

**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: Alexandros Kanakis vs. Aviva Insurance Canada, 2020 ONLAT 18-002488/AABS**

**Date: April 8, 2020**

**File Number: 18-002488/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:

**Alexandros Kanakis**

**Appellant(s)**

**and**

**Aviva Insurance Canada**

**Respondent**

**DECISION AND ORDER**

**ADJUDICATOR: Karina Kowal**

**APPEARANCES:**

For the Appellant:

Alexandros Kanakis, Applicant

Loreto Scarola, Paralegal

For the Respondent:

Julie-Ann MacDonald, AB Specialist

Jennifer Cosentino, Counsel

Court Reporter:

Aaron Weingott

**HEARD:**

by teleconference with written submissions.

**Teleconference hearing:**

**January 24, 2019**

## OVERVIEW

- [1] The applicant, A.K., was 79 years old when he was involved in an automobile accident on October 31, 2015. He was a belted driver of a vehicle which was rear-ended that subsequently struck the vehicle in front. The applicant sustained injuries as a result of this accident and applied for non-earner benefits (NEB) and other benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule")*.
- [2] As it relates to this matter, initially, the respondent paid the applicant non-earner benefits in the sum of \$185.00 per week from May 1, 2016 to January 28, 2017 inclusive, but discontinued payments after receiving further medical documentation from the applicant and conducting its own insurer examinations.
- [3] The applicant disagreed with the respondent's decision to discontinue payment of non-earner benefits and submitted an application for dispute resolution services to the Licence Appeal Tribunal (the "Tribunal") regarding his entitlement to non-earner benefits.

## ISSUES

- [4] The issues in dispute for the hearing are as follows:
  - i. Is the applicant entitled to a non-earner benefit in the amount of \$185.00 per week from January 28, 2017 to date and ongoing, as denied by the respondent on December 20, 2016?
  - ii. Is the applicant entitled to any applicable interest?
  - iii. Is the applicant entitled to an award under Ontario Regulation 664 because the respondent unreasonably withheld or delayed the payment of benefits?

## RESULT AND ORDER

- [5] I find that:
  - i. The applicant is not entitled to a non-earner benefit from January 29, 2017 to date and ongoing (subject to the following provisions):
    - a. The applicant was paid non-earner benefits for January 28, 2017 inclusive (the stoppage date was January 28, 2017),

- b. The applicant sustained an accident after the age of 65 and any payable specified benefits are subject to the ramp down formula required by s.12(5) of the *Schedule*.<sup>1</sup>
- ii. I find that the applicant is in non-compliance with s.44(9) from September 26, 2018<sup>2</sup> for failing to attend a properly scheduled insurer examination and that the respondent was entitled to rely on s.37 to terminate the non-earner benefit.
- iii. The applicant is not entitled to any applicable interest.
- iv. The issue of an Award under Ontario Regulation 664 was withdrawn on consent by the parties at the case conference of August 13, 2018,<sup>3</sup> confirmed by the order of Adjudicator Grant, and no finding was made on this issue.

## **I: NON-EARNER BENEFIT**

### **A: The *Schedule* and Case Law**

[6] The test for entitlement to a non-earner benefit is set out in s.12(1) as follows:

12(1) The insurer shall pay a non-earner benefit to an insured person who sustains an impairment as a result of an accident if the insured person satisfies any of the following conditions:

1. The insured person 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. [*underlining mine*]

[7] Section 3(7)(a) of the *Schedule* provides further definition as to the meaning of a complete inability to carry on a normal life:

3(7) For the purposes of this Regulation,

(a) a person suffers a complete inability to carry on a normal life as a result of an accident if, as a result of the accident, the person sustains an impairment that continuously prevents the person from engaging in

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<sup>1</sup> O. Reg. 34/10, as amended but prior to Reg. 251/15 coming into force, re: accidents before June 1, 2016, ss.9(1) and 12(5)

<sup>2</sup> Sept. 26, 2018 – letter from Aviva to applicant re: non-compliance

<sup>3</sup> Case conference report and order dated August 13, 2018

substantially all of the activities in which the person ordinarily engaged before the accident [*underlining mine*]

- [8] As “substantially all” is not defined in *the Schedule*, the applicant has provided the guiding decision of *Galdamez v. Allstate Insurance Company of Canada*, wherein the Ontario Court of Appeal held that “substantially all” does not mean “all.”<sup>4</sup> The respondent was silent with respect to the *Galdamez* clarification. The guidance from the Court of Appeal in *Galdamez* is of assistance and I will rely on it when viewing the applicant’s pre- and post- accident activities of daily living.
- [9] Both parties are in agreement that the leading case for non-earner benefits is *Heath v. Economical Mutual Insurance Company*.<sup>5</sup>
- [10] At paragraph 50 of *Heath*, the Court of Appeal held that:
- The starting point for the analysis of whether a claimant suffers from a complete inability to carry on a normal life will be to compare the claimant's activities and life circumstances before the accident to his or her activities and life circumstances after the accident.
- [11] A proper, principled, and analytical approach for the determination of entitlement to a non-earner benefit was detailed in *Heath*:
1. Consideration of a claimant's activities and life circumstances prior to the accident requires more than taking a snapshot of a claimant's life in the time frame immediately preceding the accident. It involves an assessment of the appellant's activities and circumstances over a **reasonable period prior to the accident**, the duration of which will depend on the facts of the case.
  2. All of the pre-accident activities in which the claimant ordinarily engaged should be considered. However, in deciding whether the necessary threshold has been satisfied, **greater weight may be assigned to those activities which the claimant identifies as being important to his/her pre-accident life.**
  3. It is not sufficient for a claimant to demonstrate that there were changes in his or her post-accident life. Rather, it is incumbent on a claimant to establish that those changes amounted to him or her being continuously prevented from engaging in substantially all of his pre-accident activities. The phrase **"continuously prevents"** means that a claimant must prove "disability or

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<sup>4</sup> *Galdamez v. Allstate Insurance Company of Canada*, 2012 ONCA 508, 111 OR (3d)321 at para 39

<sup>5</sup> *Heath v. Economical Mutual Insurance Company of Canada*, 2009 ONCA 391, 95 OR (3d) 785

incapacity of the requisite nature, extent or degree which is and remains uninterrupted".

4. The phrase "**engaging in**" should be interpreted from a qualitative perspective and as meaning more than isolated post-accident attempts to perform activities that a claimant was able to perform before the accident. The activity must be viewed as a whole, and a claimant who merely goes through the motions cannot be said to be "engaging in" an activity. Moreover, the manner in which an activity is performed and the quality of performance post-accident must also be considered. If the degree to which a claimant can perform an activity is sufficiently restricted, it cannot be said that he or she is truly "engaging in" the activity.
5. In cases where **pain is a primary factor** that allegedly prevents the insured from engaging in his or her former activities, the question is not whether the insured can physically do these activities, but whether the degree of pain experienced, either at the time or subsequent to the activity, is such that the individual is practically prevented from engaging in those activities.

[12] The parties did not dispute whether the applicant became impaired within 104 weeks of the accident. The issue arises when determining if the applicant's impairments **continuously** prevent him from engaging in substantially all of his activities in which he ordinarily engaged in before the accident, **for the period from January 29, 2017 and ongoing**, or in other words, those activities that constituted a normal life for him.

[13] The onus of proof rests on the applicant to prove, on a balance of probabilities, that he continues to be entitled to the non-earner benefit claimed.

[14] Based on all the evidence presented, from a combination of physical and psychological impairments, I find that the applicant **has not** proven he meets the test for non-earner benefits.

## **B: Evidence**

### **The Applicant's Case**

- [15] The applicant submits that he has, and continues to suffer, a complete inability to carry on a normal life as a result of the accident. In support of his claim, the applicant submits the following documents:
- a. Disability certificate (OCF-3) dated November 9, 2015 by Dr. M. Gordanpour, D.C.

- b. Disability certificate (OCF-3) dated May 19, 2016 by Dr. B. Pawan Sabharwal, D.C.
- c. Disability certificate (OCF-3) dated September 29, 2016 by Dr. M. Gordanpour, D.C.
- d. Psychological report dated April 19, 2016 by Dr. J. Pilowsky.
- e. Psychological reassessment dated August 5, 2016 by Dr. J. Pilowsky.
- f. Psychological reassessment #2 dated November 3, 2016 by Dr. J. Pilowsky.
- g. Orthopaedic Assessment dated August 24, 2016 by Dr. O. Benmofteh.
- h. Clinical notes and records for September 24, 2015 to December 17, 2017 from family doctor Dr. E. McFadden.

### **The Respondent's Case**

[16] The respondent submits that it had requested the following multidisciplinary s.44 insurer examinations, which were attended by the applicant:

- a. Multidisciplinary Assessment Report dated June 2, 2016 including:
  - i. Psychology Assessment by Dr. Irina Valentin
  - ii. Occupational Therapy Assessment by Ms. Sarah Maddix
  - iii. General Practitioner Assessment by Dr. Pravesh Jugnundan

[17] The applicant met the test for non-earner benefits from a psychological perspective and the benefit was paid from 6 months after the date of the accident as required. As new information continued to be provided to the insurer, the respondent requisitioned an updated multidisciplinary assessment as follows:

- a. Multidisciplinary Assessment Report dated December 19, 2016 including:
  - i. Psychology Assessment by Dr. Mor
  - ii. Occupational Therapy Assessment by Mr. Ron Findlay
  - iii. General Practitioner Paper review by Dr. Pravesh Jugnundan

- [18] As a result of the second set of multidisciplinary assessments, it was determined that the applicant no longer met the test for non-earner benefits and the benefit was stopped effective January 28, 2017.

### **Psychology Assessments**

- [19] In reviewing all the psychology assessments, Dr. Pilowsky's initial assessment conducted on behalf of the applicant dated April 16, 2016 is very consistent with that of Dr. Valentin's psychology assessment conducted on behalf of the respondent dated June 2, 2016. Both psychologists find psychological impairments as a direct result of the accident, diagnosed the applicant with post traumatic stress disorder, depressed mood and adjustment disorder. Both psychologists also make recommendations for psychotherapy treatment.
- [20] Dr. Pilowsky's first follow up reassessment dated August 5, 2016 (after the applicant had participated in one session of psychotherapy) details that the applicant's diagnosis had worsened to a diagnosis of major depressive disorder, somatic symptom disorder-severe. I find this to be plausible as both psychologists had recommended therapy and treatment was only recently initiated.
- [21] Dr. Pilowsky's second follow up reassessment report dated November 3, 2016 was conducted after the applicant had participated in 9 sessions of psychotherapy. She identifies the same diagnoses as her previous reassessment report. However, the details of the report identify levels of improvement in the areas of anxiety both on objective psychodiagnostic testing as well as in the applicant's subjective reporting. The applicant reported less frequent flashbacks of the accidents, nightmares and panic attacks. He reported that his cognitive abilities were improving. He also reported feeling more confident as a driver and passenger.
- [22] The respondent provided Dr. Pilowsky's third follow up reassessment report dated May 18, 2017 as part of its document brief. Dr. Pilowsky confirmed that the applicant had continued to participate in psychotherapy and that there has been gradual improvement in the areas of flashbacks, driver anxiety as well as concentration and focus. It is noted that his mood remains low, that he is still irritable and impatient and that his sleep is poor. His pain remains a source of significant frustration and grief. Dr. Pilowsky confirms that his depression has improved from severe to moderate, and that his anxiety remains in the same range since her last assessment of him.

- [23] The second insurer examination psychology report conducted by Dr. Mor on December 6, 2016 diagnosed the applicant with depressed mood, mild. The assessor noted that the applicant had been reaping the benefits of psychotherapy and another 4 sessions would be appropriate. The applicant had reported 60% overall improvement in terms of overall functioning.
- [24] From review of all the psychology reports, I find that the assessors provide a consistent medical record showing an arc of psychological recovery. Dr. Pilowsky and Dr. Valentin recommended psychotherapy in their initial assessments which were conducted approximately 2 months apart. By the time the applicant-initiated treatment, his symptoms worsened (as outlined in Dr. Pilowsky's reassessment report of August 5, 2016). However, by November 3, 2016 I see a substantial improvement in both Dr. Pilowsky's reassessment report #2 and confirmed by Dr. Mor's insurer examination. Both Dr. Pilowsky and Dr. Mor are consistent in that further psychotherapy sessions would be beneficial to the applicant. By Dr. Pilowsky's reassessment report #3, the applicant did indeed have substantial improvement.

### **Physical Assessments**

- [25] In reviewing all the physical assessments conducted of the applicant, I also find them to be very consistent in their assessments and diagnoses.
- [26] Dr. Jugnundan, general practitioner, assessed the applicant on behalf of the respondent for as part of the first multidisciplinary assessment for the non-earner benefit on May 12, 2016 and concluded that he did not meet the test.
- [27] Dr. Jugnundan's physical examination of the applicant was non-significant for any impairments. He diagnosed that from a physical perspective, there are soft tissue injuries to the neck related to the index motor vehicle accident. The applicant reported to him that his main issue is his psychological state and Dr. Jugnundan appropriately deferred comment on psychological symptoms and diagnoses to the multidisciplinary psychologist. The applicant reported that he was independent in self-care activities but at a slower pace. He avoids participating in household activities due to lack of motivation, but he is independent with respect to light household chores.
- [28] Dr. Jugnundan provided another opinion via paper review dated December 19, 2016 regarding the non-earner benefit as part of second multidisciplinary assessment team. Dr. Jugnundan notes that he previously assessed the applicant on three (3) prior occasions, December 17, 2015, May 12, 2016 (for the non-earner benefit) and November 10, 2016. In this paper review, he specifically

reviews the other reports of the multidisciplinary assessors--namely Mr. Findlay, occupational therapist, and Dr. Mor, psychologist. Dr. Jugnundan determined that his opinion has not changed, and that applicant remains to not meet the test for non-earner benefits.

- [29] Of concern with this paper review is that Dr. Jugnundan did not specifically address Dr. Benmoftah's orthopaedic report (conducted on behalf of the applicant) dated August 24, 2016. I do note, however, that Dr. Jugnundan reviewed Mr. Findlay's occupational therapy report, which in turn provides a review of this orthopaedic report. The applicant provides evidence that the family doctor's clinical notes and records were provided to the insurer in advance of the second multidisciplinary assessments. It does not appear from the document list that the second multidisciplinary group had an opportunity to review them. This is concerning as well.
- [30] As mentioned, Dr. Benmoftah provided an orthopaedic assessment on behalf of the applicant dated August 24, 2016. Although Dr. Benmoftah's conclusion regarding non-earner benefits is that the applicant "has and continues to suffer a complete inability to carry on a normal life," his physical examination findings are similar to that of Dr. Jugnundan's assessment dated May 12, 2016. Dr. Benmoftah's diagnoses of the applicant include myofascial strain of the cervical spine, lumbar spine and bilateral shoulders, which are all soft tissue injuries as outlined in Dr. Jugnundan's assessment. Dr. Benmoftah also notes an exacerbation of pre-existing degenerative disc disease.
- [31] With respect to Dr. Benmoftah's diagnoses of post-traumatic headaches and chronic pain syndrome, I find comment in these areas to be out of scope of practice as an orthopaedic surgeon. I do recognize Dr. Benmoftah to be a highly qualified orthopaedic surgeon, but I do not note any specialized training in the areas of pain management in his credentials. As such, I give little weight to these diagnoses.

### **Occupation Therapy In-Home Assessments**

- [32] Ms. Maddix assessed the applicant at home on April 19, 2016 as part of the first multidisciplinary insurer examination team. She determined that although the applicant did not meet the test for non-earner benefits from a physical perspective, he did have decreased physical tolerances and did require assistive devices and education on pacing strategies.
- [33] Mr. Findlay assessed the applicant at home on December 2, 2016 as part of the second multidisciplinary assessment team. By this date, the applicant had

reported that he had completed 4 months of physical treatment and 12 sessions of psychotherapy. He had received the recommended assistive devices (bath chair, tub rail and a heating pad).

- [34] Mr. Findlay also concluded that the applicant did not meet the test for non-earner benefits, and further he determined that he had sufficient physical tolerances, strength and ranges of motion to return to all of his pre-accident functional activity, including personal care and housekeeping immediately. Further, he opined that the applicant was underestimating his abilities and was receiving a level of assistance in excess of what he requires. In Mr. Findlay's view, this prevents the applicant from recovering from his injuries by inhibiting his participation in his pre-accident activities that he is capable of completing independently.
- [35] The applicant submitted that during the assessment, Mr. Findlay did not assess the low back and lower extremities, and as such 50% of the physical examination was not conducted so the assessment should not be given any weight. I have reviewed Mr. Findlay's report in detail. He identifies that he did not assess the low back and lower extremities in the standing position out of safety concerns for the applicant's reliance on a cane for mobility assistance. Mr. Findlay did perform an assessment of the low back and lower extremities via observation of sitting, stooping to shin level and kneeling.
- [36] The applicant also submits that the respondent specifically chose to use a different psychological and occupational therapy assessor for the second set of insurer examinations. The respondent was silent on this point. I agree with the applicant only to the extent that it is preferable to utilize the same assessors for a consistent opinion, but it is not mandatory to do so. Often the same assessors are not available, or scheduling is not possible when it comes to co-ordinating multidisciplinary assessments, which would leave the applicant waiting unnecessarily.

#### **Family Doctor - Dr. McFadden's Records**

- [37] Dr. McFadden's records are provided for the period of October 7, 2015 to March 20, 2017 as well as an MRI of the right knee dated December 17, 2017.
- [38] The applicant consistently saw his family doctor after the accident from November 2, 2015. He reported the accident and sought treatment for his accident related injuries including cervical pain, shoulder pain, lower back pain, headache, temporomandibular joint pain, depression, anxiety and sleeping problems.
- [39] The applicant received prescribed medication for both his physical and psychological symptoms. He was concurrently receiving treatment through the

insurance stream for physiotherapy and psychotherapy. On March 31, 2016, the applicant reported that he felt better overall. In September 2016, the applicant informed that his physical complaints had worsened as he no longer had access to physiotherapy. A diagnosis of chronic myofascial pain syndrome is made on November 11, 2016.

- [40] The family doctor recommended that physiotherapy be restarted and a note in January 2017 confirms that the applicant restarted physiotherapy “with some improvement.” An antidepressant/anti-anxiety medication that was originally prescribed in March 2016 was discontinued in December 2016 due to improvement in conjunction with psychotherapy.
- [41] Visits in February 2017 begin with complaints of left hip pain which were treated with Tylenol Arthritis and an opioid pain medication. The opioid was not well tolerated and the applicant stopped the medication, relying solely on Tylenol Arthritis.
- [42] There are no further family doctor clinical notes or records from March 20, 2017 until an MRI of the right knee dated December 17, 2017. The MRI is significant for mild medial and patellofemoral compartment osteoarthritis. There is a complex tear involving the anterior horn, posterior horn and body of the medial meniscus. There is an associated 6 mm parameniscal cyst intimate with the anterior horn of the medial meniscus. There is also a calcified interarticular body.
- [43] Although this right knee MRI is a significant, objective finding, I have not been provided with any corroborating clinical notes and records from the applicant’s family doctor, from the orthopaedic surgeon or any other clinician to interpret it in view of the applicant. The respondent attempted to schedule a third multidisciplinary assessment in September 2018 during which this MRI would have been reviewed. These assessments were never attended.
- [44] Without a clinical opinion on the relevance of the right knee MRI, as well as the left hip pain, I cannot place much weight on it. There is a great delay between the date of the accident and the date of the MRI as well as onset of left hip pain symptomatology.
- [45] There are no reported symptoms of right knee pain to the family doctor in the records provided up to March 31, 2017. I can only assume that the reason for referral for the MRI arose after March 31, 2017. The applicant did not report any symptoms of right knee pain to the assessors for the applicant or the respondent, nor did they make any objective findings in the right knee pain. Left hip pain symptoms first arose in the clinical notes and records in February 2017. This

certainly raises questions of causation, at least in terms of right knee and left hip pain.

## **Surveillance**

- [46] The respondent submits surveillance obtained in April 2017, over a period of 5 days, 27 minutes in total, of the applicant attending church, going grocery shopping and attending doctor's appointments. The applicant was mobile in all his activities, albeit with the use of a cane or required to lean on a grocery cart for stability or balance.
- [47] This finding was corroborated with the applicant's son's testimony during the hearing. These findings are also consistent with Dr. Benmoftah and Dr. Jugnundan's assessment reports.
- [48] Both parties directed me to Tribunal decision *16-04622 v Aviva Insurance Canada*<sup>6</sup> relating to this applicant and this respondent, but addressing medical rehabilitation benefits, where this specific surveillance was addressed by a different adjudicator. I agree with the adjudicator's findings regarding the surveillance and that it does not discredit the applicant. It is important to note that this adjudicator reviewed the surveillance for the purpose of medical rehabilitation benefits, and I am evaluating it under the test of non-earner benefits.

## **Testimony of J.K.**

- [49] I heard from Mr. J.K., the applicant's son, as to his father's pre-accident activities and his life after the accident. The parties agreed that Mr. J.K.'s affidavit would stand as the examination in chief and only cross-examination and redirect examination would be conducted orally.
- [50] I will focus on summarizing the pre-accident time period after he ceased working as this issue pertains to a non-earner benefit. I found Mr. J.K. be a very credible witness. He testified to the most important aspects of his father's life in the following areas:

### The Applicant's Pre-Accident Life:

#### 1. Socialization:

- a. He would host and entertain large family dinners at least once weekly.

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<sup>6</sup> *16-004622 v. Aviva Insurance Canada*, 2018 CanLII 39477 (ON LAT)

- b. He was very active in the Greek community.
- c. He would visit with friends and family, play cards and have coffee regularly.
- d. He enjoyed reading weekly, play video games daily, and go to the movies regularly.
- e. He enjoyed “mall-walking” and “people-watching” 2-3 times per week with his wife for exercise.
- f. He was a kind, caring, helpful person who liked to entertain, tell stories and jokes, and was a proud provider of the family.

2. Travel:

- a. He travelled regularly out of the country yearly to Cuba, Greece, Las Vegas as well as visited the casino monthly on overnight trips to gamble, see a show and have dinner.

3. Housekeeping:

- a. He believed that “cleanliness is next to godliness” and his place was immaculate.
- b. He assisted his wife with cleaning the home, preparing meals and going on large grocery shopping trips.
- c. He maintained a plot at a community garden and shared the bearings of the garden with his family.

4. Personal Care:

- a. He was independent with all his personal care such as bathing, dressing and hygiene.
- b. He was always “impeccably dressed.”
- c. He used a cane rarely before the accident, i.e. only when his leg or lower back flared up or when he was in pain.

The Applicant’s Post-Accident Life:

1. Socialization:

- a. He no longer hosted family dinners and was not interested in participating in family events.
- b. He did not participate in family Christmas the first year after the accident.
- c. He was less active in the Greek community and church
- d. He had a decreased interest in visiting with friends and could not manage prolonged visits.
- e. He plays video games less but no longer goes to the movies
- f. He no longer engaged in “mall-walking”
- g. He did not leave his home much other than to go grocery shopping or attend therapy and doctor’s appointments
- h. His mood changed, he would cry often, and he would argue with his wife easily.

2. Travel:

- a. He stopped travelling out of the country but continued visits to the casino; however, the trips were less often and for shorter visits.

3. Housekeeping:

- a. He assisted his wife with her chores as best as possible because she was also in the same accident, but their home remained unkempt and untidy. The applicant’s friend came in to assist with the household chores, but this caused tension in their relationship.
- b. He often ordered take out dinner instead of preparing meals.
- c. Instead of going for large grocery shopping trips at Costco, he would walk across the street daily and buy a smaller number of items at a time.
- d. He was no longer able to maintain his community garden.

4. Personal Care:

- a. He is no longer able to properly take a shower and groom himself.

- b. He relied on a cane for balance completely after the accident.

## C: Summary

### **Heath Principle Evaluation**

- [51] 1. Reasonable period: The parties did not explicitly agree to any specified “reasonable period of time” before the accident to assess pre-accident activities. Based on the medical evidence and the testimony of the applicant’s son, I have utilized the time period after the applicant ceased working to the date of the accident as this relates specifically to a non-earner benefit. The applicant was 79 years old at the time of the accident and sold his restaurant business approximately 15 years prior to the accident. I am utilizing a broad 15-year pre-accident time period as pre-accident life for this analysis.
- [52] 2. Weight/importance of pre-accident activities: I find that the most important activities in the applicant’s life prior to the accident were his social life, which included entertaining with family and friends and attending church. Travel (out of country as well as day trips to the casino), maintaining a clean household and attending to a garden as well as having pride in maintaining excellent grooming and dressing were also very important to the applicant. There was no argument between the parties as to the importance of the applicant’s pre-accident activities.
- [53] 3. Continuous disability or incapacity: The point of contention arises at this point – if the applicant’s impairments **continuously** prevent him from engaging in substantially all his activities in which he ordinarily engaged in before the accident, for the period from January 29, 2017 and ongoing, this is the *Heath* principle that is critical to analyze.
- [54] The respondent acknowledged entitlement to non-earner benefits to January 28, 2017 inclusive (the stoppage date). There is no need to analyze his pre-accident to post-accident life for the period before January 29, 2017. It is critical to assess whether the applicant continued to be disabled compared to his pre-accident life after January 28, 2017.
- [55] Based on the medical evidence provided (insurer reports, family doctor clinical notes and records to March 20, 2017 and reports from the applicant), the applicant was recovering well from both a physical and psychological perspective as he was diligently attending physiotherapy and psychotherapy as well as seeing his family doctor regularly.

- [56] I acknowledge that the applicant had not returned to his pre-accident status; however, he had made significant gains through treatment and had not retreated to the post-accident status in the time after the accident before January 29, 2017.
- [57] The applicant did not provide me with family physician clinical notes and records after March 20, 2017 so I have no evidence as to the applicant's further progress. The applicant did provide an MRI of the right knee that identified significant impairments dated December 17, 2017; however, without a medical opinion either from an expert from either side or from the applicant's family doctor, I cannot give this MRI much weight. This also applies for the notation of left hip pain in February 2017 in the family doctor's clinical notes and records.
- [58] Causation comes into question with respect to the impairment on this MRI: the applicant did not complain of knee pain in the clinical notes and records provided or in any of his assessor reports or the insurer reports. Such a knee impairment would likely impact the applicant's ability to engage in his activities of daily living, that would require the frequent use of a cane; however, I have no evidence that this knee impairment or left hip pain/impairment is as a result of the accident.
- [59] 4. Qualitatively engaging in activities: Again, the respondent acknowledged complete disability up to and including January 28, 2017. Based on the medical records including the family doctor's clinical notes and records and the applicant's and insurer's reports, I find an arc of recovery through diligent attendance of physiotherapy and psychotherapy and visits to the family doctor. The applicant resumed travelling to the casino, visits with his family, was able to manage daily grocery shopping trips and he became less socially withdrawn over time. He was still able to perform personal care independently, although I acknowledge more slowly and with less precision.
- [60] According to his son J.K., the applicant was returning to his regular activities, such as going to his garden, going to the casino, going out for coffee or to visit friends, although still not participating in them as fully as before the accident, but "to feel more normal again."
- [61] 5. Where pain is a primary factor: On the issue of pain, it must be to the degree that it practically prevents the individual from engaging in his regular activities. The medical evidence and testimony of the applicant's son inform that the applicant was returning to a pre-accident level of functioning. The applicant reported to his family doctor that he had an overall improvement in his symptoms on the psychological front (he reported a 60% improvement to the insurer's psychological assessor Dr. Mor in December 2016) and an overall improvement on both the psychological and physical fronts to his family doctor in January 2017.

- [62] New notes of pain arise with respect to the left hip in the family doctor's records in February 2017. I do not have any further records, reports or other evidence to determine whether the left hip pain is related to the accident. The same applies to the previously mentioned right knee impairment. For this reason, I cannot consider the hip and knee impairments as part of the non-earner benefit analysis.
- [63] I find that, the applicant has recovered from his accident related impairments to a degree that, after January 28, 2017, he was no longer prevented from engaging in substantially all his pre-accident activities, and as such, no longer met the test for a non-earner benefit.
- [64] At this point, I commend the applicant for doing such excellent work in participating in treatment and continuing with excellent progress in returning to his regular activities after such an unforeseen accident.
- [65] I find that the applicant has recovered, based on the evidence provided, to a level that exceeds his status before January 29, 2017. I acknowledge this is not the same level as his pre-accident status, but he has returned to qualitatively engaging in his pre-accident essential, important activities.

## II: NON-COMPLIANCE WITH S.37 AND S.44

- [66] The respondent, in its submissions, raised an argument regarding non-compliance for the applicant's failure to attend an insurer examination, pursuant to s.37 and s.44. Further medical information was received by respondent, so insurer examinations were scheduled for September 2018. A notice of examination, compliant with s.44(5) and dated August 7, 2018, was issued to the applicant. On September 17, 2018, the applicant's representative replied that the applicant would not be attending. A non-compliance letter dated September 26, 2018 was issued by insurer.
- [67] In his submissions, the applicant did not provide a satisfactory reason as to why he would not be attending the insurer examination. He submits that the "timing of the request to re-examine the applicant is highly suspect and a blatant attempt by the respondent to unfairly bolster its evidence prior to this hearing."
- [68] Section 37(7) of *the Schedule* states that if the insured person fails or refuses to comply with **subsection 44 (9) (attendance of an insurer examination)**, the insurer may,
- (a) make a determination that the insured person is no longer entitled to the specified benefit; and

(b) refuse to pay specified benefits relating to the period after the insured person failed or refused to comply with that subsection and before the insured person complies with that subsection.

- [69] The respondent requested that if I find that the applicant is entitled to a non-earner benefit, that I terminate the benefit to the date of the non-compliance letter dated September 26, 2018.
- [70] Both parties acknowledge that further medical evidence was forwarded on a continuous basis to the respondent throughout the claim period, even beyond the NEB termination date. The respondent has a right to request the applicant's attendance at an insurer examination, especially if there is further medical information to be evaluated.
- [71] One of the applicant's arguments as part of this hearing was that a paper review was done by one of the insurer assessors instead of an in-person assessment. I would conclude, in this circumstance it would have been to the applicant's benefit to attend an in-person examination especially after he had provided further medical information has been provided. Also, the applicant did not provide a medical reason for his non-attendance, nor did he make any attempts to reschedule the assessments.
- [72] Further, this multidisciplinary examination would have been scheduled after the result of the right knee MRI and left hip pain that I had questioned earlier. It would have brought more clarity to how this diagnostic report and symptoms fall into place in the applicant's medical history and relative to the accident.
- [73] I have found that the applicant is not entitled to a non-earner benefit from January 29, 2017 and ongoing. I also find for the respondent with respect to the issue of non-compliance and terminate the benefit on September 26, 2018 pursuant to s.37 and s.44.

### **III: INTEREST**

- [74] This issue was not listed as part of the case conference order. The applicant did not make submissions on this issue. The respondent submitted that the applicant is not entitled to interest on overdue payments as the benefit was properly denied.
- [75] Section 51(2) of *the Schedule* provides that if payment of a benefit is overdue, the insurer shall pay interest on the overdue amount in accordance for each day the amount is overdue.

[76] However, as the applicant is not entitled to a non-earner benefit, interest is not found to be payable.

**IV: AWARD PURSUANT TO S.664**

[77] On consent, the parties withdrew this issue at the case conference. The respondent made submissions on this issue, however, I did not make any findings on this matter as it was not part of the order for this hearing.

**Released: April 8, 2020**



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**Karina Kowal  
Adjudicator**