

**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**



File Number: 18-001945/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:

N. K.

Applicant

and

Primum Insurance Company

Respondent

DECISION

ADJUDICATOR: Avvy Go

APPEARANCES:

For the Applicant: Arash Goneh-Farahani, paralegal

For the Respondent: Ramandeep Pandher, counsel

Hearing in Writing: October 19,2018

OVERVIEW

- [1] The applicant, N.K., was injured in a motor vehicle accident on July 27, 2015, when the vehicle being operated by her husband was rear-ended. No ambulance was called. The applicant sought treatment from her family physician two days after the accident. The applicant reported physical injuries and pain, as well as emotional issues as a result of the accident.
- [2] The applicant sought certain benefits pursuant to the *Statutory Accident Benefits Schedule – Effective after September 1, 2010* (the “*Schedule*”), including a claim for Non-Earner Benefits (NEB). After paying the applicant the NEB for a short period, the respondent stopped the payment. The applicant submitted an application for dispute resolution services to the Licence Appeal Tribunal (the “Tribunal”).

ISSUES IN DISPUTE

- [3] I have been asked to decide the following issues:
- a) Are the applicant’s injuries predominantly minor as defined in the *Schedule* and subject to treatment within the Minor Injury Guideline?
 - b) Is the applicant entitled to receive an NEB in the amount of \$185.00 weekly for the period June 13, 2016 to date and ongoing, denied by the respondent on June 13, 2016?
 - c) Is the applicant entitled to receive interest on the overdue amounts?

RESULT

- [4] For the reasons set out below, I find that the applicant is not entitled to the benefits claimed and, thus, no interest is payable.

ANALYSIS

Preliminary Issue: When did the respondent deny the applicant NEB and when was the applicant notified of the denial? Was the NEB improperly denied by the respondent?

- [5] Before addressing the substantive issue of the applicant’s eligibility to receive the NEB, I must first address some preliminary disputes with respect to the effective date of the respondent’s denial of the NEB. The applicant submitted that, while the decision to deny her NEB was made in March 2016, she was only notified of the denial on January 10, 2018. The applicant then submitted an application to the Tribunal on March 8, 2018. The applicant argued that she should be entitled

- to receive the NEB because there has been a breach of procedural fairness by the respondent.
- [6] The respondent, on the other hand, submitted that the NEB was denied by a letter dated March 31, 2016, and that there has been no procedural fairness breached.
- [7] For the reasons that follow, I find that the applicant was notified of the denial of the NEB on January 10, 2018 and that her NEB was denied effective March 31, 2016. I also find that there has not been a breach of procedural fairness by the respondent.
- [8] The applicant submitted an NEB claim to the respondent on September 15, 2015. By letter dated September 23, 2015, the respondent advised the applicant her potential entitlement to various benefits. The respondent further advised that the NEB is not payable for the first 26 weeks after the onset of the complete inability to carry on a normal life.
- [9] The applicant submitted that she received an NEB in the amount of \$185.00 weekly after the statutory wait period expired. The applicant attended a number of Independent Medical Examinations (IMEs) to determine her ongoing entitlement to NEB.
- [10] The applicant claimed that while her legal representative received a complete copy of her accident benefits file from the respondent on November 2, 2017, the file did not contain any correspondence “unequivocally terminating the applicant’s entitlement” to the NEB, nor was the applicant informed of her right to dispute the termination of her NEBs. In effect, the applicant’s position is that it was only when she only became aware her NEB had been stopped as of June 13, 2016 when she received the letter dated January 10, 2018 from the respondent advising her of the same.
- [11] The respondent asserts the applicant was wrong both about the date her NEB was denied, and the date she was advised of the denial. The respondent submitted a letter dated March 18, 2016 sent to both the applicant and her legal representative in which the respondent “unequivocally” states that the applicant’s claim for NEB was denied based on the IMEs, effective March 31, 2016. Further, in a second letter also dated March 18, 2016, the respondent advised the applicant that she was entitled to the NEB from the end of the 26 week waiting period (January 24, 2016) to the stoppage date of March 31, 2016. The applicant was sent a cheque in the amount of \$1,810.93. Relying on these letters, the respondent thus disputed the applicant’s assertion that there has been procedural non-compliance as well as her claim that there was no denial of NEB until January 10, 2018.

- [12] With respect to the applicant's claim that the date of stoppage was June 13, 2016, the respondent explained that the date was inadvertently included in its January 10, 2018 letter, while the correct date was March 31, 2016. In any event, since the January 10, 2018 letter was not the first unequivocal denial of the NEB, the respondent submitted that this letter has no bearing on the actual denial date of the NEB.
- [13] While given an opportunity to do so, the applicant did not submit any reply to the respondent's submission.
- [14] I have reviewed the record submitted by the respondent and note that it contains a letter dated March 18, 2016 addressed to the applicant stating that based on the IME reports, the respondent has determined that the applicant is not entitled to the NEB. The letter further states that the applicant is found not to be entitled to the benefit because she does not suffer a complete inability to carry on a normal life as a result of the accident and that the payment of the NEB would be stopped effective March 31, 2016. The letter also enclosed a copy of the report of the examination and "Applicant's Right to Dispute" notice explaining the rights and limitations in regard to the applicant's claims. The letter was copied to the applicant's legal representative.
- [15] Another letter dated March 18, 2016 was also contained in the respondent's record to the Tribunal, which explained that the respondent had noticed that they did not issue the applicant's NEB for the period of January 24, 2016 to March 31, 2016, and a cheque was issued in the amount of \$1,810.93 for this period along with interest.
- [16] The applicant's position, though not explicitly stated, is that she never received the first March 18, 2016 letter advising that her NEB had been stopped and the reasons for the stoppage. However, I note that the applicant did not provide any evidence to confirm that she did not receive the March 18, 2016 letter of denial. On the other hand, while the respondent had produced the letter which did just that, I note that the respondent did not argue the issue of statutory limitation period, which would have barred the applicant from filing this application had she been notified of the stoppage of NEB back in March 2016.
- [17] With no clear evidence before me as to how the March 18, 2016 letter was sent by the respondent and that it was received by the applicant, I am willing to give the applicant the benefit of the doubt and accept that the applicant was first apprised formally of the stoppage of the NEB on January 10, 2018. I came to this conclusion in part as I recognize that it could be difficult for the applicant to prove a negative, i.e. that she did not receive the letters, and in part because the respondent also did not provide any confirmation that the letters were indeed sent to and received by the applicant.

[18] Having made that finding, I further find that the letter dated January 10, 2018 did clearly and unequivocally notify the applicant that her application for NEB has been denied based on the IME reports. It also advised the applicant of the last date of the payment of her NEB as well as her right to dispute the respondent's determination. Given that the applicant is relying on the January 10, 2018 decision to ground her current appeal to the Tribunal, I find that there is no breach of procedural fairness, as the letter clearly explains to the applicant the reasons for the rejection of the NEB claims.

Do the Applicant's injuries fall within the Minor Injury Guideline (the "MIG")?

Definition of MIG and burden of proof

[19] The term "minor injury" is defined in s. 3 of the Schedule as "one or more of a strain, sprain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury." The terms "strain", "sprain," "subluxation," and "whiplash associated disorder" are all defined in s. 3, collectively referred as "soft tissue injuries" in this decision. S. 18(1) limits recovery for medical and rehabilitation benefits for such injuries to \$3,500.

[20] The applicant has the burden of proving that his injuries fall outside of the minor injuries guideline and are not subject to the \$3,500 treatment limit in s. 18 of the Schedule. Specifically, the applicant has the burden of showing that the injuries are not minor injuries as defined by the Schedule, commonly known as "soft tissue injuries".

[21] I began by examining the injuries sustained by the applicant as a result of the accident. I note that the injuries as described in the medical reports can be described as sprain and strain and other "soft tissue injuries". The disability certificate submitted by the applicant indicates that shortly after the accident, she reported injuries such as whiplash, low back pain, thoracic sprain, hip sprain, and arm pain, etc. Based on the medical evidence before me, I conclude therefore that the applicant suffered "soft tissue injuries" from the accident.

[22] I then consider whether the applicant has any pre-existing conditions that may take her out of the MIG. No evidence has been provided by the applicant in this regard.

[23] The definition of Minor Injury under the Schedule does not include any psychological or psycho-emotional impairment and the applicant relies on this ground to support her removal from the MIG. The applicant submitted that since the accident, she suffered lack of sleep, headaches and migraines. She finds herself to be agitated and irritated. She has not been able to participate in pre-accident activities, such as going out with friends, going to the Temple,

housekeeping, caregiving to her children and other activities of her daily life. The disability certificate submitted by the applicant referred to the applicant as suffering from headaches, nervousness, restlessness, agitation, irritability, anger and fatigue. Other than the disability certificate, the applicant did not refer to any medical report or evidence with respect to her psychological impairment.

- [24] As noted above, the applicant was required to attend IMEs to assess her eligibility for NEB. The applicant was examined by three healthcare professionals, an orthopaedic surgeon, a psychiatrist and an occupational therapist, whose findings are summarized below.
- [25] Dr. Christopher Gallimore, an orthopaedic surgeon examined the applicant on February 5, 2016. Dr. Gallimore reviewed the medical documentation provided by the applicant and conducted a physical examination with her. He concluded that the applicant “likely sustained at most strain-type injuries to her areas of concern.” Dr. Gallimore opined that these injuries would have resolved by the time of the examination, and that “her assessment today provided for evidence of pain-focused behaviour with evidence for functional overlay.” However, Dr. Gallimore concluded that there was “no current orthopaedic diagnosis or impairment”, and the applicant “does not suffer a complete inability to carry on a normal life”.
- [26] The applicant was also examined by Dr. Mohammad Nikkou, a clinical psychiatrist in March, 2016. In his very detailed report, Dr. Nikkou laid out his examination of the applicant, the tests he conducted and the findings he made. Dr. Nikkou found that psychometrically, the applicant’s profile was “suggestive” of severe depression subjectively (subclinical on an objective measure), and extreme anxiety. However, Dr. Nikkou also noted that “the claimant has shown a tendency to report her psychopathological symptoms in an exaggerated manner” and that “on the objective measure, the diagnoses cannot be considered definite”. As a result, from a psychological perspective Dr. Nikkou concluded that the applicant “does not suffer a complete psychological inability to carry on a normal life” as a result of the accident.
- [27] Finally, an occupational therapist, Sarah Lee, conducted an in-home/functional assessment of the applicant on February 3, 2016. Ms. Lee’s report outlined the methodology she used, the documents reviewed, and most importantly, the detailed assessment she completed. At the time, the applicant’s key concerns were low back pain, and bilateral shoulder pain down to both hands. The applicant also complained of numbness and tinkling in both hands, inability to sleep, and emotional issues. After completing a series of assessments, Ms. Lee concluded there were “inconsistencies” between her observations and the applicant’s functions, and opined that the applicant “is likely capable of achieving greater abilities than demonstrated at the time of the assessment when she is not

focused on her pain”. Examples of the inconsistencies noted include: “fluid neck movements demonstrated throughout history-taking and during functional testing”, and “greater and functional bilateral shoulder internal rotation range of motion demonstrated during history-taking”, versus during the assessment. Ms. Lee concluded:

“Given the noted inconsistencies and pain-limited behavioural presentation, formal test findings may not represent a valid profile of [the applicant’s] maximum functional abilities, as she is likely capable of achieving greater abilities than demonstrated at the time of this assessment when she is not focused on her pain....it is in this therapist’s opinion that [the applicant] does not suffer a complete inability to carry on a normal life.”

- [28] Relying on the IMEs, the respondent submitted that the applicant has failed to meet the test for NEB.
- [29] While not specifically referred to in the applicant’s submission, the applicant had included clinical notes from her family physician, Dr. Asifa Bawangoanwala before and after the accident. I have reviewed Dr. Bawangoanwala’s notes to gain a better understanding of the applicant’s conditions and limitations during the relevant time period, and find the evidence lacking. For instance, the clinical notes show that two days after the accident, the applicant reported no numbness, no radiation of pain, and have full flexion, although the notes also reported low back pain. By September, 2015, the applicant was reporting pain and was in “mild distress”. On November 7, 2015, she reported bilateral shoulder pain with a pain level of 4/10 and otherwise looked well. For a long stretch of time, during her appointments with her family physician, little was discussed about the issues arising from the accident, and by September 26, 2016, the applicant reported that she had no pain at this time, although it would flare up on and off. Similar finding was noted on May 12, 2017.
- [30] In conclusion, there are three IMEs by three healthcare professionals done right before the stoppage of the NEB concluding that the applicant does not suffer from a complete inability to carry on a normal life. As well, the clinical record from the applicant’s own family physician indicates that while she did suffer pain, the severity of which would appear at the lower end of the spectrum.
- [31] Based on the evidence, I find that the applicant’s injuries are predominantly minor as defined in the *Schedule* and subject to treatment within the Minor Injury Guideline.

Is the applicant entitled to receive an NEB in the amount of \$185.00 weekly for the period March 31, 2016 to date and ongoing, denied by the respondent on January 10, 2018?

- [32] To qualify for NEBs, s.12(1) of the Schedule states that an insured person has to demonstrate that he/she 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.
- [33] The applicant did not make any substantial submission on her eligibility for NEB. In her submission the applicant relied solely on the procedural fairness argument and on s.37(4) of the Schedule when she urged the Tribunal to find her entitled to NEB. In the alternative, the applicant asked for the opportunity to submit supplemental evidence that addresses her entitlement to the NEB.
- [34] As noted above, I accept that the applicant was only notified of the denial of the NEB by the letter dated January 10, 2018, which sets out clearly the reason for the denial was based on the IME reports.
- [35] I agree with the respondent that the applicant has the burden of proving her eligibility for NEB and her opportunity to meet the burden has passed. The applicant ought to have submitted her evidence by the deadline ordered by the case conference adjudicator, instead of asking for more time to do so after the fact.
- [36] Apart from the initial claim application and disability certificate, the applicant did not refer to any medical document that would support her claim for NEB. The clinical notes from the applicant's family physician would suggest that the applicant was in "mild distress" and did not raise the issue of pain in subsequent visits. On the other hand, IME reports, as summarized above, also do not support a finding that the applicant suffers a complete inability to carry on a normal life as a result of the accident.
- [37] In light of the evidence before me, I therefore find that the applicant has failed to meet the burden of the test as stipulated by the *Schedule* to qualify for the NEB.

Is the applicant entitled to interest for the overdue payment of benefits?

- [38] In view of my findings above, the applicant is not entitled to interest.

FINDING AND ORDER

- [39] The applicant's application for an NEB in the amount of \$185.00 weekly for the period commencing March 31, 2016 and ongoing is dismissed. The applicant is not entitled to interest.

Released: February 21, 2019

**Avvy Go
Adjudicator**

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