



Citation: Steele v. Aviva General Insurance, 2023 ONLAT 21-007268/AABS

Licence Appeal Tribunal File Number: 21-007268/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:

Andrea Steele

Applicant

and

Aviva General Insurance

Respondent

DECISION

VICE-CHAIR: Jeffery Campbell

APPEARANCES:

For the Applicant: Andrea Steele, Applicant
Amelia Theiss, Counsel

For the Respondent: Katherine Geer, Aviva General Insurance, Claims
Representative
Geoffrey Keating, Counsel

Court Reporter: Breanna Clancy

HEARD: by Videoconference: September 22, 2022

REASONS FOR DECISION

BACKGROUND

- [1] The applicant was involved in an automobile accident on **May 24, 2019**, and sought benefits pursuant to the Statutory Accident Benefits Schedule - *Effective September 1, 2010 (including amendments effective June 1, 2016)*. The applicant was denied certain benefits by the respondent and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”).

ISSUES

- [2] The issues to be decided in the hearing are:
1. Is the applicant entitled to a non-earner benefit of \$185.00 per week from June 21, 2019 to May 21, 2021 date and ongoing?
 2. Is the respondent liable to pay an award under s. 10 of Regulation 664 because it unreasonably withheld or delayed payments to the applicant?
 3. Is the applicant entitled to **interest** on any overdue payment of benefits?

RESULT

- [3] I find that the applicant is not entitled to the non-earner benefit, award and interest claimed.

ANALYSIS

Issue 1 – Non-Earner Benefit

- [4] The disability test for a non-earner benefit is set out in s. 12(1) of the *Schedule*. To be eligible for this benefit, an applicant must prove, on a balance of probabilities, that as a result of and within 104 weeks of the accident, she suffers a “complete inability to carry on a normal life.”
- [5] Section 3(7)(a) of the *Schedule* provides that 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 substantially all of the activities in which the person ordinarily engaged before the accident.

- [6] In *Heath v. Economical Mutual Insurance Company* [*Heath*],ⁱ the Ontario Court of Appeal set out general principles to assist triers of fact in interpreting and applying the non-earner benefit provisions. *Heath* urges a claimant-focused inquiry that reflects the high threshold created by the language of the *Schedule*.
- [7] This interpretive approach starts with a comparison of the claimant's activities and life circumstances over a reasonable period before and after the accident. A "reasonable" time period pre-accident will depend on the facts of each case, but more than a "snapshot" will be required. While all the claimant's ordinary pre-accident activities should be considered, greater weight may be assigned to those activities which the claimant identifies as being significant to their pre-accident life.
- [8] To establish a "complete inability to carry on a normal life," the claimant must also prove an uninterrupted accident-related disability or incapacity. But the phrase "engaging in" is to be interpreted qualitatively. Merely "going through the motions" of an activity will not amount to engaging in it. As well, where pain is the primary factor preventing a claimant from engaging in former activities, it must be shown that the degree of pain experienced prevents the claimant from engaging in those activities.

The Applicant's Testimony

- [9] The applicant submits that although she is able to do things, she cannot totally engage in any of her pre-accident activities due to accompanying pain. The Court of Appeal observed in *Galdamez v. Allstate Insurance Company of Canada*,ⁱⁱ the *Schedule* requires that an applicant show an inability to engage in "substantially all" (not "all") of her pre-accident activities to qualify for a nonearner benefit.
- [10] For instance, the applicant testified that she has some limitations with respect to dressing, although if it is necessary, she can dress herself without help. The applicant testified that she no longer bathes due to pain when bending. She testified that she now showers. The applicant advised that, because of her inability to perform her hair care routine due to pain in her left shoulder, she often wears wigs.
- [11] The applicant testified concerning her abilities with respect to various aspects of her life. With respect to functional abilities, the applicant testified that she has not returned to the gym, as her previous routine of three to four times per week would cause pain. The applicant testified that her one-hour walks of 5 - 6 days per week are now 16-20 minute walks of once or twice per week.

- [12] Regarding her employment, the applicant testified that she has owned her accounting business since 2003. She testified prior to the accident she would work 3-5 hours per day. Due to difficulty sitting, she now works 1-2 hours per day. She testified that, while she used to distribute flyers for her business, her husband and daughters distribute them now.
- [13] The applicant testified that pre-accident, she was the music and choir director for her church. She advised that she is no longer in that position, as it is now too physical and mentally difficult to perform.
- [14] The applicant testified that at the time of the accident, she was engaged in studies at Rivers International Christian College, working towards her bachelor's degree in theology. She testified that due to difficulties in concentrating, she has fallen behind in her submitting her exams and completing her thesis. She testified that college administrator has allowed her an extension of time for the completion of her studies.

Medical Evidence

- [15] The applicant relies on the Disability Certificate (OCF-3) dated May 29, 2019 completed by Dr. Mehul Patel and diagnosed the applicant's accident-related injuries as sprain and strain of the cervical spine, lumbar spine, dislocation of other and unspecified parts of shoulder girdle, headache and other sleep disorders, Dr. Patel advised that the applicant suffers from a complete inability to carry on a normal life. Dr. Patel advised the anticipated duration of that disability to be 9 – 12 weeks.
- [16] The applicant relies on an ultrasound of the left shoulder dated August 16, 2019 advising of a partial thickness tearing at the common origin of left extensor tendon.
- [17] The applicant relies on a Psychological Assessment Report dated March 31, 2020, by Dr. Lital Grinberg, psychologist and Dr. Peter Waxer, psychologist. In the report Drs. Grinberg and Waxer diagnosed the applicant's accident related injuries as; Somatic Symptom Disorder with Predominant Pain, Severe as well as Situational Phobia, Situational: Vehicular. Drs. Grinberg and Waxer advised that the applicant endorsed limitations such as memory difficulties, changes in sleep pattern, changes in appetite as well as limitations in household chores, walking with her children and her ability to work or study.
- [18] The applicant relies on a Chronic Pain Assessment, by Dr. Michael Gofeld, dated April 14, 2020 in which Dr. Gofeld diagnosed the applicant's accident related

injuries as chronic pain syndrome and chronic pain in the left shoulder, low back and left elbow. Dr. Gofeld advised that her ability to work will deteriorate and that some of her basic activities of daily living had been limited by her injuries, including housekeeping activities. Dr. Gofeld advised that the applicant's prognosis is guarded.

- [19] The respondent relies on an Activities of Normal Life (OCF-12), dated July 31, 2019 in which the applicant advised, that out of 43 previously conducted activities, she could not perform 2 activities, could partially perform 17 activities and perform all of the remainder 24 activities.
- [20] The respondent relies on a Multidisciplinary Assessment Report, dated December 18, 2019 conducted by Dr. Paul Tepperman, occupational health physician, which concluded that the applicant does not suffer a complete inability to carry on a normal life. Upon subsequently receiving the ultrasound of the left shoulder, dated August 16, 2019, Altum Health advised in a Physician Addendum, dated March 4, 2020 that their conclusion of December 18, 2019 had not changed.
- [21] The respondent relies on a Psychological Report, dated August 4, 2020, by Dr. David Direnfeld, psychologist in which Dr. Direnfeld concluded that there is insufficient evidence that the applicant presented with a psychological injury or impairment from the accident. Dr. Direnfeld concluded that the applicant does not suffer a complete inability to carry on a normal life from a psychological perspective.
- [22] I do not find the Disability (OCF-3) signed by Dr. Patel on May 29, 2019 useful, as it is contradicted by the Activity of Normal Life (OCF-12), signed by the applicant on July 31, 2019 makes it evident that the applicant, indeed, is capable of most activities.
- [23] I also do not find the Psychological Assessment Report, produced by Drs. Grinberg and Waxer as particularly helpful for the applicant, as Drs. Grinberg and Waxer merely state the symptoms that the applicant herself endorses.
- [24] Although the evidence before me references adjustments to the applicant's routines, some more problematic than others, it does not establish that the applicant is unable to engage in "substantially all" of her activities. Although the applicant reports prevention in engaging in some of her pre-accident activities, and a reduction in the frequency with which she engages in others, she has not demonstrated that she is continuously prevented from engaging in substantially all of the activities in which she ordinarily engaged before the accident.

[25] For the reasons above, I find that the applicant does not have a complete inability to carry on a normal life. Therefore, I find that the applicant is not entitled to non-earner benefits.

Issue # 2 – Award under s. 10 Reg 664

[26] The applicant seeks a special award under s. 10 of the Regulation 664 on the basis that the respondent unreasonably withheld or delayed payments to the applicant.

[27] The applicant has not provided any submissions or evidence that proves that the respondent unreasonably withheld or delayed payments to him. Hence, I find that the applicant is not entitled to an award under s. 10 of the Regulation 664.

Issue # 3 – Interest

[28] Since I do not find any benefit to be payable, no interest is applicable. Therefore, the applicant is not entitled to interest.

CONCLUSION AND ORDER

[29] The applicant is not entitled to a non-earner benefit, an award or interest. The application is dismissed.

Released: January 13, 2023

Jeffery Campbell
Vice-Chair

ⁱ 2009 ONCA 391 at para. 50.

ⁱⁱ 2012 ONCA 508 at para. 39.