LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels enmatière de permis et des normes Ontario

Tribunal File Number: 17-001125/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:

T.H.

Applicant

and

Aviva Insurance

Respondent

DECISION

ADJUDICATOR: Robert Watt

APPEARANCES:
Applicant: [redacted]

Counsel for the Applicant: Mohamed Elbassiouni

For the Respondent: Jessica Green

Representative for the Respondent: Almeda Lucas

HEARD: Written and Teleconference hearing: September 7, 2017

OVERVIEW

[1] The applicant, T. H., was injured in a motor vehicle accident on October 7, 2014 and sought benefits pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule"). He brought an application before the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") and the parties participated in a case conference on May 15, 2017.

ISSUES

[2] Although the original claim involved a number of issues, the parties advised me that all issues had been settled, except the issue of the non- earner benefit claim.

Late Filed Evidence

[3] On September 5, 2017, the applicant sent the respondent a new medical report by Dr. Sandhu dated July 21, 2017, which he wanted to be put into evidence. The respondent objected. I reserved my decision on this issue.

RESULT

[4] I find that the applicant is not entitled to a non-earner benefit in the amount of $185.00 weekly, from April 7, 2015 to date, and ongoing. There is therefore also no interest owing.

[5] I am not allowing the applicant to file the medical report by Dr. Sandhu, dated July 21, 2017, served on the respondent on September 5, 2017 two days before the scheduled hearing.

ANALYSIS

The Law Re: Non–Earner Benefits

[6] Section 12(1)1 of the *Schedule* sets out the test for the non-earner benefit and requires an insurer to pay a non-earner benefit to an insured person who sustains an impairment as a result of an accident if the insured person "*suffers a complete inability to carry on a normal life as a result of…the accident.*" (emphasis added)

[7] In turn, s. 3(7) (a) of the *Schedule* defines a complete inability to carry on a normal life as follows:

> 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.* (emphasis added)

[8] In Heath v. Economical Mutual Insurance Company, the Ontario Court of Appeal noted that the applicant's life circumstances and activities prior to the accident must be assessed over a reasonable period of time prior to the

accident, taking into account the activities he identified as being important to her pre-accident life. [1]

[9] In relation to the issue of ongoing pain, the courts have held that ongoing pain as a result of an accident is not sufficient to meet the non–earner benefit test. Non-earner benefits are not intended to compensate an insured person from having to engage in post-accident activity with pain and discomfort.[2]

Breaches of Compliance of Schedule

[10] The *Schedule* requires an insured, within 10 days after receiving an application, to either pay the specified benefit or give notice explaining the medical and any other reason why the insurer does not believe the applicant is entitled to the specified benefit, and if the insurer requires further examinations or information.[3]

[11] If the insurer fails to comply within 10 days, the *Schedule* also requires that the insurer pay the specified benefit from the day the application was received with the disability certificate, until the insurer does give proper notice.[4]

[12] In relation to the issue of breaches of the *Schedule* by an insurer, the Court of Appeal in Stranges v. Allstate has indicated that even if an insurer does not properly comply with the *Schedule* requirements, the insured is still required to prove entitlement based on the criteria to receive a particular benefit. In other words, a technical breach is not an automatic windfall for an applicant if they cannot prove entitlement.[5]

EVIDENCE

Accident

[13] On October 7, 2014 the applicant was stopped at an intersection when he was rear ended. He exited his car on his own volition without any assistance. He indicated at this time that he was experiencing some pain in his head, neck, down his legs and left arm. There was a police officer nearby who advised him to go to the nearest police station to fill out a report, which he did. The applicant drove himself to the station. No medical assistance was called at any time to

[1] Heath v. Economical Insurance 2009 ONCA 391
[2] Cook v Pilot, 2005 Carswell 2697 para 40
[3] Schedule 36(4)(5)(6)
[4] Ibid 3
[5] Stranges v. Allstate 2010 ONCA 457

assist the applicant after the accident, at the police station, or on his return home.

[14] The applicant was 78 years, 11 months of age at the time of the accident, and was retired. He had a history of medical issues including: heart problems, conjunctivitis, pre-existing foot pain, diabetes, hypertension, and degeneration of cervical and lumbar spine. He lived with his wife and his son at the time of the accident. His wife had serious cancer related problems in both lungs, and required physical assistance at home, to deal with her medical problems.

Oral evidence at hearing

[15] The applicant in direct examination gave evidence that his activities pre-accident included the following; assisting his wife with moving her oxygen tank around the house, taking short trips; taking the grandchildren (2, 3 years of age) to Wonderland, the zoo, Niagara Falls, African Safari; rolling on the floor with the grandchildren and throwing them up in the air; reading to the grandchildren 5-6 times per month; competing in chess tournaments, darts and table tennis for 8 hours at a time, in relation to each activity; spending time with Free Masons (for an 8 hour time period, 6-8 times per month) memorizing 10-15 pages of information and giving lectures; vacuuming and doing housework, laundry, etc.

[16] The applicant in his direct examination gave evidence that his activities post-accident were restricted. His evidence indicated that: he had problems with his memory and could no longer memorize 10-15 pages for lecturing at the Free Masons, but can only memorize 2-3 pages; he still attends the Free Masons now once or twice a month, but only for three hours at a time; he still can play chess but plays for a shorter period of time with younger persons and they beat him; he doesn't play darts or table tennis because he can't stand up for long periods of time because of the pain **in** his back and in his legs; he can't sit for more than 10 minutes because of the pain in his legs and back; his son now does most of the grocery shopping, takes the wife for doctor appointments, and moves the oxygen tank around the house for her and does a lot of the housekeeping chores; he has nightmares two to three times a week and only sleeps 3-4 hours a night before he wakes up; he can't throw the grandkids up in the air or roll with them on the floor or read to them because of the continuous pain he states that he has in his legs and back. He is unhappy with his life now.

[17] The applicant on cross examination admitted that: he needed no assistance after the accident, to drive to the police station and to drive home; he still goes to the Free Mason meetings once every two months; it takes him ½ hour to drive there and he spends only three hours at a time at the meetings; his son would help around the house pre-accident; he can dress himself currently and

take all medications by himself; he manages his own money himself; he still reads to the grandchildren.

[18] The applicant on cross examination admitted that the pain in his neck and back are not as severe now, as in 2014-2015.

Medical Evidence

[19] The OHIP records show that the applicant attended at his family physician Dr. Somersall three days after the accident, where he was diagnosed with neck and back pain.

[20] The applicant attended at Mississauga Hospital on December 1, 2014, where he was diagnosed with mechanical back pain.

[21] The applicant attended at his family doctor Dr. Salah-Eddin Ali on January 6, 2015, and was diagnosed with myofascial pain in the low back and neck. Dr. Ali on January 20, 2015, on seeing the applicant noted that the neck pain had much improved.

[22] Dr. Michael Hofstatter, a physiotherapist at Elite Physiotherapy, submitted an OCF-3 on May 13, 2015, confirming that the applicant did not meet the test for non- earner benefits as the applicant did not suffer from a complete inability to carry on a normal life. A letter dated May 20, 2015, from Dr. Hofstatter to Dr. Ali, confirmed that the applicant no longer had complaints of neck or mid back problems.

[23] Dr. Davis Mula assessed the applicant on April 18, 2016 under section 44 of the Schedule. In his report dated April 26, 2016, he noted that the applicant confirmed that his neck pain "had resolved six weeks prior to the assessment". The assessment took place on April 18, 2016 – approximately 18 months post-accident.

ANALYSIS

[24] The applicant did not need assistance at the time of the accident to drive to the hospital or to drive home from the hospital. The applicant sought further medical assistance three days after the accident. All of the medical evidence indicates that the applicant suffered soft tissue injuries, many of which had resolved by March 2016.

[25] I find both on the direct oral testimony of the applicant, and on the medical reports, that the evidence clearly shows that the applicant did not suffer a complete inability to carry on a normal life as a result of, and continuously, within the 104 weeks after the accident. The evidence shows that the applicant may have currently some remaining back pain, but the neck pain is no longer an issue. The applicant is currently able to carry on most of the pre-accident activities like playing chess, driving, memorization, housework, reading to his grandchildren etc., albeit in a more restricted manner.

[26] The Cook v Pilot case cited above states that ongoing pain as a result of an accident is not sufficient on its own to meet the non–earner benefit test. Non earner benefits are not intended to compensate an insured person from having to engage in post- accident activity with pain and discomfort. The Court in Heath expressed the view that when looking at whether the applicant continues to engage in substantially all of her pre-accident activities, greater weight can be assigned to the activities which she identified as being important to her; the applicant must prove that post-accident she is continuously prevented from engaging in the activities; that one must view the activity as a whole, taking into account the manner in which the activity is performed, and the quality of the performance; and lastly, to consider not only her ability to do the activities, but whether the pain experienced at the time or after the activity is such that she would be practically prevented from engaging in the activity.

[27] I find that the change to the applicant's physical capabilities have not completely prohibited him from engaging in substantially all of his daily activities. I find that the applicant's discomfort and pain are not sufficient to meet the non-earner benefit test as set out in Heath and the Cook v. Pilot case above.

[28] I also find based on the evidence, that the applicant has not sustained an impairment that continuously prevents him from engaging in substantially all of the activities in which he ordinarily engaged before the accident. His evidence has not met the requirements of the *Schedule*, as set out above in paragraphs [8], [9] and as explained in the Heath case above.

"Technical Entitlement"

[29] The applicant in his written submissions and in his oral submissions, spent a lot of time arguing on the breach of Section 36, of the *Schedule* by the insurer. The applicant submitted that the insurer did not respond to the applicant's five treatment plans, as required under Section 36 (4), by giving to the applicant proper notice of reasons why the insurer was rejecting the application and within the ten day requirement. The applicant's position is that under Section 36 (6), the insurer is not required to pay benefits until it gives the applicant proper notice why it has refused to provide benefits.

[30] The insurer's position is that notice was given by fax. It produced a fax cover page and fax confirmation dated May 13, 2015 confirming the counsel's fax number and the inclusion of the explanation of benefits as part of the fax. The insurer's log notes confirm that an Explanation of Benefits was sent to the applicant. The applicant denies ever receiving the fax confirmation and the Explanation of Benefits. The Explanation of Benefits stated that the claimant was not eligible for non-earner benefits from May 12, 2015 and onward. I accept the insurer's evidence that the EOB was sent.

[31] In this case I find the issue is moot. The courts have already ruled on the issue of non -compliance of the *Schedule* as set out in paragraph [12] above, indicating that regardless of the non-compliance with the *Schedule*, the onus is still on the applicant to prove entitlement to the benefits being asked for. The applicant has not met this test for entitlement.

Dr. Sandhu July 21, 2017 Medical Report

[32] The LAT Rules require all expert reports that are going to be used at the hearing are to be disclosed at least at least 30, days before the hearing, or as ordered by the Tribunal. The Tribunal ordered that any disclosure be made by the applicant on or before July 21, 2017 with the reply disclosure being made by the respondent by August 8, 2017. Dr. Sandhu's report was disclosed on September 5, 2017. [6]

[33] The Respondent has objected to the report being entered into evidence. To allow the report of Dr. Sandhu in would not be fair to the respondent, and would require an adjournment of the hearing for the respondent to reply to the report. There was no valid reason presented to indicate why the report was not submitted earlier. The Tribunal is required to ensure efficient and timely resolution of the merits of all applications.

[34] I am therefore not going to allow Dr. Sandhu's report dated July 21, 2017, to be entered into evidence. The applicant should have told Dr. Sandhu of the requirement of the disclosure order requirements, in order to have Dr. Sandhu make the report a priority, to get the report finished to meet the LAT Rules.

ORDER

[35] Based on my findings above, I order that the application be dismissed.

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[6] Licence Appeal Tribunal Rules of Practice and Procedure, Rules 9, 10

Released: January 17, 2018

Robert Watt, Adjudicator