

**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**

Citation: M. K. vs. Aviva Insurance Company of Canada, 2019 ONLAT 18-009319/AABS

**Released Date: 11/22/2019
File Number: 18-009319/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:

M. K.

Applicant

and

Aviva Insurance Company of Canada

Respondent

DECISION

ADJUDICATOR: Derek Grant

APPEARANCES:

For the Applicant: Kiamehr Yazdani, Counsel

For the Respondent: Bland McPherson, Representative
Maria Cosentino, Counsel

HEARD: In-Person: September 10, 2019

OVERVIEW

- [1] The applicant ("M.K.") was involved in an automobile accident on May 15, 2017 and sought entitlement to a non-earner benefit pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule"). M.K. has failed to satisfy her onus that she is entitled to the non-earner benefit.

ISSUES IN DISPUTE

- [2] The issues in dispute in this application are as follows:
- i. Is the applicant entitled to receive a weekly non-earner benefit in the amount of \$185.00 per week for the period from June 15, 2017 to May 15, 2019?
 - ii. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [3] M.K. is not entitled to a non-earner benefit. No interest is payable.

LAW

- [4] In order to establish entitlement to non-earner benefits, there are several factors to be considered upon review of the evidence. The Court of Appeal confirmed in *Heath v. Economical Mutual Insurance Company*, 2009 ONCA 391 (CanLII), at para. 50, that the analysis of the evidence should include the following:
- a. A comparison of the applicant's activities and life circumstances before and after the accident;
 - b. A consideration of pre-accident life and circumstances involves more than a snapshot of life in the timeframe immediately before the accident, but rather an assessment of the activities and circumstances over a reasonable period prior to the accident;
 - c. All of the pre-accident activities in which the applicant ordinarily engaged in should be considered. Greater weight may be assigned to those activities which the applicant identifies as being important in their pre-accident life;
 - d. It is not sufficient to demonstrate that there were changes in post-accident life. Rather, it is incumbent to establish that those changes amounted to being continuously prevented from engaging in substantially all pre-accident activities;

- e. To look at whether the applicant is “engaging in” an activity, the activity must be viewed as a whole. The manner in which an activity is performed, and the quality of the performance post-accident must also be considered; and
- f. An inquiry into whether the degree of pain experienced either at the time or subsequent to the activity is such that the applicant is practically prevented from engaging in those activities.

ANALYSIS

M.K. is not entitled to non-earner benefits based on the evidence.

- [5] M.K. relies on the following evidence in support of her claim for non-earner benefits:
 - a. A Disability Certificate (“OCF-3”);
 - b. Her family physician, Dr. Mahgol Javanmood’s, clinical notes and records dated August 14, 2017 and February 6, 2019; and
 - c. A psychological report by Dr. Andrew Shaul dated May 29, 2018.

Disability certificate

- [6] On its own, the OCF-3 does not persuade me that M.K. meets the test of entitlement to a non-earner benefit. As indicated in *Heath*, a more thorough analysis is required, such as a comparison of pre- and post-accident activities, as well as evidence that post-accident, M.K. is “practically prevented” from engaging in substantially all of those pre-accident activities.
- [7] In the OCF-3, Dr. Hooman Nayeri, Chiropractor, notes that M.K. suffered a “sprain and strain of lumbar spine, WAD II associated disorder with complaint of neck pain with musculoskeletal signs and other headache syndromes”.¹ These injuries are consistent with physical injuries that would be considered predominantly ‘minor’.
- [8] Dr. Nayeri notes under Part 8 of the OCF-3 that M.K. is substantially unable to perform the essential tasks of her employment and cannot return to work on modified duties or hours. Dr. Nayeri goes on to state that M.K. suffers a complete inability to carry on a normal life.

¹ OCF-3 dated June 5, 2017

- [9] I find the OCF-3 does not support that M.K. suffered a complete inability to carry on a normal life based on the following:
- a. I find the OCF-3 to be contradictory. In the OCF-3, under Part 7, Dr. Nayeri indicates that the duration is 'more than 12 weeks', although that was not indicated in Part 6, where Dr. Nayeri indicated a duration of 9-12 weeks. Dr. Nayeri's opinion and basis for listing a duration of more than 12 weeks was that M.K. suffers from "chronic pain and depressive mood". However, Dr. Nayeri offers no explanation or objective findings in support of a chronic pain or depressive mood diagnoses.
 - b. Dr. Nayeri is a chiropractor and there is no indication that he is a chronic pain specialist. Although, as a frontline healthcare practitioner, Dr. Nayeri may be trained to observe possible signs of psychological issues, he is not qualified to diagnose them. As such, I place no weight in terms of the chronic pain and depressive mood diagnoses, on the OCF-3 of Dr. Nayeri.

Dr. Javanmood's clinical notes and records

- [10] For the reasons that follow, I am not persuaded by the clinical notes of Dr. Javanmood as there is little medical evidence that supports any of the criteria in *Heath* to be considered to determine entitlement to a non-earner benefit.
- [11] M.K. pointed me to notes of visits to Dr. Javanmood in support of her position. The first, dated August 14, 2017, offers little more information than M.K.'s name, address, date of birth, a prescription of "psychotherapy/psychology" and a diagnosis of "marital discord/depressive syndrome". There is no explanation of the impact the accident had on M.K.'s lifestyle or linkage of the observed condition to the accident.
- [12] The second visit, dated February 6, 2019, notes a prescription of "RMT" and a diagnosis of "neck and shoulder pain". The diagnosis of "neck and shoulder pain" is not clearly shown to be related to the subject accident. As with the August 2017 visit, there is no explanation of the impact of the accident on M.K.'s lifestyle.
- [13] I find Dr. Javanmood's clinical notes and records are not indicative of an individual who suffers a substantial or complete inability to carry on a normal life. The records contain no objective findings that establish the extent of M.K.'s accident-related injuries. Further, I find that a record of two visits, two and a half years apart, does not substantiate the allegation that M.K. suffers from a complete inability to carry on a normal life.
- [14] In addition, the diagnosis of "marital discord" is not explained as an impairment suffered as a result of or related to the accident. For these reasons, I place very little weight on Dr. Javanmood's clinical notes and records.

Dr. Shaul's Psychological Report

- [15] For the reasons that follow, I am not persuaded by the report² of Dr. Andrew Shaul, that M.K. suffers from a complete inability to carry on a normal life. Dr. Shaul's report is lacking any analysis or in-depth assessment of M.K.'s pre- and post-accident activities or a consideration of how M.K. is "practically prevented" from engaging in the activities that are most meaningful to her.
- [16] In the report, Dr. Shaul notes that M.K. is physically unable to work as much as she used to, which causes worry and stress". Dr. Shaul notes that M.K. is suffering from a variety of symptoms of depression and anxiety. Dr. Shaul goes on to note that M.K. is "fearful to travel in a vehicle", and she is not able to see her family as much as she used to. Dr. Shaul diagnoses M.K. with "Adjustment Disorder with Mixed Anxiety and Depressed Mood and Specific Phobia (travelling in and around a vehicle)". Dr. Shaul concludes that M.K.'s "physical pain is affecting her ability to perform many of her daily activities.
- [17] I find the OCF-3, the records of Dr. Javanmood and Dr. Shaul's report do not address any of the information and details necessary for me to apply the type of analysis set out in *Heath*.
- [18] In fact, I find that the evidence put forward by Aviva supports my finding, based on the following:
- a. Aviva relied on evidence from its section 44 ("IE") assessors. In his report³, Neurologist, Dr. Jeremy Spevick, concluded that M.K. did not suffer any accident-related neurological impairment. Dr. Rod Day, Psychologist diagnoses M.K. with "Adjustment Disorder with mixed anxiety and depressed mood⁴". Both Drs. Spevick and Day conclude that M.K. does not suffer a complete inability to carry on a normal life.
- [19] I agree with the IE assessors that M.K. does not suffer a complete inability to carry on a normal life for the following reasons:
- a. At the time of the accident, M.K. was employed full-time as a Personal Support Worker with RNS Healthcare. M.K. returned to work approximately 1-2 weeks post-accident, working 3 days a week.
 - b. Dr. Shaul concludes that M.K. has a fear of travelling in vehicles, however, M.K. testified that she still currently drives for work.
 - c. Although Dr. Shaul and Dr. Day come to the same conclusion, regarding M.K.'s psychological impairment as a result of the accident; neither assessor has established that M.K.'s psychological impairment has

² Psychological assessment report by Dr. Andrew Shaul and Helen Ilios dated May 29, 2018

³ Section 44 Neurologist report of Dr. Jeremy Spevick dated November 13, 2017

⁴ Section 44 Psychological report of Dr. Rod Day, dated November 13, 2017

impacted her to the point of having a complete inability to carry on a normal life.

- d. The evidence supports that other factors may also be contributing to M.K.'s well-being from a psychological standpoint, such as her marital situation and the fact that her adult children live further away from her, which makes it difficult for her to see them on a regular basis.
- e. The medical evidence does not support that M.K. suffered a complete inability to carry on a normal life. Further, the evidence does not support that M.K. suffered anything more than 'minor' physical injuries (as noted with the injuries listed in the OCF-3).

[20] The burden is on M.K. to persuade me that she is entitled to a non-earner benefit. M.K. has not satisfied her burden on the evidence to establish entitlement to a non-earner benefit.

[21] M.K.'s evidence has not persuaded me that the criteria as set out in *Heath* have been met. I acknowledge she has suffered injuries/impairments as a result of the accident. However, those injuries/impairments have not caused her to suffer a complete inability to carry on a normal life.

CONCLUSION

[22] M.K. is not entitled to a non-earner benefit, therefore no interest is payable.

[23] M.K.'s application is dismissed.

Released: November 22, 2019



**Derek Grant
Adjudicator**