Safety, Licensing Appeals and Standards Tribunals Ontario
Licence Appeal Tribunal

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Ontario

-Tribunal File Number: 16-001739/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.R.

Applicant

And

Aviva Canada

Respondent

DECISION

ADJUDICATOR: **Rebecca Hines**

APPEARANCES:

For the Applicant: **Samia Alam, Counsel**
Gamur Shah, Counsel

For the Respondent: **Paul Belanger, Counsel**

Court Reporter: **Jolynn Dickenson, Professional Court Reporters**

HEARD:

Written and Electronic Hearing: June 19 and 20, 2017

OVERVIEW:

[1] The applicant was injured in a motor vehicle accident on January 24, 2014, and applied for accident benefits to Aviva Canada ("the respondent") under the *Statutory Accident Benefit Schedule – Effective September 1, 2010* (the "*Schedule*").

[2] The parties were unable to resolve the matter at the case conference and the matter proceeded to this written and electronic hearing.

[3] This hearing involves the respondent's denial of the applicant's claim for a non-earner benefit.

[4] The parties submitted their evidence by way of written submissions, documentary and affidavit evidence and a joint document brief. The oral portion of the hearing took place by teleconference on June 19 and 20, 2017.[1] On those dates, the parties gave further submissions and the applicant was cross-examined on her affidavit and Drs. John Lee, psychologist and Irina Valentin, psychologist were cross-examined on their insurer examination ("IE") reports.

ISSUES IN DISPUTE:

[5] The following issues are in dispute before the Tribunal[2]:

a) Is the applicant entitled to a non-earner benefit in the amount of $185.00 per week, from July 24, 2014 to date and ongoing?
b) Is the applicant entitled to interest on overdue payment of benefits?
c) Is the applicant entitled to costs of this hearing?

RESULT:

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1 Motion Brought by the Respondent: At the teleconference hearing, I heard submissions on a motion brought by the respondent requesting an order from the Tribunal for the applicant to produce: (1) un-redacted medical records from numerous facilities and general practitioners from 2011 to present; and (2) un-redacted OHIP summary from 2011 to present. The applicant explained why the redacted portions of the records were not produced. The records contained private medical information not relevant to the issues before the Tribunal. I did not allow the respondent's request because I found the redacted portions of the medical records in dispute contained highly sensitive information and were not relevant to the issues in dispute.

Motion Brought by the Applicant: At the teleconference hearing, I heard submissions on a motion brought by the applicant challenging the respondent's submission of the applicant's Facebook and LinkedIn social media pages, as well as her wedding video as evidence. I find the records relevant to the applicant's claim for a non-earner benefit as I agree with the respondent that social media can reflect an individual's lifestyle and activities. Further, these records were reviewed by some of the IE assessors.

[2] The parties confirmed that all of the other issues outlined in the Order of Adjudicator Norris dated May 8, 2017 were resolved prior to the hearing.

[6] For the reasons that follow the applicant is not entitled to a non-earner benefit, interest on overdue payment of benefits or the costs of this hearing.

BACKGROUND:

[7] The applicant, a 21 year old woman was involved in three previous motor vehicle accidents on January 28, 2010, May 12, 2012 and October 2, 2012, which resulted in serious injuries. The applicant was not at fault for these accidents and was 14 years old when the first accident occurred.

[8] As a result of the 2010 and 2012 accidents, the applicant was diagnosed with mainly soft tissue injuries, as well as adjustment disorder with anxiety and depression, and chronic pain associated with psychological factors.

[9] On January 24, 2014, the applicant was involved in the subject accident in which she was driving and t-boned the passenger side of another vehicle. The applicant sustained injuries to her neck, arm, wrist, hands, fingers and chest. Further she was diagnosed by Dr. Irina Valentin, psychologist with severe adjustment disorder with mixed anxiety and depressed mood, post-traumatic stress disorder and cognitive disorder.

THE PARTIES POSITIONS AND EVIDENCE:

Applicant:

[10] The applicant contends that the January 2014 accident exacerbated her injuries from the three prior motor vehicle accidents and had the biggest impact on her from both a physical and psychological perspective. Further, she submits that she suffers a complete inability to carry on a normal life as a result of the 2014 accident and is entitled to a non-earner benefit.

[11] In support of her claim for a non-earner benefit the applicant relied on the insurer examinations ("IE") of Dr. Valentin. Dr. Valentin examined the applicant in 2012 relating to her 2012 accident and again in June and July 2016, in relation to her January 2014 accident. Dr. Valentin's IE report of 2016 found that the applicant suffered a complete inability to carry on a normal life from the accumulative effect of all four accidents and found that the 2014 accident was the contributing factor to the applicant's complete inability to carry on a normal life.

[12] The applicant also relied on the psychological IE of Dr. Lee who examined her three times in relation to treatment plans for psychological treatment and a chronic pain assessment. Dr. Lee recommended that she undergo a chronic pain assessment. The applicant also contends that the report of Dr. Howard Jacobs (chronic pain specialist) dated December 24, 2015, supports that she suffers from chronic pain and is further evidence of her complete inability.

Finally, the applicant submitted her high school and college records to demonstrate how the accident has impacted her academically.

Respondent:

[13] The respondent argued that the applicant suffered a complete inability to carry on a normal life as a result of the three prior motor vehicle accidents but not as a result of the January 2014 accident. In addition, the respondent submitted that the applicant's quality of life has not deteriorated since the January 2014 accident but has instead improved. The respondent maintains that the applicant has not met her onus in demonstrating that she is entitled to a non-earner benefit as she has not provided a thorough analysis of her pre and post-accident activities. Further, the applicant failed to disclose important information to the IE assessors which discredits their opinions.

[14] The respondent relied on its multi-disciplinary assessment in which three of the four assessors did not find that the applicant suffered a complete inability to carry on a normal life.

THE LAW:

[15] In order to determine whether or not the applicant is entitled to a non-earner benefit, section 12 of the *Schedule* provides that she must suffer a complete inability to carry on a normal life as a result of and within 104 weeks after the accident.

[16] The leading case with respect to proving entitlement to a non-earner benefit establishes that a claimant must be able to prove that he or she has been continuously prevented from engaging in "substantially all" activities in which they engaged in before the accident. In order to do this, one must look at the applicant's pre and post-accident activities over a reasonable period of time before and after the accident.[3] The onus is on the applicant to prove her entitlement to benefits.

REASONS FOR DECISION:

Is the applicant entitled to receive payment of a non-earner benefit?

[17] The applicant is not entitled to a non-earner benefit for the following reasons:

[18] First, the applicant has not met her onus in proving on a balance of probabilities that she suffers a complete inability to carry on a normal life. What was absent from the applicant's affidavit, submissions and in her oral evidence was a

[3] *Heath v. Economical*, 95 O.R. (3d) 785.

thorough analysis with respect to the activities the applicant could do before the accident compared to those she cannot do post-accident. The applicant acknowledged the *Heath* case as the authority as far as setting out the factors one must take into consideration to demonstrate a complete inability.

[19] The applicant's interpretation of *Heath* was that not only should we consider the activities performed by a claimant but the quality of that performance.[4] In the applicant's case she contends that her education, inability to maintain her part-time job and living independently were hindered by the 2014 accident. Furthermore, special care must be taken when applying the *Heath* analysis to young people as their lives are not static and more importance should be given to education in a young person's life as we must take their future potential into consideration.

[20] The applicant relied on FSCO case law which dealt with young applicants and entitlement to a non-earner benefit which I am not bound by.[5] While I agree that one must take a different approach when applying the test to a young person, the cases submitted by the applicant are distinguishable for the following reasons: the applicants in those cases sustained brain injuries and in addition to having the supporting medical records, they had several witnesses testify with respect to their pre and post-accident activities. In the present case, the applicant's mother and husband were supposed to give evidence at the hearing but they did not. Other than the applicant and IE assessors no other witnesses gave evidence on the applicant's pre and post-accident status. Witness testimony can be critical in a case for non-earner benefits.

[21] Further, I agree with the respondent, that the applicant's college records following the January 2014 do not help in supporting her case as her marks improved. In the Fall of 2013, the applicant was forced to withdraw from college due to her low grade point average. The school records show that she was struggling academically before the 2014 accident. The evidence did not link the 2014 accident to the applicant's poor academic performance. The applicant maintains that her marks improved slightly following the accident because she received special accommodation through her college and took a reduced course load. The transcripts demonstrated that she took a reduced course load for one semester but was back to taking 4-5 courses per semester in 2015 and 2016.

[22] The applicant contends that she quit her part-time job in January 2016 as a result of the 2014 accident as she wanted to focus on school and could not handle both. Further, that she was forced to move home to her parents because she could no longer take care of herself. The oral testimony of the applicant

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[4] *Todd and State Farm* (FSCO –A00-001314, November 25, 2003)

[5] Muhall and Wawanesa (FSCO –PO6-00002, October 25, 2007); *Bobeta and Aviva Canada* (FSCO-A14-006479, October 31, 2016)

confirmed she lived on her own for 27 months post-accident but that she received a lot of help from family during this time. I found credibility issues with respect to this as the timing of her moving back home with her parents coincided with school ending and the applicant's wedding in the summer of 2016. The applicant confirmed that she got married in the summer of 2016 and moved in with her husband and his family. In addition, the employment records were not submitted to back up the applicant's self-reports.

[23] To qualify for a non-earner benefit, it is not sufficient enough for the applicant to demonstrate that she has sustained injuries, that she suffers from physical pain or that her pre-existing injuries have been aggravated. What must be proven is that the injuries and associated pain were directly caused by the subject accident and have significantly interfered with almost all of the applicant's pre-accident daily activities. I did not find that the applicant met her onus in providing evidence about her pre-accident activities. Therefore, I was unable to apply a comparison to her post-accident activities.

[24] Secondly, the only report submitted by the applicant that supports entitlement to a non-earner benefit was the IE assessment of Dr. Valentin dated August 22, 2016. While this report supported entitlement to a non-earner benefit, I found the report lacked an analysis of the applicant's pre-accident activities. I have also placed less weight on this report due to credibility issues raised during the cross-examination of the applicant and Drs. Lee and Valentin. While both assessors acknowledged that during their assessment of the applicant that she had a remarkable clinical presentation and did not show evidence of malingering and had valid test results, the doctors confirmed that they were missing important information that may have changed their opinion or the validity of their conclusions.

[25] For example, Dr. Valentin did not have the applicant's college records, ambulance call reports or any medical records from the 2010 accident. The applicant advised Dr. Valentin that she lived on her own prior to the 2014 accident and moved home because she could not take care of herself. During cross-examination the applicant confirmed that she was getting married and had plans to move in with her future husband's family.

[26] Both Dr. Valentin and Dr. Lee both admitted during their cross-examination that had they known about the applicant's three prior claims for non-earner benefits as well as having more information about her pre and post academic performance and other factors going on in her personal life it could challenge the validity of the conclusions they reached in their reports.

[27] Finally, the evidence demonstrated that the applicant suffered a complete inability to carry on a normal life before the accident. For example, during her

oral testimony the applicant admitted that she had issued three tort claims on the three previous accidents where she alleged she suffered from a permanent and serious impairment as a result of these accidents. She was diagnosed with psychological issues and chronic pain. However, she claimed she was getting better in between each accident prior to the 2014 accident and improvement was noted in some of the IE reports. The applicant admitted during cross-examination that she suffered from a complete inability before the 2014 accident and had claimed a non-earner benefit on the three prior accidents.

[28] While I believe that the applicant has suffered physical and psychological pain and that being the victim of four motor vehicle accidents has had a serious impact on her life, for the above reasons she has not succeeded in demonstrating that she suffers from a complete inability to carry on a normal life as a result of the January 2014 accident.

[29] For all of the above-noted reasons I do not find the applicant is entitled to a non-earner benefit.

Is the applicant entitled to her costs of this hearing?

[30] The applicant is not entitled to her costs of this hearing for the following reasons:

[31] The applicant requested that she be awarded the costs of this hearing due to the respondent's unreasonable withholding of benefits. The applicant did not elaborate in her submissions with respect to why costs should be awarded.

[32] The *Licence Appeal Tribunal Rules of Practice and Procedure* (the "*Rules*") include a provision in Rule 19.1 for parties to request costs, if they believe that the other party in a proceeding has acted unreasonably, frivolously, vexatiously, or in bad faith. Rule 19.4 further sets out the requirements for that request, which must include the reasons for the request and the particulars of the alleged conduct. The applicant did not provide submissions with respect to this.

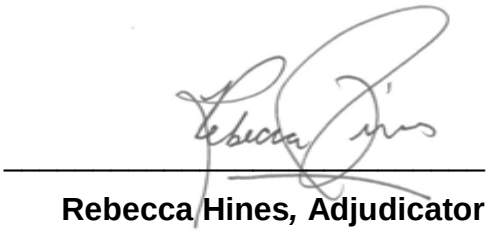
[33] Rather than requesting an award of costs, it is more likely that the applicant's intention was to request an award under section 10 of Ontario Regulation 664, R.R.O.1990 which allows the Tribunal to make an award in addition to awarding the benefits and interest to which an insured person is entitled when an insurer unreasonably withholds or delays payments. The applicant did not make submissions with respect to this issue.

[34] Given my reasons above, I find that this award is not warranted in the circumstances in this case.

ORDER:

[1] This application is dismissed.

Released: September 11, 2017



Rebecca Hines, Adjudicator