

**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**

Tribunal File Number: 19-000099/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:

Raymond Tang

Applicant

and

Certas Direct Insurance Company

Respondent

DECISION AND ORDER

PANEL:

Sandeep Johal, Adjudicator

APPEARANCES:

For the Applicant:

Yu Jiang

For the Respondent:

Paul Irish

HEARD:

In Writing on: August 26, 2019

REASONS FOR DECISION AND ORDER

OVERVIEW

- [1] The applicant was injured in an automobile accident on June 30, 2016 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (the "Schedule").
- [2] The applicant states that he struck his head on the windshield and the driver's side doorframe in the accident. He describes developing a bump or a bruise but no cuts and noted immediate pain in his neck and lower back.²
- [3] The applicant applied for medical benefits that were denied by the respondent because he was placed into the Minor Injury Guideline (the "MIG"). The applicant's claim for a non-earner benefit ("NEB") was also denied. He disagreed with this decision and submitted an Application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal").
- [4] At the case conference the only treatment plan in dispute for physiotherapy services in the amount of \$2,252.00 was withdrawn and will therefore not be a part of this written hearing.³

ISSUES TO BE DECIDED

- [5] The following are the issues to be decided:
 - i. Did the applicant sustain predominantly minor injuries as defined under the *Schedule*?
 - ii. Is the applicant entitled to receive a non-earner benefit in the amount of \$185.00 per week for the period of December 29, 2016 to date and ongoing?
 - iii. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [6] The issue of the MIG is premature as there are no treatment plans in dispute and therefore the MIG will not be addressed as part of this written hearing.

¹ O. Reg. 34/10.

² Written Submissions of the Applicant Tab 1, Insurer Examination Report dated December 13, 2016 at page 3.

³ Case Conference Order dated May 2, 2019 at para. [2] iii.

- [7] Based on the totality of the evidence before me, I find that the applicant is not entitled to a NEB and accordingly, no interest is payable.

ANALYSIS

Applicability of the Minor Injury Guideline

- [8] The MIG establishes a framework for the treatment of minor injuries. The term “minor injury” is defined in section 3(1) of the *Schedule* as “one or more of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury.” The terms “strain,” “sprain,” “subluxation,” and “whiplash associated disorder” are also defined in section 3(1). Section 18(1) limits recovery for medical and rehabilitation benefits for such injuries to \$3,500.
- [9] The MIG is a guideline and not a standalone issue entitled to a determination on its own under the *Schedule*.⁴ The MIG establishes a framework for treatment in order to speed access to rehabilitation for persons who sustain predominantly minor injuries in automobile accidents.⁵ Without any treatment being sought by the applicant, the issue of the MIG is moot and therefore will not be addressed as part of this written hearing.

Does the applicant meet the requirements for a non-earner benefit?

- [10] I find that the applicant has not satisfied his onus to prove that he suffers from a complete inability to carry on a normal life for the following reasons.
- [11] The test for entitlement to a NEB is for the applicant to show that he sustained an impairment as a result of the accident and that he suffers a complete inability to carry on a normal life as a result of and within 104 weeks of the accident and does not qualify for an income replacement benefit.⁶
- [12] Both parties have cited the *Heath*⁷ case where the Ontario Court of Appeal has provided an analysis of the proper approach to interpret the test for NEBs. The principles from *Heath* are as follows:

⁴ *A.S. v Aviva Insurance Canada*, 2019 CanLII 51335 (ON LAT) at para. 15,

⁵ Written Submissions of the Respondent at Tab 14 at page 85, *Minor Injury Guideline*, Superintendent’s Guideline No. 1/14.

⁶ Section 12(1) of the *Schedule*

⁷ *Heath v Economical Mutual Insurance Company*, 2009 ONCA 391. (*Heath*)

- I. There must be a comparison of the applicant's activities and life circumstances before the accident to those post-accident.
- II. The applicant's activities and life circumstances before the accident must be assessed over a reasonable period prior to the accident; the duration of which will depend on the facts of the case.
- III. 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.
- IV. The applicant must prove that his/her accident-related injuries continuously prevent him/her from engaging in substantially all of his/her pre-accident activities. This means that the disability or incapacity must be uninterrupted.
- V. "Engaging in" should be interpreted from a qualitative perspective. Even if an applicant can still perform an activity, if the applicant experiences significant restrictions when performing that activity, it may not count as "engaging in" that activity.
- VI. If pain is the primary reason that an applicant cannot engage in former activities, the question is whether the degree of pain practically prevents the applicant from performing those activities. The focus should not be on whether the applicant can perform those activities.

[13] In order for me to assess the applicant's claim for NEBs, he must show what his life was like before and after the accident.

[14] The applicant relies upon the following to show he has a complete inability to carry on a normal life:

- i. Disability Certificate of Dr. Alibhai, Chiropractor dated November 11, 2016 where Dr. Alibhai check-marked "yes" to the question of whether the applicant suffers a complete inability to carry on a normal life.
- ii. The applicant's medical records which according to the applicant show that his injuries developed as a result of the subject accident which has now led to pain and psychological impairment.

[15] The issue I have with the applicant's evidence is that it does not provide me with a description in accordance with the *Heath* analysis. I am not provided with any

evidence of the applicant's activities and life circumstances before and after the accident.

- [16] There is no discussion of what activities were more important to the applicant, which ones he is unable to participate in post-accident, or whether his impairments actually prevent him from engaging in substantially all of his pre-accident activities in accordance with the guidelines from *Heath*.
- [17] In the present case, the applicant has provided a Disability Certificate ("OCF-3") that check marked "yes" to the question of whether he suffers a complete inability to carry on a normal life and that he has difficulty with his activities of daily living. However, the OCF-3 does not address the components from the *Heath* test and it does not provide a comparison or a snap shot of the applicant's pre and post accident activities.
- [18] The applicant submits that his pre and post accident activities have been significantly affected, however, I have not been directed to any evidence of that and submissions alone are not evidence.
- [19] As a result of the above and on a balance of probabilities, I find that the applicant has not met his onus in proving he meets the test to be entitled to a NEB.

CONCLUSION

- [20] For the reasons outlined above, I find that the issue of the MIG is premature and the applicant is not entitled to a NEB. Accordingly, no interest is payable as there are no overdue benefits owing.

Released: January 28, 2020



Sandeep Johal
Adjudicator