



Civil Resolution Tribunal

Date Issued: January 11, 2023

File: AB-2022-001433

Type: Motor Vehicle Injury

Category: Accident Benefits

Civil Resolution Tribunal

Indexed as: *Mariyanayaga v. ICBC*, 2023 BCCRT 30

BETWEEN:

SURESHKUMAR WILLIAM MARIYANAYAGA

APPLICANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Leah Volkers

INTRODUCTION

1. This dispute is about entitlement to income replacement benefits.
2. The applicant, Sureshkumar William Mariyanayaga, was in a motor vehicle accident on November 12, 2021. Mr. Mariyanayaga had more than one job at the time of the

accident and was undisputedly off work as a result of the accident. Mr. Mariyanayaga says the respondent insurer, Insurance Corporation of British Columbia (ICBC), underpaid him for income replacement benefits. Mr. Mariyanayaga claims \$8,800 in income replacement benefits.

3. ICBC says it calculated Mr. Mariyanayaga's income replacement benefits as required by the *Insurance (Vehicle) Act* (IVA) and associated regulations. ICBC denies it owes Mr. Mariyanayaga any further income replacement benefit compensation.
4. Mr. Mariyanayaga 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). CRTA section 133(1)(a) 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.

ISSUE

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

BACKGROUND, EVIDENCE AND ANALYSIS

10. In a civil claim such as this, as the applicant Mr. Mariyanayaga bears the burden of proof on a balance of probabilities, meaning “more likely than not”. While I have read all of the parties’ evidence and submissions, I have only addressed the evidence and arguments to the extent necessary to explain my decision.
11. It is undisputed that Mr. Mariyanayaga was in an accident and is entitled to income replacement benefits. Mr. Mariyanayaga says the accident occurred on November 13, 2021. ICBC says the accident occurred on November 12, 2021. I find the documentary evidence shows that the accident occurred on November 12, 2021. So, I find Mr. Mariyanayaga is entitled to income replacement benefits from November 12, 2021.
12. Mr. Mariyanayaga says he was employed as a janitor, and also worked as a driver for Uber, Lyft and Amazon at the time of the accident. Mr. Mariyanayaga says he earned \$3,600 per month as a janitor. He says after deducting \$100 per month for his gas expenses and a \$1,700 payment from ICBC, he is entitled to \$8,800 for 3 months of income replacement benefits. Mr. Mariyanayaga says he only received around \$1,700 in income replacement benefits.
13. ICBC says based on the employment information Mr. Mariyanayaga provided, it has paid Mr. Mariyanayaga income replacement benefits as required by the IVA and the applicable regulations.

14. At the time ICBC provided its Dispute Response, ICBC said it has paid Mr. Mariyanayaga \$4,212.95 in income replacement benefits, and would review any additional documents provided by Mr. Mariyanayaga and make any required adjustments to Mr. Mariyanayaga's income replacement benefits.
15. However, the evidence shows ICBC has paid Mr. Mariyanayaga \$8,811.88 in income replacement benefits between November 12, 2021 and February 18, 2022. In submissions, ICBC says it initially calculated Mr. Mariyanayaga's income replacement benefits based on his work for only Lyft, Uber and Amazon, and then recalculated Mr. Mariyanayaga's income replacement benefit to include his work as a janitor when Mr. Mariyanayaga provided further employment information. ICBC says it continues to pay Mr. Mariyanayaga his income replacement benefits.
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. Mariyanayaga'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. As noted, Mr. Mariyanayaga says he was employed as a janitor, and also worked as a driver for Uber, Lyft and Amazon. Mr. Mariyanayaga did not submit any proof of employment with Lyft, so I find that employment unproven. Mr. Mariyanayaga did provide proof of some earnings from both Uber and Amazon. Based on the evidence, I find Mr. Mariyanayaga was employed with Amazon and Uber on an intermittent basis. In submissions, Mr. Mariyanayaga says he is only seeking income replacement benefits based on his janitorial work. Mr. Mariyanayaga says he is not claiming any income replacement benefits based on his work for Uber, Lyft, or Amazon because he does not have expense receipts for the work. He says “these will be focused on at a later date”. Mr. Mariyanayaga submitted his application for dispute resolution on February 24, 2022.
21. Given all the above, I find Mr. Mariyanayaga claim for \$8,800 in income replacement benefits is specifically for the 3 months immediately following the accident. Mr. Mariyanayaga did not make any claim or provide submissions about his entitlement to income replacement benefits beyond the 3 months immediately following the accident. So, I have not considered Mr. Mariyanayaga’s entitlement to income replacement benefits after February 13, 2022 in this dispute.
22. As noted, Mr. Mariyanayaga also says he will address income replacement benefits for his employment with Uber and Amazon “at a later date”, and did not address them in this dispute. However, given the manner in which income replacement benefits are calculated under the IRB for specified time periods, and given that Mr. Mariyanayaga does not dispute that he worked for Uber and Amazon at the time of the accident, I have considered this employment when determining his income replacement benefits for the 3 months following the accident.
23. ICBC calculated Mr. Mariyanayaga’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.

24. IVA section 113 defines a “part-time earner” as an insured who, at the time of the accident, holds regular employment on a part-time basis. IRB section 1 defines “part-time basis” as an insured who is employed for less than 28 hours per week. Mr. Mariyanayaga’s janitorial contract shows that his employment started on October 15, 2021 and was scheduled for 28 hours per week. So, I find Mr. Mariyanayaga was not employed on a part-time basis.
25. IRB section 1 says “full-time basis” means the insured is employed either 28 hours or more in each week of the year before the accident, or for 28 hours per week or more for 2 years or more with periods of work of 8 months or more with gaps of less than 4 months. As noted, Mr. Mariyanayaga’s janitor employment started a month before the accident. Mr. Mariyanayaga says he has experience working as a janitor since “the pandemic”, which I infer means 2020. However, he provided no documentary evidence that shows he worked as a janitor before October 15, 2021. I find Mr. Mariyanayaga was not employed as a janitor on a “full-time basis”.
26. I have found Mr. Mariyanayaga was not employed on a part-time or full-time basis. So, I find Mr. Mariyanayaga was employed on a temporary basis and is a “temporary earner”.
27. IRB section 5 sets out how the income replacement benefit is determined for temporary earners and part-time earners in the first 180 days after the accident.
28. ICBC says it determined Mr. Mariyanayaga’s income replacement benefit based on Mr. Mariyanayaga being “self-employed” under IRB section 5(1)(b). Mr. Mariyanayaga does not dispute that he was self-employed, and I find the documentary evidence supports this. IRB section 5(1)(b) applies to self-employed temporary and part-time earners.
29. IRB section 5(1)(b) says that, for self-employed temporary earners, the income replacement benefit is based on either:
- (i) The gross yearly employment income (GYEI) of the same class of employment from Table 1 in the IRB schedule, or

- (ii) The GYEI the temporary earner would have earned from employment, whichever is higher.

Table 1, titled “Classes of Employment Income by Occupational Classification”, sets out various employment classes, as discussed further below.

30. IRB section 5(1)(c) says that the income replacement benefits for a temporary earner that hold more than one employment at the time of the accident is based on the GYEI the temporary earner would have earned from all employment that the temporary earner is unable to continue because of the accident.
31. IRB section 18(2) says GYEI for self-employed workers under IRB section 5(1)(b)(ii) is based on “business income”. I find Mr. Mariyanayaga has not provided enough information about his employment as a janitor or for Uber and Amazon to calculate his “business income”.
32. Therefore, I find Mr. Mariyanayaga’s income replacement benefit must be determined based Table 1 of the Schedule, as set out IRB section 5(1)(b)(i). Section 18 further says if using Table 1, GYEI is derived using IRB, Part 8, Division 3, “Classes of Employment”.
33. Based on IRB section 5(1)(b)(i), I find Mr. Mariyanayaga’s employment as a janitor falls within National Occupational Classification (NOC) code and employment class 673 for “cleaners”, as set out in Table 1 of the Schedule. The three levels of GYEI for NOC 673 are: Level 1: \$28,947, Level 2: \$41,980, Level 3: \$55,810.
34. I find Mr. Mariyanayaga’s employment with Uber falls within NOC code 7513 “taxi and limousine drivers and chauffeurs”. The three levels of GYEI for NOC 7513 are: Level 1: \$16,579, Level 2: \$24,416, Level 3: \$35,169.
35. As noted, the parties do not dispute that Mr. Mariyanayaga worked as a janitor and also did “piece-work” for Uber and Amazon. The GYEI dollar figures set out in Table 1 of the schedule are for full-time work for a full year. Given this, and the limited information for Mr. Mariyanayaga’s employment with Uber and Amazon, I find it

unnecessary to consider a third NOC code for Mr. Mariyanayaga's intermittent employment with Amazon. I find it reasonable to determine Mr. Mariyanayaga's income replacement benefits by combining the GYElS based on the NOC codes for his employment as a janitor and for Uber.

36. Section 42(1) of the IRB says when using Table 1, ICBC must determine the level of experience that the insured has in the determined class of employment. Section 42(1) defines 3 levels of experience:

- i. Level 1 means less than 36 months of experience,
- ii. Level 2 means 36 months or more but less than 120 months of experience, and
- iii. Level 3 means 120 months or more of experience.

37. Mr. Mariyanayaga says his GYEl should be determined based on experience level 2. However, the evidence does not show that he worked more than 36 months before the accident as either a janitor or for Uber or Amazon. No other information about Mr. Mariyanayaga's prior work history was provided. So, I find level 1 is the appropriate level of experience for Mr. Mariyanayaga. This means Mr. Mariyanayaga's GYEl is \$45,526 (\$28,947 + \$16,579) for the purposes of determining his entitlement to income replacement benefits.

38. ICBC also says it reduced Mr. Mariyanayaga's GYEl to account for Mr. Mariyanayaga starting his return to work with Uber and Amazon on January 14, 2022. Mr. Mariyanayaga does not dispute that he started his return to work with Uber and Amazon on around January 14, 2022.

39. So, I find I must calculate Mr. Mariyanayaga's entitlement based on being fully disabled from work from November 12, 2021 to January 13, 2022, and being partially disabled from work from January 14, 2022 to February 13, 2022.

40. To account for his partial return to work in January 2022, ICBC says it reduced Mr. Mariyanayaga's GYEl based on NOC code 7513 for his employment with Uber by

50% to \$8,289.50. Combined with the full GYEI for his work as a janitor, Mr. Mariyanayaga's reduced GYEI is \$37,236.

41. The IRB does not specifically address what income replacement benefits are payable when an insured has started a gradual return to work. However, IVA section 133(1) says an insured that is a temporary earner is entitled to income replacement benefits if they are unable to continue the employment or hold an employment that the temporary earner would have held if the accident had not occurred. ICBC says Mr. Mariyanayaga returned to work for Uber and Amazon in a "part-time" capacity, and does not dispute that Mr. Mariyanayaga has been unable to continue his employment as a janitor. Therefore, I find Mr. Mariyanayaga continued to be substantially unable to continue his employment, and remained entitled to income replacement benefits. In the absence of clear language in the IVA or IRB, I find it reasonable to pay Mr. Mariyanayaga income replacement benefits based on a reduced GYEI to account for Mr. Mariyanayaga's gradual return to work with Uber and Amazon.
42. Given all the above, I find Mr. Mariyanayaga is entitled to income replacement benefits based on an unreduced GYEI of \$45,526 from November 12, 2021 to January 13, 2022. I also find Mr. Mariyanayaga is entitled to income replacement benefits based on a reduced GYEI of \$37,236 from January 14, 2022 to February 13, 2022. As noted, I have not considered Mr. Mariyanayaga's entitlement to income replacement benefits after February 13, 2022.

Income replacement benefits from November 12, 2021 to January 13, 2022

43. IRB section 35(2), says an insured is not entitled to payment of an income replacement benefit for the first seven days following the accident, subject to some exceptions that do not apply here. So, I have not calculated any income replacement benefits from November 13 to 19, 2021, the first seven days following the November 12, 2021 accident.

44. Neither party provided submissions on the appropriate deductions on Mr. Mariyanayaga's unreduced GYEI. On a judgment basis, I deduct a nominal 10%. This means net income on the \$45,526 unreduced GYEI is \$40,973.40.
45. 90% of \$40,973.40 is \$36,876.06. So, further to IRB section 2, Mr. Mariyanayaga's yearly income replacement benefit based on his unreduced GYEI is \$36,876.06. This works out to \$707.21 per week.
46. This means Mr. Mariyanayaga is entitled to \$5,556.65 in income replacement benefits for the 7-week and 6 day period from November 20, 2021 to January 13, 2022.

Income replacement benefits from January 14, 2022 to February 13, 2022

47. ICBC says it deducted \$4,100.64 for income tax and \$3,677.28 for CPP contributions from Mr. Mariyanayaga's reduced GYEI, but did not explain how it determined these amounts. Mr. Mariyanayaga did not dispute these deductions, but without any explanation I cannot determine if they are appropriate. On a judgment basis, I deduct a nominal 10%. This means net income on the \$37,236 reduced GYEI is \$33,512.40.
48. 90% of \$33,512.40 is \$30,161.16. So, further to IRB section 2, Mr. Mariyanayaga's yearly income replacement benefit based on his reduced GYEI is \$30,161.16. This works out to \$578.43 per week.
49. This means Mr. Mariyanayaga is entitled to \$2,561.62 in income replacement benefits for the 4-week and 3 day period from January 14, 2022 to February 13, 2022.

Alternate Formula

50. The IRB also provides an alternate formula for calculating income replacement benefits. Section 3(2) says an insured who is entitled to an income replacement benefit under section 2(1), is entitled to the greater of (a) the income replacement benefit calculated elsewhere within the regulation, or (b) the income replacement benefit determined under section 3, but not both.

51. However, in order to use the IRB's alternate formula to determine income replacement benefits, Mr. Mariyanayaga'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. I also find Mr. Mariyanayaga did not provide enough information about his earnings in the 12 months preceding the accident to calculate his gross earnings. I can use the GYEl's determined based on the NOC codes discussed further above. However, I do not have the information required to determine the number of weeks worked by Mr. Mariyanayaga in the 12 months preceding the accident. Therefore, I have not calculated Mr. Mariyanayaga's income replacement benefit under section 3.

Income replacement benefits payable

52. Based on the IRB and Mr. Mariyanayaga's employment, I find Mr. Mariyanayaga is entitled to \$8,118.27 in income replacement benefits between November 12, 2021 and February 13, 2022.

53. The evidence shows that ICBC paid Mr. Mariyanayaga \$6,093.17 for income replacement benefits between November 12, 2021 and February 14, 2022. The evidence also shows that ICBC paid Mr. Mariyanayaga a further \$2,718.49 on March 30, 2022 for his "gradual return to work top up" between January 14, 2022 and February 18, 2022. Based on the evidence, I find that ICBC paid Mr. Mariyanayaga \$8,476.17 for income replacement benefits between November 12, 2021 and February 13, 2022. This is more than the \$8,118.27 I have found Mr. Mariyanayaga is entitled to.

54. I find ICBC has paid Mr. Mariyanayaga the income replacement benefits he was entitled to between November 12, 2021 and February 13, 2022, based on Mr. Mariyanayaga's employment and the applicable statute and regulations. Given all the above, I dismiss Mr. Mariyanayaga's claim for income replacement benefits.

FEES, EXPENSES AND INTEREST

55. Under CRTA section 49 and the CRT rules, a successful party is generally entitled to the recovery of their CRT fees and dispute-related expenses. As Mr. Mariyanayaga was unsuccessful in this dispute, I dismiss his fee claim. ICBC is entitled to reimbursement of \$25 for its paid CRT fees. Neither party claimed dispute-related expenses, so I award none.

ORDERS

56. Within 30 days of the date of this decision, I order Mr. Mariyanayaga to pay ICBC a total of \$25 as reimbursement of CRT fees.

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

58. I dismiss Mr. Mariyanayaga's claims.

59. 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