB section 5 sets out the basis on which the income replacement benefit is determined for temporary earners and part-time earners in the first 180 days after the accident. IRB section 5(1)(a) says that, for temporary earners, the income replacement benefit is based on the GYEI that the temporary earner earned or would have earned from the employment if the temporary earner would have held employment as a "salaried worker" at the time of the accident.
24. ICBC says it determined Mr. Berlinguette's income replacement benefit based on Mr. Berlinguette being a "salaried worker" under IRB section 5(1)(a). The IRB does not provide a definition for "salaried worker". The Oxford Canadian Dictionary defines "salary" as a fixed regular payment made by an employer to an employee. The certificate of earnings form completed by Mr. Berlinguette's employer included an option for the employer to indicate whether the employee was paid a salary, or was paid hourly. Mr. Berlinguette's employer indicated that he was paid hourly. I find Mr. Berlinguette's bi-weekly pay statements also indicated that he was paid hourly, and do not show that he was receiving fixed regular payments from his employer. Given all the above, I find Mr. Berlinguette was not a salaried worker at the time of the accident.
25. The IRB provides other options to determine the basis of the income replacement benefit for a temporary worker under section 5. However, IRB section 5(1)(b) applies to self-employed temporary workers, and IRB section 5(1)(c) applies to temporary

workers that held more than one employment at the time of the accident. Neither of these subsections apply to Mr. Berlinguette. Therefore, I find IRB section 5 does not provide a basis for determining Mr. Berlinguette's income replacement benefit.

26. IRB section 20 says the GYEI of a temporary earner or part-time earner during the first 180 days after the accident is the amount determined under IRB section 17 and section 18. In reliance on IRB section 5(1)(a), ICBC says it calculated Mr. Berlinguette's GYEI based on IRB section 17. IRB section 17 sets out the method to calculate GYEI for a salaried worker. However, I have already found that Mr. Berlinguette was not a salaried worker at the time of the accident. Therefore, I find IRB section 17 does not apply. IRB section 18 is for self-employed workers. So, I find IRB section 18 also does not apply.
27. The IRB does not provide a basis to determine a temporary earner's GYEI or net income when their GYEI cannot be determined under section 17 or 18. However, IRB section 3(2) does set out an alternate formula for determining an insured's income replacement benefit.
28. IRB section 3(2) says an insured who is entitled to an income replacement benefit based on section 2(1), is entitled to the greater of (a) the income replacement benefit calculated elsewhere within the IRB, or (b) the income replacement benefit determined under section 3(3), but not both.
29. It is undisputed that Mr. Berlinguette is entitled to an income replacement benefit under section 2(1). However, as discussed, I cannot determine his income replacement benefit based on section 2(1), or elsewhere within the IRB as contemplated by section 3(2)(a), because I find the IRB does not provide a basis to determine his GYEI or net income. Therefore, I find Mr. Berlinguette is entitled to an income replacement benefit under section 3(2)(b), and his income replacement benefit must be determined using the alternate formula set out in IRB section 3(3).
30. IRB section 3(3) says the income replacement benefit in section 3(2)(b) is the lesser of \$740 per week, or an amount per week calculated by:

$$[(0.75 \times Y) / W] - \text{ODC}$$

Y = the insured's "gross earnings" for the 12-month period immediately preceding the accident

W = the number of weeks actually worked by the insured during that period

ODC = the other disability compensation

31. IRB section 3(1) says ODC is other compensation under IVA section 122.
32. In order to use the IRB's alternate formula to determine income replacement benefits, Mr. Berlinguette's "gross earnings" are required. The IRB does not set out a method to determine "gross earnings" in the 12 months prior to an accident, or say what amounts should be included in an insured's gross earnings. Mr. Berlinguette's certificate of earnings from his employer at the time of the accident indicated that his "gross wages" in the 52 weeks before the accident were \$51,113.28. However, the certificate of earnings form did not require his employer to provide a statement of Mr. Berlinguette's "gross earnings".
33. Based on his employer's email, Mr. Berlinguette worked between April 19, 2021 and May 31, 2021 and November 16, 2021 to February 25, 2022. Mr. Berlinguette did not dispute this. I find his year-to-date (YTD) earnings on his pay statements during this time period total \$59,040.82. Therefore, based only on his YTD earnings from April 19, 2021 to February 25, 2022, I find Mr. Berlinguette's gross earnings for the 12 months before the accident total \$59,040.82.
34. IRB section 3(4) says an insured's gross earnings for the purposes of the alternate formula may not be more than the maximum yearly insurable income. IRB section 2(2) says the maximum yearly insurable income from May 1, 2021 to March 31, 2022 is \$100,000. The maximum insurable income from April 1, 2022 is \$105,500.
35. ICBC says Mr. Berlinguette was also receiving \$650 per week in short-term disability benefits (STD), which it says must be deducted as ODC because STD is "other

compensation” within the meaning of IVA section 122. IVA section 122(2) says that ICBC must not pay a benefit to a person entitled to other compensation for the same accident except to the extent the amount of the benefit payable by ICBC exceeds the value of the other compensation. Other compensation includes amounts payable from a prescribed insurance coverage (IVA section 122(1)(c)), which I find includes Mr. Berlinguette’s STD. Mr. Berlinguette indicated in his “accident benefits application” form that he had other disability insurance, and he did not dispute that he received \$650 per week in STD. So, pursuant to IVA section 122(2) and IRB section 3(1), I find his weekly STD payment must be deducted as ODC.

36. Based on his certificate of earnings, Mr. Berlinguette worked 28-day shifts with 20 days on and 8 days off. The IRB does not define “week”, and does not say how to determine “weeks actually worked” for the purpose of the alternate formula. As noted, Mr. Berlinguette was employed between April 19, 2021 and May 31, 2021 and November 16, 2021 to February 25, 2022. I find this amounts to 21 weeks. So, for the purpose of this decision, I have used 21 weeks as Mr. Berlinguette’s “weeks actually worked”.

37. Using the section 3(3) alternate formula and based only on Mr. Berlinguette’s gross earnings in the 12 months before the accident as calculated above, Mr. Berlinguette is entitled to \$1,458.60 per week:

$$[(0.75 \times \$59,040.82) / 21] - \$650 = \$1,458.60$$

38. \$740 is less than \$1,458.60, so I find Mr. Berlinguette’s income replacement benefit under IRB section 3(3) is \$740. I did not determine Mr. Berlinguette’s income replacement benefit under any other IRB section, because, as noted above, I find the IRB does not provide a method to determine a temporary worker’s GYEI when it cannot be determined under sections 17 or 18. Without a GYEI, it is not possible to determine either Mr. Berlinguette’s net income under IRB section 28, or his income replacement benefit under section 2(1). Therefore, pursuant to section 3(2)(b), I find

Mr. Berlinguette is entitled to income replacement benefits calculated at \$740 per week, as determined under IRB section 3(3)'s alternate formula.

39. ICBC says it has paid benefits from March 4, 2022 to July 11, 2022. Mr. Berlinguette says he returned to work on July 20, 2022. An email from Mr. Berlinguette's STD provider to ICBC indicated that Mr. Berlinguette returned to work on July 11, 2022. Mr. Berlinguette did not provide any documentary evidence to contradict this. So, I find Mr. Berlinguette returned to work on July 11, 2022. It is unclear exactly what amounts ICBC paid Mr. Berlinguette each week between March 4, 2022 and July 11, 2022. ICBC did not provide a weekly breakdown of payments provided. It is also unclear when or whether Mr. Berlinguette stopped receiving STD payments, although the evidence suggests this may have been at some point in July 2022.
40. Based on the evidence and the IRB, I find Mr. Berlinguette is entitled to income replacement benefits at \$740 per week from March 4, 2022 to July 11, 2022, which totals 18 weeks. This totals \$13,320. This amount is less than what ICBC undisputedly paid. Therefore, I find Mr. Berlinguette is not entitled to any higher income replacement benefit for benefits paid. I dismiss Mr. Berlinguette's claim.

FEES AND EXPENSES

41. Under section 49 of the CRTA, and the CRT rules, a successful party is generally entitled to the recovery of their tribunal fees and dispute-related expenses. As Mr. Berlinguette was not successful, I find that he is not entitled to reimbursement for his paid CRT fees. For the same reason, I order Mr. Berlinguette to reimburse ICBC \$25 for its paid CRT fees. Neither party claimed dispute-related expenses.

ORDERS

42. Within 30 days of the date of this decision, I order the applicant, Mr. Berlinguette, to pay the respondent, Insurance Corporation of British Columbia (ICBC), a total of \$25 as reimbursement of CRT fees.

43. ICBC is also entitled to post-judgment interest under the *Court Order Interest Act*.

44. I dismiss Mr. Berlinguette's claims.

45. Under section 57 and 58 of the CRTA, a validated copy of the CRT's order can be enforced through the Supreme Court of British Columbia or the Provincial Court of British Columbia if it is under \$35,000. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

Leah Volkers, Tribunal Member