



Citation: Lin v. Aviva Insurance Company, 2023 ONLAT 20-011980/AABS

Licence Appeal Tribunal File Number: 20-011980/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:

Qiu Yun Lin

Applicant

and

Aviva Insurance Company

Respondent

DECISION AND ORDER

ADJUDICATOR: Stephanie Kepman

APPEARANCES:

For the Applicant: Yu Jiang, Paralegal

For the Respondent: Gina Nardella, Counsel

HEARD: By way of written hearing

OVERVIEW

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

ISSUES

- [2] The following issues are before the Tribunal:
- i. Is the applicant entitled to receive a non-earner benefit (“NEB”) in the amount of \$185.00 per week for the period from March 30, 2019 , to date?
 - ii. Is the applicant entitled to an award under *Regulation 664* because the respondent unreasonably withheld or delayed payments to the Applicant?
 - iii. Is the applicant entitled to interest on any overdue payment of benefits?

RESULTS

- [3] The applicant is not entitled to the non-earner benefit.
- [4] The applicant is not entitled to interest
- [5] The applicant is not entitled to an award under section 10 of *Regulation 664*.
- [6] The application is dismissed.

NON-EARNER BENEFIT

Submissions and evidence

- [7] Section 3(7) of the *Schedule* states 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.
- [8] Section 12(1)1 of the *Schedule* states that the insurer shall pay a non-earner benefit to an insured person who sustains an impairment as a result of the accident if the insured person suffers a complete inability to carry on a normal life

as a result of, and within one hundred and four weeks after the accident and does not qualify for an income replacement benefit (an 'IRB').

- [9] The applicant submitted she suffers a complete inability as a result of the accident and meets the s. 3(7) test requirements outlined by the Ontario Court of Appeal in *Heath v. Economical Mutual Insurance Company*, 2009 ONCA 391 ("*Heath*"). The respondent submitted that the applicant did not suffer a complete inability based on *Heath*, which found that the test for non-earner benefit is one of the most rigid tests under the *Schedule*. This test is subjective and requires a comparison of the insured person's "normal life" before and after the accident over a reasonable period of time.
- [10] There are six factors from *Heath* at paragraph 50 that the Court of Appeal considered when determining if an insured person suffers a complete inability to carry on a normal life under section 3(7) of the *Schedule*.
- [11] To establish entitlement to an NEB, the applicant must discharge her burden of proving that she is prevented from engaging in "substantially all" of the pre-accident activities in which she ordinarily engaged. In doing so, the applicant must provide evidence of the frequency and time commitments of her pre-accident activities to compare how much less she can dedicate to the same activity post-accident.
- [12] The applicant submitted that her doctors' evidence shows that she suffered a right wrist injury that causes her to struggle with her activities of daily living ("ADL"s) including her personal care, shopping, meal preparing and cleaning. The applicant also argued that her psychological injuries have impacted her ADLs. The applicant was not employed at the time of her accident and had not been since 2014. The applicant also reported being in good health before her accident. She was responsible for cooking, cleaning and caregiving activities and engaged in driving and home exercise.
- [13] The applicant relied on the clinical notes and records ("CNR"s) of her family doctor, Dr. Patric Chiu, her Activities of Normal Living ("OCF-12") dated March 26, 2019, the disability certificate ("OCF-3") of Qi Xu, physiotherapist, the applicant's treatment plans ("OCF-18"s) for passive therapy from 2019, the Psychological Assessment Report of Dr. Sharleen McDowall, psychologist, dated August 6, 2019, and the Insurer's Examinations ("IE"s) of Dr. Robert Woods, psychologist, Dr. Paul Tepperman, physician, and Sarah Lee, occupational therapist. The applicant argued that the respondent did not consider all of her evidence and chose to rely on its IEs of 2019, despite the applicant providing a

plethora of corroborating evidence to support her position that she suffered a complete inability as a result of her accident.

- [14] The respondent argued that the applicant has not shown that she suffered a complete inability to carry on a normal life as a result of her accident-related injuries and has returned to all of her pre-accident ADLs and activities. The respondent submitted that the applicant has not provided a complete comparison of her pre- and post-accident activities and therefore, has not shown she suffers a complete inability of section 3(7) of the *Schedule*.
- [15] The respondent also relied on the IEs of Dr. Woods, Dr. Tepperman, and Ms. Lee, which it submitted showed that the applicant has healed from her accident-related injuries and impairments, and returned to her ADLs, with the exception of her driving. The assessors all found that the applicant did not suffer a complete inability to live a normal life as a result of her accident-related impairments and injuries. The respondent argued that the applicant's driving limitation does not rise to the occasion of suffering a complete inability, as the applicant has failed to compare her pre- and post-accident ADLs and fully explore the impact of her driving on her ability to live a normal life. The respondent also submitted that the applicant's OCF-12 supports its position, as the applicant reported being able to participate in all of her ADLs, be it with some assistance, and that she has returned to her driving.

Analysis

- [16] I find that the applicant has not shown that she suffers a complete inability to carry on a normal life as a result of her accident. The applicant has not provided detailed information regarding her pre-accident activities which she normally engaged in, including the frequency and time commitments of said activities and how long these now take after her accident versus before her accident.
- [17] Though I appreciated the applicant's self-reports of issues with her ADLs, I agreed that *Heath* requires a comparison between the insured person's "normal life" before and after the accident over a reasonable period of time. I also agreed that the applicant has not provided this comparison.
- [18] Instead, the medical professionals captured the applicant's reports of pain and injuries, but do not speak to the legal issue at hand with respect to the *Heath* test. The evidence of Dr. Chiu, Ms. Xu, and Dr. McDowall does not provide a comparison of the applicant's pre-accident activities beyond subjective, self-reporting after her accident.

- [19] I was not provided with a detailed account of how the applicant spent her time before and after her accident, nor was there a quantified comparison of such. As this is a requirement for entitlement, the applicant has not met her burden of proof of showing she suffers a complete inability to lead a normal life as a result of her accident-related injuries. When considering the applicant's circumstances with respect to *Heath*, I find there was limited evidence with respect to the applicant's pre-accident activities and how her accident-related impairments have caused a complete inability to carry on with them after her accident.
- [20] The applicant also did not provide any direct evidence via testimony or affidavit to speak to the *Heath* factors. Most of the evidence led by the applicant related to the complete inability test did not provide a fulsome "snapshot" of what her normal day to life after her accident consisted of and how it differed from her pre-accident life. Instead, her evidence supported that she was having pain that made her ADLs more difficult, but that she was still able to engage in them, albeit at a reduced level.
- [21] Since the applicant submitted that her pain was impeding her from living a normal life, she had not provided sufficient evidence that her pain practically prevents her from engaging in the majority of her self-care and ADLs. I was also not given a full understanding of how the applicant's accident impairments led to a complete inability.
- [22] I was left with more questions than answers after reviewing the applicant's submissions and arguments in light of the responses on the OCF-12 and some inconsistencies with respect to the applicant's ADLs as reported to the IE assessors such as her abilities related to driving, cooking, cleaning and self-care, as argued by the respondent. Therefore, I find she has not met the NEB test.
- [23] Since I have found that the applicant does not suffer a complete inability to carry on a normal life because of her accident-related impairments and injuries, she is not entitled to an NEB.

INTEREST AND AWARD

- [24] Section 51(2) of the *Schedule* states that interest is due on a benefit that is overdue if the insurer does not pay the benefit within the time stated by the Schedule.
- [25] Section 10 of *R.R.O. 1990, Regulation 664, Automobile Insurance* states that if the Tribunal finds that an insurer has unreasonably withheld or delayed payments, the Tribunal, in addition to awarding the benefits and interest to the

insured person, may award a lump sum of up to fifty percent of the amount to which the insured person was entitled to at the time of the award, with interest, on all amounts owing to the insured person.

[26] As I have found that no benefits are outstanding, the applicant is not entitled to interest or an award.

ORDER

[27] The applicant is not entitled to a non-earner benefit in the amount of \$185.00 per week for the period from March 30, 2019, to date.

[28] The applicant is not entitled to an award under Regulation 664.

[29] The applicant is not entitled to interest.

Released: February 15, 2023



**Stephanie Kepman
Adjudicator**