

**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**



**Tribunal File Number: 17-003463/AABS**

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:

**D.M.**

**Applicant**

and

**Aviva Insurance**

**Respondent**

**DECISION**

**ADJUDICATOR:**

**Sandeep Johal**

**APPEARANCES:**

Counsel for the Applicant:

Joseph Caprara

For the Respondent:

Julien-Ann MacDonald, Adjuster

Counsel for the Respondent:

Ramandeep Pandher

Court Reporter:

Sharon Gilmour

**Heard by Teleconference:**

**November 15, 2017 and November 16, 2017.**

## OVERVIEW

- [1] The applicant was injured in an automobile accident on January 20, 2015 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "Schedule").
- [2] The applicant applied for non-earner benefits ("NEB"), attendant care benefits ("ACB") and for medical benefits which were denied by the respondent. The applicant disagreed with this decision and submitted an Application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal").

## ISSUES

- [3] The following are the issues to be decided as per the case conference order dated August 9, 2017:
  - i. Is the applicant entitled to receive a non-earner benefit of \$185.00 per week from July 21, 2015 and ongoing?
  - ii. Is the applicant entitled to attendant care benefits for \$404.90 per month, from March 5, 2016 and ongoing?
  - iii. Is the applicant entitled to receive a medical benefit of \$2,920.00 for chiropractic services recommended by Dr. Kevin Gaymes in a treatment plan submitted on April 27, 2016?
  - iv. Is the applicant entitled to receive a medical benefit of \$1,531.70 for occupational therapy services recommended by Nikita D'Souza in a treatment plan submitted on May 9, 2016?
  - v. Is the applicant entitled to interest for the overdue payment of benefits?
  - vi. Although not listed in the order, both parties have made a request for costs in their written submissions.

## RESULT

- [4] Based on the totality of the evidence before me, I find :
  - i. The applicant is not entitled to a non-earner benefit.
  - ii. The applicant is entitled to an attendant care benefit of \$404.90 per month from March 5, 2016 and ongoing.
  - iii. The applicant is entitled to the medical benefit of \$2,920.00 for chiropractic services.
  - iv. The applicant is not entitled to a medical benefit of \$1,531.70 for

occupational therapy services as the benefit is not reasonable and necessary.

- v. The applicant is entitled to interest for the overdue payment of benefits in accordance with the *Schedule*.
- vi. Neither party is entitled to costs.

## **ANALYSIS**

### **Causation**

- [5] Despite not being listed in the order, the respondent has raised the issue of causation with respect to the applicant's entitlement to the NEB, which the applicant provided a response to in his submissions. The respondent submits that the "applicant has the burden of showing that but for the January 20, 2015 accident, he would not suffer from the disabilities he puts forward as the basis of this claim", and that the applicant's inability to carry on a normal life is not due to the accident but caused by problems existing prior to the subject motor vehicle accident.
- [6] I find the applicant has proven causation and "but for" the accident he would not suffer the impairments that cause the complaints he puts forward for the basis of his claim for NEB's based on the following.
- [7] The applicant visited Dr. Matthew Cooper, a chronic pain specialist who reports the motor vehicle collision further increased his lower back pain, contributed to neck and shoulder pain and the additional cervical and lumbar soft tissue issues add to his pre-existing multilevel bulging discs present in the applicant's lumbar spine.
- [8] Dr. Victor Naumetz, an Orthopaedic Surgeon who completed an insurer's examination on the applicant also notes that the applicant does have pre-existing conditions which might have been aggravated by the accident.
- [9] Occupational Therapist, Sarah Maddix notes in her report that she recognizes "some changes in his current abilities, and an aggravation of his pre-existing pain."
- [10] As a result of the above and on a balance of probabilities, I am satisfied that the injury or impairment the applicant has sustained and is experiencing was as a result of the motor vehicle accident which impacted his functions and made his impairments worse.

### **Non-Earner Benefit (NEB)**

- [11] I find the applicant is not entitled to a NEB in accordance with the *Schedule* and from the guiding analysis of the Court of Appeal case of *Heath v.*

*Economical Mutual Insurance Company*, 2009 ONCA 391 (CanLII) “(Heath)”

- [12] The test for entitlement for a NEB is for the applicant to show that he sustained an impairment as a result of the accident and that he suffers a complete inability to carry on a normal life as a result of and within 104 weeks of the accident.<sup>1</sup>
- [13] Based on the evidence from the applicant, his doctor and the IE reports of Sarah Maddix, Occupational Therapist, and Dr. Victor Naumetz, Orthopaedic Surgeon who both opined that the applicant's impairments did not result in a complete inability to carry on a normal life, it is my finding that the applicant does not have a complete inability to carry on a normal life.
- [14] Both parties have cited the *Heath* case where the Court has provided an analysis of the proper approach to interpret the test for NEB's. The principles from *Heath* are as follows:
- I. There must be a comparison of the applicant's activities and life circumstances before the accident to those post-accident.
  - II. The applicant's activities and life circumstances before the accident must be assessed over a reasonable period prior to the accident; the duration of which will depend on the facts of the case.
  - III. All of the applicant's pre-accident activities must be considered, but greater weight may be placed on activities that were more important to the applicant's pre-accident life.
  - IV. The applicant must prove that his/her accident-related injuries continuously prevent him/her from engaging in substantially all of his/her pre-accident activities. This means that the disability or incapacity must be uninterrupted.
  - V. “Engaging in” should be interpreted from a qualitative perspective. Even if an applicant can still perform an activity, if the applicant experiences significant restrictions when performing that activity, it may not count as “engaging in” that activity.
  - VI. If pain is the primary reason that an applicant cannot engage in former activities, the question is whether the degree of pain practically prevents the applicant from performing those activities. The focus should not be on whether the applicant can perform those activities.
- [15] In order for me to assess the applicant's claim for NEB's he must show what his life was like before and after the accident.

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<sup>1</sup> Section 12(1) of the *Schedule*

- [16] The applicant testified at the teleconference and described his pre-accident life as follows:
- a. Independent in his personal care tasks
  - b. Independent with house chores
  - c. Grocery shopping once a week
  - d. Visit friends twice a week
  - e. Visit his younger kids twice a month, take them to a movie or the park
  - f. Attend bingo four to five times a week for at least four hours each time.
- [17] The applicant described his post-accident life as follows:
- a. Personal care tasks much more difficult and takes longer to do
  - b. He does light household cleaning, father does the rest and a maid who comes to the home once a month
  - c. Only goes grocery shopping for light items and it takes longer to shop
  - d. No longer visits friends as much
  - e. No longer visits his kids, he would speak to them on the phone but he is no longer able to visit them.
  - f. Attends bingo maybe twice a week for about 2 hours.
- [18] The applicant submitted an initial Disability Certificate (OCF-3) completed by his family physician Dr. Hack on January 28, 2015 and that the duration of the impairments would be more than 12 weeks as a result of multiple injuries however Dr. Hack checked off the box indicating that the applicant did not have a complete inability to carry on a normal life. The OFC-3 was completed within the first 26 weeks of the accident when NEB's are not payable.
- [19] Dr. Hack testified that he check marked the "no" box to whether the applicant has a complete inability to carry on a normal life based on the injuries reported by the applicant however he does not do an assessment of the person's pre-accident versus post-accident activities
- [20] The applicant submitted two further OCF-3's both from his chiropractor on January 29, 2015 and June 15, 2015 both of which state that the applicant has a complete inability to carry on a normal life and that his injuries are expected to last more than 12 weeks.
- [21] The applicant's activities and life circumstances must be assessed over a

- reasonable period of time before the accident and the applicant stated he did them for a few years prior to the accident however he has not stated which activities were more important to him in his pre-accident life and for how long a period did he partake in those activities.
- [22] The applicant's family doctor, Dr. Hack testified that the applicant would see him every two weeks since the accident and in his opinion the applicant may be restricted by pain but he does not believe the applicant has a complete inability to carry on a normal life.
- [23] During his testimony the applicant stated that he is unable to visit his kids and take them to a movie like he did pre-accident because he is unable to sit and because of back soreness. Also, he is unable to visit his friends but then also states that he is able to attend bingo for two hours at a time currently as opposed to four hours pre-accident.
- [24] The *Heath* case outlined above states that even if the applicant is able to perform an activity it does not mean he is "engaging in" the activity if he has significant restrictions when performing that activity. Does the degree of pain prevent him from performing those activities? In my opinion, the applicant has not satisfied his onus that his pain restricts him significantly enough that he has a complete inability as he is able to attend bingo for two hours a couple of times per week but has not stated whether he suffers from continuous pain that restricts him significantly enough that he is no longer able to engage in the activity. I find that he is still able to do the activities but to a lesser degree and in my opinion he is not completely unable to participate in bingo.
- [25] The applicant further has not stated why his pain prevents him from seeing his kids or his friends when he has stated that he is able to drive to his bingo activity a couple of times per week and why he is able to do that but he is unable to drive to visit friends or drive to see his kids.
- [26] I find the applicant's complaints of pain to be legitimate and I believe the applicant's testimony that his personal care tasks, household chores and grocery shopping have now become more difficult to do however based on the *Heath* analysis above and from the applicant's family doctor's opinion, I find that the applicant may be restricted by pain but that does not equate to a complete inability to carry on a normal life.
- [27] As a result of the above, I find the applicant does not have complete inability to carry on a normal life and in accordance with the principal's from the *Heath* case he is therefore not entitled to a NEB.

### **Attendant Care Benefit (ACB)**

- [28] It is my finding that the applicant is entitled to ACB's in the amount of \$404.90 per month from March 5, 2016 and ongoing. I find the report of Elsa Poon more persuasive than the insurer's examination report completed by John

Duong.

- [29] The respondent submits the applicant is not entitled to ACB's because he has not provided proof that the expenses have been incurred or proof of any economic loss for attendant care services. The respondent further submits that the applicant has stated to various assessors that he is independent in all his activities of daily living with respect to self-care, hygiene and grooming. I do not agree with the respondent.
- [30] The *Schedule* permits the Tribunal to deem the expense to have been incurred for the purpose of determining an insured person's entitlement to the benefit.<sup>2</sup>
- [31] In reviewing the insurer's Occupation Therapy In Home Assessment report completed by John Duong on February 8, 2016, the physical findings of functional mobility for the applicant are similar to what Elsa Poon (Occupational Therapist) found in a report completed on behalf of the applicant dated January 5, 2016. However the recommendations are different.
- [32] Elsa Poon's recommendation is that the applicant should have assistance with meal preparation because he has "reduced standing/walking tolerance, restriction in low level reaching, overall low activity tolerance and reduced motivation." Ms. Poon noted that the applicant reported increased lower back pain and that he would also reach out for the wall or furniture for support while walking or standing.
- [33] John Duong opines that the applicant does not need any formal assistance with meal preparation as he "possesses the physical capabilities to perform (the) task in an independent manner." However, in his report under the Physical Findings and Functional Mobility section with respect to standing and walking Mr. Duong observed and notes that the applicant demonstrated walking/standing dynamically for approximately 15 minutes continuously, supported at times with a wall or elliptical machine. According to the report, the applicant stated he has pain in the lower back and lower extremities with standing and walking and feels unbalanced and uses the wall for support.
- [34] To further bolster his opinion that the applicant does not need any attendant care for meal preparation and feeding he notes that the applicant demonstrated to be able to lift a nine pound weight for approximately twenty-five feet with either hand and lift it from the floor to shoulder level. Mr. Duong then opines that the applicant possesses the physical capabilities and does not require any formal assistance, I do not agree with Mr. Duong.
- [35] When reviewing the Physical Findings and Functional Mobility section of his

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<sup>2</sup> Section 3(8) of the *Schedule*

report, Mr. Duong observed that the applicant was able to bend down to pick up the nine pound weight, but did so by placing his right hand on a coffee table for support and while doing so the applicant had “facial grimacing and sighing; pain in the chest, arm and lower back.” The applicant also demonstrated the same difficulties and limitations when attempting to pick up the weight with his right hand. These physical findings do not coincide with Mr. Duong’s concluding opinion that the applicant does not require any formal assistance.

[36] Ms. Poon also recommends attendant care services for ten minutes once a week to maintain bathroom hygiene due to his restriction in low level reaching. The respondent’s assessor, Mr. Duong opines that the applicant possesses the physical capabilities and therefore does not require any formal assistance. However Mr. Duong notes the applicant “demonstrated assuming and rising from a semi-squat, supported with his left hand on elliptical machine, with facial grimacing” and “pain in the knees.” Mr. Duong further testified at the hearing that the applicant is not able to do a deep cleaning but only a quick tidy up of any spilled toothpaste or water around a sink or to wipe the toilet seat. During cross-examination he agreed that a steady posture would be required to clean a bathroom and that the applicant would not been able to do a cleaning of the bathroom for ten minutes.

[37] I find there to be inaccuracies in Mr. Duong’s report in that his opinion is not supported by his physical observations and the applicant’s demonstrated ability. As a result of the above, I find the applicant to be entitled to ACB’s as recommended in the Assessment of Attendant Care Needs (Form 1) dated December 22, 2015 by Elsa Poon in the amount of \$404.90 per month.

**Is the applicant entitled to a medical benefit of \$2,920.00 for chiropractic services?**

[38] The applicant has the onus to show that the treatment plan is reasonable and necessary and it is my finding that the applicant has satisfied his onus and I find the treatment plan for chiropractic services to be reasonable and necessary for the following reasons.

[39] The treatment plan dated April 27, 2016 is recommended by chiropractor, Keven Gaymes. The goals of the treatment plan are to reduce pain, increase strength, increase range of motion and to allow the applicant to return to activities of normal living. Part 6 of the treatment and assessment plan lists the injuries the applicant has which includes injuries to his back, rotator cuff of his shoulder, thoracic spine, the muscle and tendon of his hip and neck and a sprain and strain of the anterior cruciate ligament of the knee.

[40] The applicant was referred to Dr. Matthew Cooper who is a family physician and emergency room doctor and treats patients with chronic pain. Dr. Cooper recommends the applicant continue physiotherapy, massage and chiropractic

treatments and goes on to state that the clinical treatments will ultimately strengthen muscles, reduce pain, increase mobility and raise the applicant's functional goals.<sup>3</sup>

- [41] The applicant's family doctor, Dr. Unus Hack is someone the applicant visits on a regular basis and he testified that the applicant should do exercises and stretches however they should be supervised and not on his own. He further states that clinical treatment would be beneficial and would offer pain management and in his opinion clinical treatment would be beneficial even after one and half years post-accident.
- [42] As a result of the above, I find the treatment plan for chiropractic services to be reasonable and necessary.

**Is the applicant entitled to a medical benefit of \$1,531.70 for occupational therapy services?**

- [43] I find that the applicant is not entitled to the treatment plan for occupational therapy for the following reasons.
- [44] The onus is on the applicant to show why he is entitled to any benefits being claimed and the applicant has not directed me to any evidence to state why the request for occupational therapy services is reasonable and necessary.
- [45] The applicant submits that the respondent's IE assessor Mr. Duong took a limited view of the therapy and Mr. Duong failed to identify why the proposed treatment was deemed not reasonable or necessary. Even if I were to agree with the applicant, pointing out that the IE assessor had a lack of reasons for denying the treatment plan does not, in my opinion, satisfy the applicant's onus to show that the treatment plan is reasonable and necessary.
- [46] Even though the applicant has not directed me to any evidence in his submissions I have reviewed the treatment plan and the accompanying letter listed in part 9 of the treatment plans under the goals section. The letter dated April 13, 2016 states the applicant is unable to tolerate walking for longer than 10-15 minutes at a time and it is recommended the applicant receive an additional three occupational therapy sessions to complete a community assessment, consult the family physician and assess the applicant's need for a rollator walker.
- [47] It is not clear to me what is involved with the community assessment and how it would help in achieving the goals of the treatment plan which are listed as pain reduction and a return to activities of normal living when the letter dated April 13, 2016 states the applicant is unable to walk for longer than 10-15 minutes. Furthermore, it is not clear on how the goal of pain reduction will be met if the applicant had the use of a rollator walker rather than a cane he

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<sup>3</sup> Chronic Pain Report of Dr. Mathew Cooper dated Jul 31, 2016 at page 30-31

currently uses for mobility and support.

- [48] I am not satisfied that the goals of the treatment plan will be met based a community assessment and the description listed in part 12 of “Training, motor and living skills” and what that entails. The applicant has not satisfied his onus that the treatment plan is reasonable and necessary and therefore it is not payable.

**Is the applicant entitled to interest on any overdue payment of benefits?**

- [49] The applicant is entitled to interest on the overdue payment for the ACB’s and the treatment plan for chiropractic services in accordance with the *Schedule*.

**Is either party entitled to costs?**

- [50] I find that neither party is entitled to costs as I am not persuaded of evidence of unreasonable, frivolous, vexatious or bad faith behaviour from either party.
- [51] The respondent requests costs of the proceeding because the applicant acted unreasonably in bringing this claim before the Tribunal where it should have been apparent that the respondent’s denials were proper and the applicant did not have any evidence to dispute the denials.
- [52] Applicants may initiate applications where they believe they are entitled to benefits. Respondents have the right to raise appropriate defences in response to those applications. The Tribunal should not deter applicants from filing applications that may have merit, because as in this case, the applicant was partially successful.
- [53] The applicant submits the respondent’s conduct is unreasonable because it filed its submissions and materials several days late and because the respondent made submissions on matters that were not an issue in dispute with respect to causation and for referring the applicant as a “she” when the applicant is in fact a male.
- [54] I am not convinced that the conduct as submitted by the applicant is of such a degree to be considered to pass the threshold that the respondent in the proceeding has acted unreasonably, frivolously, vexatiously or in bad faith.
- [55] Not complying with Tribunal orders should not be taken lightly, however in this case I am not provided with any evidence of prejudice suffered by the applicant in the late submission of materials and cost awards under *Rule 19*<sup>4</sup> are not meant to compensate parties for suffering an inconvenience or for the cost of their involvement in a proceeding.

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<sup>4</sup> Licence Appeal Tribunal (LAT) Rules of Practice and Procedure, Version 1 (April 1, 2016)

**ORDER**

[56] The applicant is entitled to the following benefits:

- i. ACB's in the amount of \$404.90 per month from March 5, 2016 and ongoing.
- ii. A medical benefit of \$2,920.00 for chiropractic services.
- iii. Interest on the above benefits in accordance with the *Schedule*.

[57] The applicant is not entitled to the following benefits:

- i. Occupational therapy services in the amount of \$1,531.70.
- ii. A non-earner benefit.

[58] Neither party is entitled to costs.

**Released: June 7, 2018**



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**Sandeep Johal, Adjudicator**