

**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: 17-002048/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:

Elizabeth Dodds

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

ADJUDICATOR: Christopher A. Ferguson

APPEARANCES

George Malakassiotis, Counsel for the Applicant

Jennifer Cosentino, Counsel for the Respondent

HEARD in Writing on October 16, 2017

OVERVIEW

- [1] ED (“the applicant”) was involved in a motor vehicle accident (“the accident”) on September 7, 2015 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (“the Schedule”).
- [2] The applicant applied for benefits from the respondent, and applied to the Licence Appeal Tribunal (the “Tribunal”) when the disputed benefits were denied.
- [3] The applicant is elderly. In the accident, she was a pedestrian struck and thrown to the ground by a motor vehicle in a parking lot.

DISPUTED BENEFITS

- [4] The issues to be decided by the Tribunal are:
 - 1. Is the applicant entitled to receive a non-earner benefit in the amount of \$185.00 per week for the period March 8, 2016 to-date and ongoing?
 - 2. Is the Applicant entitled to attendant care benefits in the amount of \$1,596.99 per month for the period June 14, 2016 to-date and ongoing?
 - 3. Is the applicant entitled to payments for the cost of examinations in the amount of \$2,550.40 for an orthopaedic assessment, recommended by Excel Medical Diagnostics in a treatment plan dated January 27, 2016, denied by the respondent on March 21, 2016?
 - 4. Is the applicant entitled to receive a medical benefit in the amount of \$5,637.87 for chiropractic services, recommended by Health Bound Health Network in a treatment plan dated November 19, 2015, denied by the respondent on January 21, 2016?
 - 5. Is the applicant entitled to receive a medical benefit in the amount of \$1,440.95 for chiropractic services, recommended by Health Bound Health Network in a treatment plan dated March 30, 2015, denied by the respondent on May 2, 2016?
 - 6. Is the applicant entitled to receive a medical benefit in the amount of \$130.00 (claimed \$3,552.61 less \$3,422.61 approved by the respondent) for chiropractic services, recommended by Health Bound Health Network in a treatment plan dated September 14, 2015, denied by the respondent on October 14, 2015?

¹ O.Reg. 34/10.

FINDINGS

- [5] I find that the applicant has not proven her entitlement to any of the benefits she seeks.
- [6] The applicant's appeal is dismissed.
- [7] There are no overdue payments in this matter and therefore no interest is payable.

REASONS

- [8] The onus is on the applicant to show that she is entitled to the benefits she is claiming.²
- [9] The applicant made no submissions in this matter: she advanced no discussion or argument respecting the evidence that she provided, nor did she reply to the respondent's submissions. Her evidence consisted of her personal affidavit, a chronic pain assessment, and treatment and assessment plans for medical benefits.

Non-Earner Benefits

- [10] Section 12 of the *Schedule* requires an insurer to pay a non-earner benefit ("NEB") to an insured person who does not qualify for an income replacement benefit and who suffers a complete inability to carry on a normal life as the result of an impairment sustained in an accident. The compensable impairment must arise within 104 weeks after the accident.
- [11] Section (3)(7)(a) explains that a person suffers "a complete inability to carry on a normal life" if that person suffers an impairment as a result of the accident that "continuously prevents" him or her from "engaging in substantially all of the activities in which the person ordinarily engaged before the accident".
- [12] As noted by the respondent, the court has defined the standard for determining whether impairment meets the test for NEBs in *Heath v. Economical Mutual Insurance*³: it is not enough to show changes from pre- to post-accident activities; the claimant must be continuously prevented from engaging in substantially all of her pre-accident activities.
- [13] However, *Heath* also indicates that "a claimant who merely goes through the motions cannot be said to be engaging in an activity" and that "the question is not whether he can do the activity, but whether pain or after-pain [sic] practically prevents engaging in activity".⁴

² *Scarlett v. Belair*, 2015 ONSC 3635

³ *Heath v. Economical*, 2009 ONCA 391, May 11, 2009 or 95 OR (3d), 785

⁴ *Ibid.*

- [14] The applicant submits an affidavit, dated September 5, 2017 in which she describes a pre-accident lifestyle that include active gardening (planting, weeding, digging), cooking – including family meals, babysitting grandchildren and great-grandchildren, knitting (as part of a group) and attending Church services on Sunday mornings and on Sunday and Wednesday evenings.
- [15] The applicant's affidavit indicates that she now requires help with cooking, has had to quit her knitting group, no longer attends evening services (because she is afraid of being struck by a car) and has impaired walking. All of this she attributes to the accident.
- [16] The applicant relies on an undated chronic pain assessment by Dr. Nimrit Dhillon, who examined the applicant on August 9, 2017. Dr. Dhillon's report notes:
- i. The applicant reported "nagging discomfort" in her right wrist, triggered by exertion and alleviated by rest.
 - ii. The applicant's injured wrist was significantly weaker than her left wrist in all aspects: grip, resistance to extension and flexion.
 - iii. The applicant was continuing to perform wrist exercises daily, with improvements to function noted.
 - iv. The applicant described new limitations in her activities of living consistent with the limitations set out in her affidavit.
- [17] In reading Dr. Dhillon's report, I found it unclear whether many of the problems noted would contribute to the finding that the applicant has suffered a complete inability to carry on a normal life:
- i. The applicant's reluctance to drive was not clearly linked to the accident, and in any event it appeared to relate to night-time driving only -- and the impacts included a reduction but not elimination of Church attendance and the need to have her son pick her up and drive to his home for regular dinners.
 - ii. The applicant reported that weakness in her wrist created concerns about lifting and holding young children upright – her solution is to place the children on her lap.
 - iii. The applicant can no longer carry luggage with her right hand: the result is that rather than travelling to her daughter's house, her daughter comes to her house for visits.

[18] The respondent relies on insurer's examination (IE) reports from:

- i. Dr. Gianni Maistrelli who concluded from his orthopedic assessment of March 1, 2016, that the applicant does not meet the criteria for NEBs from an orthopedic perspective. Dr. Maistrelli also opined that the applicant's right wrist was largely healed with "no objective impairment" and that there was no impairment of the applicant's left hip or knee.
- ii. Ms. Sarah Maddix, occupational therapist, who conducted an occupational therapy in-home assessment on March 2, 2016 and found no objective evidence from her tests of impairment of the applicant's back, neck, shoulders, left forearm, hips, knees or ankles. Ms. Maddix did note pain and weakness in the applicant's right wrist.

[19] The respondent's evidence also points to the applicant's own statements to Ms. Maddix that undermine her claim. Ms. Maddix's report notes the following about the applicant's self-reporting:

- i. no mention of pre-accident babysitting of grand- and great grand-children;
- ii. no mention of pre-accident gardening;
- iii. a statement that her daily routine was unchanged, except for ending her attendance at evening Church services.

[20] The applicant makes no explanation for the discrepancies in her self-reporting in the affidavit and Ms. Maddix's assessment. Accordingly, I am confident in giving the IE reports substantial weight in determining how the applicant's self-reporting speaks to her claims of complete inability to carry out pre-accident activities.

[21] I am also concerned that the applicant's affidavit evidence does not provide me with detail about the relative frequency or time consumed by most of the activities she claims formed her pre-accident routine or a sense of whether they are now entirely discontinued. Her evidence does not provide me with any sense of the relative importance or weighting of these activities. I concur with other adjudicators that this information is necessary to determine whether the applicant is continuously unable to engage in the greater part of her pre-accident activities.⁵

[22] The applicant's affidavit and the reports she submitted did not provide me with enough evidence to support any theory that her pre-accident activities have been so constrained by her injuries as to have been "practically prevented". Her accounting of her post-accident activities to the IE assessor does not support an

⁵ See *RS v Aviva Insurance* 2017 CanLII 46352 on the issue of how much time each activity occupied in a typical day, week or month, and *DD and Dominion of Canada General Insurance Co.* 2017 Can LII 33671 on the need to weight the importance of pre-accident activities.

assertion that she was continuously prevented from engaging in substantially all of her pre-accident activities.

[23] I find that the applicant has not met the onus on her to prove that she is entitled to NEBs.

Attendant Care Benefits

[24] The insurer's obligation to pay attendant care benefits, the definition of eligible expenses and the prescribed amounts are set out in s.19 of the *Schedule*.

[25] The process for making attendant care claims, required information, the insurer's right to examination and to require reassessment of attendant care needs are detailed s.42 of the *Schedule*.

[26] The respondent notes that it did pay ACBs to the applicant for a period of time, but asserts that they are no longer reasonable and necessary.

[27] The applicant relies on her affidavit in which she describes difficulty with prolonged standing or walking, an inability to climb stairs without supervision, her need for help with such chores as folding laundry and setting the table, and need for assistance with personal grooming such as hair-brushing and clipping nails.

[28] The applicant also relies on Dr. Dhillon's assessment above, as noted, she reported limitations consistent with her affidavit. Dr. Dhillon opined that the applicant "would benefit from ongoing assistance with household chores and outdoor home maintenance activities".

[29] I find Dr. Dhillon's report unpersuasive. It was not, in fact, based on an examination set up to determine ACBs, and the opinion on her needs was not clearly indicative of attendant care needs as opposed to housekeeping and home maintenance assistance.

[30] The respondent relies on the report of Avi Kaplun, occupational therapist, dated June 6, 2016 who concluded that ACBs as claimed are not reasonable and necessary. His conclusion was based on his direct observation that the applicant was completely independent with personal care tasks.

[31] The respondent notes that the applicant also reported being independent in her personal care tasks to Ms. Maddix on March 2, 2016.

[32] I find that *unexplained* and contradictory self-reporting by the applicant in clinical examinations undermines her case that she has met the onus on her to prove entitlement to ACBs.

[33] The relative weakness of Dr. Dhillon's report and the inconsistencies in the applicant's self-reporting lead me to conclude that she has not proven her entitlement to ACBs and that this part of her application should be denied.

Medical Benefits and Costs of Examination

[34] Section 14 and 15 of the *Schedule* provide that an insurer is liable to pay for medical expenses that are reasonable and necessary as a result of the accident. The applicant bears the onus of proving on a balance of probabilities that each treatment and assessment plan is reasonable and necessary.

[35] I agree with the respondent that the applicant must prove that the treatment costs are proportionate to the goals set out in each plan.

Issue 3 -- Cost of Examination: Orthopedic Assessment

[36] The applicant's claim for an orthopedic assessment set out as issue 3 in paragraph [4] above is supported by the OCF-18 prepared by Dr. Getahun.

[37] I found the credibility of Dr. Getahun's OCF-18 to be weak, because it stated that an assessment is required to assess spinal issues such as spinal stenosis and disc herniation. This is inconsistent with OCF-18's the stated treatment goals of returning the applicant to her activities of daily living, especially by increasing her range of motion and strength in her right wrist, which is where the applicant reported pain. It is also inconsistent with the lack of any complaint about spinal issues – which were never mentioned by the applicant to IE assessors or to her own expert, Dr. Dhillon.

[38] The respondent relies on a report by Dr. Maistrelli dated January 21, 2016 in which the physician, after examining the applicant in person on January 13, 2016:

- i. notes that the applicant is satisfied with the healing of her right wrist and with the results of bone stimulator therapy provided by Brampton Civic Hospital;
- ii. finds no concerns with wrist function, or neck or back problems warranting further investigation;
- iii. reports test results that were normal for range of motion and strength;
- iv. Opined that the proposed treatment plan is not reasonable and necessary.

[39] I find Dr. Maistrelli's report more persuasive than Dr. Getahun's OCF-18.

[40] In reading the evidence, I note that the applicant was under the care of an orthopedic surgeon who considered her satisfactorily healed (see below). The

applicant does not explain why, given her treatment by an orthopedic specialist, additional assessment would be required.

[41] I find that under these circumstances the applicant has not met the onus on her to prove that the orthopedic assessment sought is on balance necessary.

Issues 4 and 5 -- Medical Benefits: Chiropractic Treatments

[42] The applicant's claims for chiropractic treatments, set out as issue 4 and 5 in paragraph [4] above are supported by:

i. OCF-18 by Dr. Ho dated March 30, 2016

ii. OCF-18 by Dr. Ho dated November 19, 2015

[43] I found the credibility of Dr. Ho's OCF-18 of November 19, 2015 to be weakened by his inclusion of "return to pre-MVA work activities and modified work activities as treatment goals. The applicant is an octogenarian who has been retired for many years. To be strongly credible, an assessment proposal must be accurate in such important details.

[44] The respondent relies on reports obtained from Dr. Maistrelli as noted above, with follow-up paper reviews dated March 21, 2016 and May 2, 2016. As noted above, Dr. Maistrelli found satisfactory wrist healing and normal wrist function and no reporting of neck or back problems. He further notes that the applicant's treating orthopedic surgeon, at Brampton Civic Hospital reported satisfactory healing of the wrist in a report dated January 7, 2016.

[45] I am persuaded by Dr. Maistrelli's observation that if the applicant had concerns about her right wrist, she could report her issues to her family doctor and get a referral to an orthopedic specialist at the hospital – covered by OHIP. I share his view that this makes the proposed plans, which focus on the injured wrist, potentially duplicative, and creates substantial doubt as to their necessity.

[46] I find that the applicant has not met the onus on her to prove that the chiropractic treatment sought is reasonable and necessary. The application is denied.

[47] The applicant's claim for \$130.00 (claimed \$3,552.61 less \$3,422.61 approved by the respondent) for chiropractic services, arose when the respondent determined that a fee of \$200.00 charged for completion of a form by an occupational therapist was excessive.

[48] I dismiss the claim because the applicant offers no evidence or argument to contest the respondent's position.

Request for Interest

[49] Section 51 of the Schedule sets out the criteria for assessing and awarding interest on overdue payments.

[50] In this case, the applicant not entitled to interest on denied claims, because no payment is due from the insurer.

CONCLUSIONS

[51] The applicant not proven her entitlement to the benefits she claims. Her application is dismissed.

[52] There are no overdue payments and hence no interest owing to the applicant.

Released: December 13, 2017



**Christopher A. Ferguson
Adjudicator**