

**LICENCE APPEAL
TRIBUNAL**
Safety, Licensing Appeals
and Standards Tribunals
Ontario

**TRIBUNAL D'APPEL EN
MATIÈRE DE PERMIS**
Tribunaux de la sécurité, des
appels en matière de permis et des
normes Ontario



Date: 2019-06-13

File Number: 18-002934/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:

E.A.

Appellant(s)

and

Allstate Insurance

Respondent

WRITTEN DECISION

ADJUDICATOR: Robert Watt

APPEARANCES:

For the Appellant: Marina Korshunova, Paralegal

For the Respondent: Patrick Baker Counsel

HEARD In Writing on: November 19, 2018

OVERVIEW

- [1] The applicant was involved in an accident on July 7, 2014 (“the accident”) and applied for accident benefits from the respondent pursuant to the Statutory Accident Benefits Schedule-Effective September 1, 2010. (“the *Schedule*”)
- [2] The applicant applied to the Licence Appeal Tribunal (“the Tribunal”), when the respondent denied her entitlement to certain benefits.
- [3] The applicant (now 19 years of age) was a passenger in the vehicle operated by her mother. The vehicle was hit from behind. The applicant began to experience lower back pain as well as headaches after the collision but did not require immediate medical attention.

ISSUES IN DISPUTE

- [4] I have been asked to decide the following issues
 - i. Is the applicant entitled to a non-earner benefit (NEB) in the amount of \$185.00 per week from August 9, 2017, to date and ongoing?
 - ii. Is the applicant entitled to receive a medical benefit in the amount of \$2878.06 for physiotherapy treatment pursuant to a treatment plan (OCF-18) completed by Health Max Physio, submitted on December 6, 2016, and denied on January 7, 2017?
 - iii. Is the applicant entitled to interest on then overdue payment of benefits?

RESULTS

- [5] The applicant is not entitled to a NEB in the amount of \$185.00 per week from August 9, 2017, to date and ongoing.
- [6] The applicant is not entitled to receive a medical benefit in the amount of \$2,878.06 for physiotherapy treatment.
- [7] The applicant is not entitled to interest.

NON EARNER BENEFIT

- [8] The *Schedule* requires that a NEB be paid to an insured who sustains an impairment, as a result of the accident if the insured suffers a complete inability to carry on a normal life as a result of and within 104 weeks after the accident.¹

¹ *Schedule* sec 12

- [9] Section 3(7)(a) of the *Schedule* defines a complete inability to carry on a normal life as “ an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident.”
- [10] The courts² have set out the following criteria to consider when determining an individual’s entitlement to a NEB:
- a. There must be a comparison of the applicant’s activities and life circumstances before the accident to those post–accident;
 - b. The applicant’s activities and life circumstances before the accident must be assessed over a reasonable period of time prior to the accident; the duration of which will depend upon the facts of the case;
 - c. All of the applicant’s pre-accident activities must be considered, but greater weight may be placed on activities that were more important to the applicant’s pre-accident life;
 - d. The applicant must prove that her accident related injuries continuously prevent her from engaging in substantially all of her pre-accident activities requiring the disability /incapacity to be continuous;
 - e. If an applicant experiences significant restrictions in performing an activity, the applicant may not be engaging in that activity; and
 - f. If pain is the primary reason that an applicant cannot engage in former activities, does the pain prevent the applicant from performing those activities?

Pre-accident

- [11] The applicant had been diagnosed with Attention Deficit Hyperactivity disorder (ADHD), and Oppositional Defiant Disorder, which affected her home and school life.³
- [12] The applicant has a history of Reynaud’s disease, a condition in which circulation is restricted to the fingers in response to stress and cold.⁴ The applicant has a history of lower back pain complaints, in connection to lifting and had some sleeping problems.⁵
- [13] Dr. Sherry Taub psychiatrist indicated in her report dated May 17, 2013, that the applicant was not interested in academics with the applicant describing her mood

² *Heath v. Economical Mut. Ins Co.* 2009 ONCA 391

³ Consultation Report Dr. Taub dated May 17 2013 Respondent’s brief of documents Tab 1

⁴ Consultation Report Dr. Taub dated May 17 2013 Respondent’s Brief of Documents Tab 2

⁵ Clinical notes of Dr. Taub Respondents Brief of Documents Tab 3 –p4-5

as lazy and angry, when told to do something.⁶ Dr. Kurtz's (family doctor) medical records of May 2013, noted that the applicant indicated that she was "lazy" and not too "energetic".

- [14] The applicant claims in a written (unsworn) statement dated September 27, 2018:
- a. that she lived a busy life before the accident: playing video games every day; doing dance classes twice a week;
 - b. swimming with her father twice a week; attending art classes twice a week; taking piano lessons once or twice a week;
 - c. doing army cadets; socializing with friends; walking the dog twice or three times a week;
 - d. riding her bicycle every other day, and visiting grandparents on weekends to help her grandmother cook and garden;
- [15] There were no time lines included, as to when the activities took place or whether they took place a year before the accident.

Post- accident

- [16] The applicant claims that she "continues to experience injuries and emotional devastation" as a result of the accident. The applicant indicates that since the accident: she became lazier than she used to be; did not resume her social activities, sports life, dance, art, piano classes, and did not go out with friends. She claims she is still suffering pain in the lower back, pain in her feet, neck and shoulder and has experienced a decline in concentration, memory and motivation to do anything.
- [17] The applicant started work post-accident at Winners part time on the weekends but seems to suffer pain when she stands on her feet all day. She claims that now she prefers to stay in her room, with the doors closed, lights off and windows covered.

Medical Reports

- [18] The respondent relied on multidisciplinary IE reports that found no impairment.⁷ Dr. Oshidari, orthopedic surgeon, determined that there were no neuromusculoskeletal abnormalities or medical restrictions affecting the applicant. Dr. Syed, psychologist indicated there were no psychological impairments relating to the accident. Ms. O'Grady, occupational therapist did an

⁶ Consultation Report of Dr. Taub dated May 17, 2013 Respondent's Brief of Documents Tab 1

⁷ Multidisciplinary Report July 28 2016 Respondent's Brief of Documents Tab 13, 14

in-home assessment finding the applicant had full abilities to cope with her functioning in the home. These reports have not been challenged by any medical reports from the applicant.

- [19] On November 7, 2016, the applicant visited Dr. Kurtz and indicated that she had headaches and was not depressed.⁸ The applicant attended again on April 25, 2017, and reported headaches, lower back aches appearing at random, and neck and shoulder aches. There was no mention of the accident or that these issues were related to the accident.
- [20] The applicant has continued her educational programs with similar marks pre and post -accident. Her grade 12 report cards, in the first quarter demonstrate that the applicant did significantly better in her marks than pre -accident. The applicant also enrolled at Seneca College in September 2017, to further her education, and took on a part time job with Winners, while also studying.⁹

ANALYSIS

- [21] I do not find that the applicant suffers a complete inability to carry on a normal life as a result of her accident related impairments for the following reasons.
- [22] First, I have difficulty with the applicant's submissions that she was active pre-accident and no longer engages in these activities post-accident. The applicant's evidence is contradicted by the activities that she is currently doing as she is working at Winners part-time while going to school at Seneca College. The test for entitlement to a NEB is that the applicant sustained a complete inability to carry on substantially all of her pre-accident activities. Based on the facts before me the applicant has not met her onus in proving on a balance of probabilities that she meets this test.
- [23] Second, I do not find that the applicant's post-accident functional limitations are supported by the medical evidence of her family doctor and psychiatrist. The applicant's family doctor and psychiatrist noted in 2013 in their clinical notes that she indicated to them that she was lazy and not too energetic, contradicting her claims to be very active pre-accident. I accept their notes of what the applicant stated to them in 2013, over the applicant's statement dated September 27, 2018. Other than the applicant's self- reports in her statement, no evidence was submitted in support of the activities the applicant was involved in pre-accident activities.
- [24] Dr. Kurtz' CNRs note that the applicant was able to make new friends at Seneca College, and she reported that she had relationships with two boyfriends.¹⁰ In

⁸ Respondent's Brief of Documents Tab 4 p6

⁹ Grade 9, 10, 11 12 Report Cards Respondent's Brief of Documents tabs 5-9/Report of Dr. Kurtz Respondent's Brief of Documents tab 4

¹⁰ Report of Dr. Kurtz Respondent's Brief of Documents Tab 4 p 2-3

actuality, the applicant's post- accident activities appeared to have increased as she went to Seneca College, had relationships, and continued to work at her part time at Winners.

- [25] There is no medical evidence before me that the applicant's pre-accident medical issues were, exacerbated by the accident.
- [26] Further, there is little evidence before me to show that the applicant suffered an impairment from the accident that resulted in her having a "complete inability to carry on a normal life." The applicant saw her family doctor off and on after the accident, with her doctor reporting headaches occasionally, and back aches, which the applicant had pre-accident.
- [27] I do not find that the applicant suffered such an impairment as a result of the accident, that led to her having a complete inability to carry on a normal life.
- [28] The applicant's claim for a NEB is hereby dismissed.

MEDICAL BENEFIT

- [29] The *Schedule* requires all medical benefits to be reasonable and necessary before the insurer is required to pay for them.¹¹
- [30] The applicant's position is that the insurer failed to give its reasons for rejecting the OCF-18 for physiotherapy within 10 days as required by section 38(8) of the *Schedule*. The applicant submitted an OCF-18 on December 6, 2016 which was denied by the insurer on January 17, 2017. The applicant's position is that the insurer has also not given proper reasons for denying the OCF-18. The applicant claims that the insurer relies on the IE reports of Dr. A. Oshidari dated November 16, 2015, and July 6, 2016, which the applicant claims are outdated because they are not current. Those reports indicate that the applicant has reached maximum medical recovery. The respondent's position is that it relied on the IE reports which are proper medical reasons for not granting the payment of benefits.
- [31] The courts have made it clear that the onus is on the applicant to prove on a balance of probabilities that the proposed treatment plans are reasonable and necessary.¹²
- [32] I find that the respondent can rely on the findings of Dr. Oshidari as proper medical reasons for denying the requested benefit. Dr. Oshidari opined that his assessment failed to reveal any specific neuromusculoskeletal abnormality. He opined also that the applicant had reached maximum medical recovery. I found Dr. Oshidari's reports persuasive because of a lack of other medical evidence to

¹¹ Reference missing?

¹² K.M. and Certas Ins.co., CanLII 13412 (Lat) para 18

contradict the findings in his reports. His findings are the only objective medical findings on this issue. It is clear from the report that if the applicant has reached maximum medical recovery and further physiotherapy is not reasonable or necessary.

[33] There is no evidence before me to show that the OCF-18 in the amount of \$2,878.06 for physiotherapy is reasonable and necessary. Further, there are no recommendations from the applicant's family doctor for physiotherapy. The onus is on the applicant to prove that the benefit is reasonable and necessary, which the applicant has not proved on a balance of probabilities.

[34] I find that the applicant is not entitled to receive a medical benefit in the amount of \$2,878.06 for physiotherapy treatment because it is not reasonable and necessary.

Interest

[35] As no benefits are owing, I find that the applicant is not entitled to interest.

Released: June 13, 2019

**Robert Watt
Adjudicator**