LICENCE APPEAL TRIBUNAL

Safety, Licensing Appeals and Standards Tribunals Ontario

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

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

Ontario

Tribunal File Number: 17-005284/AABS

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

Between:

Marlene Resendes

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

ADJUDICATOR: **Chris Sewrattan**

APPEARANCES:

Representative for the applicant: Nader Fathi

Counsel for the Respondent: Jennifer Cosentino

Heard: **Written Hearing: April 16, 2018**

Overview:

[1] The applicant was injured in a motor vehicle accident on November 8, 2015. She sought payment for a number of benefits under the *Schedule*[1]. Aviva Insurance Company of Canada ("Aviva") denied payment for a non-earner benefit. The applicant appeals for payment of the non-earner benefit to the Licence Appeal Tribunal – Automobile Accident Benefits Service.

Issues:

[2] The following issues are in dispute:

1. Is the applicant entitled to receive a non-earner benefit of $185.00 per week from October 28, 2016 to the date of this hearing?

2. Is the applicant entitled to interest on the overdue payment of the non-earner benefit?

3. Is Aviva entitled to costs under Rule 19.1?

4. Is the applicant entitled to costs under Rule 19.1?

Result:

[3] The applicant is not entitled to a non-earner benefit. She has not proven that she is continuously prevented from engaging in substantially all of her pre-accident activities. The evidence in her favour is undermined by a number of statements made by the applicant to medical practitioners hired by Aviva. The statements suggest that the applicant can engage in many, if not all, of her pre-accident activities.

[4] The applicant is not entitled to interest.

[5] Neither the applicant nor Aviva is entitled to costs.

Discussion:

The applicant is not entitled to a non-earner benefit

[6] The applicant is not entitled to a non-earner benefit because I am not satisfied that that she is continuously prevented from engaging in substantially all of her pre-accident activities as a result of the accident.

[7] Under s. 12(1) of the *Schedule*, an insured person is entitled to receive a non-earner benefit only if she or he suffers a complete inability to carry on a normal life as a result of and within 104 weeks after the accident and does not qualify for an income replacement benefit. Section 12(1) is interpreted to require that the

[1] O. Reg. 34/10, *Statutory Accident Benefits Schedule – Effective September 1, 2010.*

applicant prove that she is continuously prevented from engaging in substantially all of her pre-accident activities as a result of the accident.[2]

[8] In the context of this specific case, there are three factors that are controlling:[3]

1. the applicant's pre-accident physical and mental condition;
2. the applicant's pre-accident activities; and,
3. the applicant's ability post-accident to engage in her pre-accident activities.

1. The applicant's pre-accident physical and mental condition

[9] Looking at physical condition, the applicant suffered from a number of physical ailments prior to the accident. The applicant suffered from left sciatic pain, left arm pain, a complete tear of the ACL in her right knee, a head injury, degenerative disc disease, right elbow and forearm pain, and a tailbone injury.

[10] Looking at psychological condition, the applicant reported being the victim of sexual assault at the age of 8, involvement in an abusive relationship from 2007 onwards, and sadness related to her young son's medical diagnosis in 2014. Her son became ill with transverse myelitis and she assumed care on a full-time basis. Moreover, the applicant reported sleep difficulties, insomnia, and daily anxiety arising from these stressors prior to the accident.

2. The applicant's pre-accident activities

[11] Prior to the accident, the applicant was able to complete the following activities, which constituted her activities of daily living:

i. Taking care of her (then) four-year old son on a full-time basis. This required lifting, carrying, transfers, pushing of a wheelchair, bathing, dressing, and transportation to medical appointments.

ii. Driving her two children to and from school.

iii. All housekeeping chores, including meal preparation, grocery shopping, floor cleaning, bed making, and laundry and garbage removal tasks.

iv. Self-care such as showering, grooming, and dressing.

[12] The above list is itemized in order of importance to the applicant's life. I have deduced this order based on the applicant's submissions and what she told Mr. Rasul Kassam. Mr Kassam is an occupational therapist, retained by Aviva, who conducted an in-home assessment on October 6, 2016.

---

[2] *Heath v. Economical Mutual Insurance Co.*, 2009 ONCA 391 at para. 50. See also s. 2(7)(a) of the *Schedule*.

[3] The causation of injury and impairment is not discussed. Causation is an important factor in the analysis; however, in the circumstances of this case it does not control how the non-earner benefit claim is decided.

[13] It is important to recognize that despite the applicant's pre-accident physical and mental issues, she was able to engage in the above tasks with ease relative prior to the accident. An inability to engage in these tasks post-accident is circumstantial evidence that the accident caused her inability to function.

3. The applicant's ability post-accident to engage in her pre-accident activities

[14] The applicant's ability post-accident to engage in her pre-accident activities is the critical issue in this case. The law requires that the applicant prove that she is continuously prevented from engaging in substantially all of her pre-accident activities.[4] The phrase "engaging in" is interpreted from a qualitative perspective. An insured person who just goes through the motions cannot be said to be "engaging in" an activity.[5] And if the degree to which the insured person can perform an activity is sufficiently restricted, he or she is not really "engaging in" the activity.[6]

[15] The applicant submits that the accident has caused her extreme stress, rending her unable to perform her pre-accident activities. The submission is anchored in the consultation report of Dr. Romeo Vitelli, a psychologist. Dr. Vitelli diagnosed the applicant with provisional adjustment disorder with mixed anxious and depressed mood, and a specific phobia (driving). According to Dr. Vitelli, the applicant's psychological functioning and perceived level of pain impacts her ability to complete necessary tasks. The applicant suffers as a result from an inability to perform self-care, work activities, and housekeeping.

[16] The applicant further submits she sustained an impairment in the functional use of her left upper extremity, which is an integral part of her body used to lift and assist her son. The activities that the applicant remains capable of performing are more time consuming to complete, given the restrictions in function caused by the accident.

[17] I am not satisfied that the applicant is continuously prevented from engaging in substantially all of her pre-accident activities. Flying in the face of Dr. Vitelli's analysis and the applicant's submissions is a host of contrary statements from the applicant to number of medical practitioners. These practitioners were all hired by Aviva to assess the applicant. While the optics and potential for bias are not lost on me, I find the following accounts to be credible.

[18] Dr. David E. Mulla is a physician. In a report dated October 26, 2016, Dr. Mulla stated that the applicant reported that she can complete the following tasks:

i. self-care tasks

ii. personal hygiene and grooming

---

[4] *Heath v. Economical Mutual Insurance Co.*, 2009 ONCA 391 at para. 50.
[5] *Ibid.*
[6] *Ibid.*

iii. dressing and undressing

iv. self-feeding

v. functional transfers

vi. bowel and bladder management

vii. ambulation

viii. housework

ix. taking medication

x. managing money

xi. shopping for groceries

xii. using the telephone and other technology as applicable

xiii. drive

[19] Mr. Kassam is an occupational therapist. In a report dated October 26, 2016, Mr. Kassam recounted the applicant advising that she could participate in her pre-accident tasks, albeit with pain. The applicant was independent with self-care tasks, though she must do them slowly and with pain. The same was said for housekeeping, which was sometimes assisted by her daughter. The applicant further reported that she continued to care for her son, again albeit with pain. She continued to dress, bathe, toilet, change, transfer, push, and transport her son, including driving him to and from medical appointments.

[20] Where pain is a primary factor that prevents an insured person from engaging in her pre-accident activities, the question is whether the degree of pain practically prevents the insured person from engaging in those activities.[7] I am mindful that the applicant experiences pain while she engages in some of her pre-accident activities. However, I am not satisfied that the pain practically prevents the applicant from engaging in those activities. If the applicant is relying on pain to prove her entitlement to a non-earner benefit, she has to prove, at least, that it is more likely than not that the pain practically prevents her from engaging in the pre-accident activities in question. She has not done so here. It bears mentioning that the applicant did not provide submissions or affidavit evidence on the extent to which pain affects her ability to engage in some of her pre-accident activities. This is not required in every case. But it would have been helpful in this case.

---

[7] *Ibid.*

The applicant is not entitled to interest

[21] Given that the applicant is not owed payment for a non-earner benefit payment, no interest is owing.

The applicant is not entitled to costs

[22] The applicant seeks costs under Rule 19.1. Costs are available when a party acts unreasonably, frivolously, vexatiously, or in bad faith in a proceeding. The applicant did not provide submissions on what party of Aviva's conduct was unreasonable, frivolous, vexatious, or in bad faith. The costs claim is dismissed.

Aviva is not entitled to costs

[23] Aviva seeks costs under Rule 19.1 on the basis that it was unreasonable for the applicant to bring a claim before the Tribunal. Aviva submits that it should have been apparent that Aviva's denial of the non-earner benefit was proper and there was no evidence to dispute the denial at the Tribunal.

[24] Aviva's costs claim is dismissed. This case was a close call. The propriety of Aviva's denial was not at all apparent. In any event, the Tribunal will not issue costs in a manner that discourages insured persons from using it as a forum for dispute resolution. The *Schedule* is consumer protection legislation, and the Tribunal is a forum in which the *Schedule's* objectives are animated.

Conclusion:

[25] The applicant is not entitled to a non-earner benefit or interest.

[26] Neither the applicant nor Aviva is entitled to costs.

Released: June 13, 2018

Chris Sewrattan, Adjudicator