

**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**

Citation: **Niall Forde vs. Allstate Insurance, 2019 ONLAT 18-005028/AABS**

Date: June 4, 2019

File Number: 18-005028/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:

NF

Applicant

and

Allstate Insurance

Respondent

DECISION

ADJUDICATOR:

Christopher A. Ferguson

APPEARANCES

Counsel for the Applicant:

Helen Chiasson

Counsel for the Respondent:

Andrew McKague

HEARD in Writing:

December 10, 2018

REASONS FOR DECISION

OVERVIEW

- [1] The applicant, NF, was involved in an automobile accident on August 11, 2016, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (the "Schedule"). He applied for dispute resolution services to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") when the respondent, Allstate, denied the disputed claims.

DISPUTED BENEFITS

- [2] The issues before the Tribunal are:
1. Is NF entitled to a non-earner benefit (NEB) in the amount of \$185.00 per week from August 11, 2016 to date and ongoing, submitted on August 11, 2016 and denied on March 22, 2017?
 2. Is NF entitled to an attendant care benefit (ACB) in the amount of \$944.61 from August 11, 2016 to date and ongoing, submitted on June 6, 2017 and denied on June 12, 2017?
 3. Is NF entitled to a medical benefit in the amount of \$2,003.48 for occupational therapy services recommended by Julian Amchislavsky, submitted on June 9, 2017 and denied on June 12, 2017?
 4. Is NF entitled to a cost of assessment in the amount of \$1,440.92 for a functional abilities evaluation (FAE) recommended by Amir Owliael, submitted on August 4, 2017 and denied on August 18, 2017?
 5. Is NF entitled to a medical benefit in the amount of \$1,796.00 for physiotherapy recommended by Patel Nilisskumar submitted on August 28, 2017 and denied on September 1, 2017?
 6. Is NF entitled to a medical benefit in the amount of \$3,341.87 for psychological treatment recommended by Dr. Romeo Vitelli submitted on November 30, 2017 and denied on December 5, 2017?
 7. Is NF entitled to a medical benefit in the amount of \$169.06 for psychological treatment submitted on October 4, 2017 and denied on October 13, 2017?
 8. Is NF entitled to a medical benefit in the amount of \$2,260.00 for medical services recommended by Dr. Igor Wilderman, submitted on June 12, 2017 and denied on June 27, 2017?
 9. Is NF entitled to interest on any overdue payment of benefits?

¹ O.Reg. 34/10

[3] NF withdrew his ACB claim, issue #2, in Reply.

FINDINGS

[4] I find that NF has not proven his entitlement to NEBs or medical benefits. His application is denied. No benefits are overdue and therefore no interest is payable.

ANALYSIS

1. NEB

[5] Section 12 of the Schedule provides that an insurer must pay an NEB to an insured person who does not qualify for an income replacement benefit and who suffers a complete inability to carry on a normal life as the result of an impairment sustained in an accident. The compensable impairment must arise within 104 weeks after the accident

[6] Section 3(7)(a) prescribes that a person suffers “a complete inability to carry on a normal life” if that person suffers an impairment as a result of the accident that “continuously prevents” him or her from “engaging in substantially all of the activities in which the person ordinarily engaged before the accident”.

[7] In determining this dispute, I have considered and applied principles for meeting the test for NEB entitlement that have been articulated by the courts in a case called *Heath v. Economical Mutual Insurance*² (“*Heath*”), specifically:

- i. “a claimant who merely goes through the motions cannot be said to be engaging in an activity” and that “the question is not whether he can do the activity, but whether [the impairment] practically prevents engaging in activity”.
- ii. It is not enough to show changes from pre- to post-accident activities; the claimant must be continuously prevented from engaging in substantially all of her pre-accident activities.
- iii. The manner in which an activity is performed and the quality of performance post-accident must be considered. If the degree to which a claimant can perform the activity is sufficiently restricted, it cannot be said that he or she is engaging in the activity.
- iv. Proving disability is not sufficient to satisfy the requirements of s. 12(2) of the *Schedule*. The applicant must establish on a balance of probabilities that his disability prevents him from engaging in substantially all of the activities in which he engaged before the accident.

² *Heath v. Economical*, 2009, 95 OR (3d) 785, cited by NF

- v. Where pain is the primary factor preventing an applicant from engaging in former activities, the applicant must show that the degree of pain experienced by the applicant either during or subsequent to the activity renders the applicant practically unable to engage in the activity.

- [8] In order to assess fairly whether or not an insured person meets the threshold of inability prescribed by s. 3(7)(a), decision-makers – whether the insurer or an adjudicator – need an accurate accounting of the insured person’s normal activities both before and after the accident. A comparison of pre- and post-accident functionality is essential to establishing entitlement to NEBs.
- [9] NF supports his NEB claim with statements of his inability to work, play hockey (a favorite pre-accident activity), attend school or perform volunteer community work.
- [10] My review of the medical reports and other documents appended to NF’s submissions revealed a psychological report from Dr. Romeo Vitelli, neuropsychologist, dated October 25, 2016 in which the doctor opines that NF was at that time unable to hold down a job or go to school as a result of the accident.
- [11] Allstate rebuts NF’s claims with the following:
 - i. Evidence in the form of ASHL³ statistics, that NF played hockey in the 2016-2017 season, after the accident, scoring goals and assists in seven games.
 - ii. Academic transcripts indicating that NF stopped attending college in the fall of 2015, almost a year before the accident happened. There is no evidence that the accident shaped NF’s decision or that he had previously intended to return to school.
 - iii. Inconsistencies in NF’s self-reported pre-accident employment status, as recorded in insurer’s examination reports. His Disability Certificate indicated that he was unemployed at the time of the accident, but told an insurer’s examination (IE) assessor that he was employed as a sheet metal worker at the time of the accident and resumed the job thereafter⁴. NF told a second IE assessor that he was working in a restaurant/bar at the time of the accident.⁵
 - iv. NF told a third IE assessor that he started work as a sheet metal worker in February, 2017.⁶ Allstate notes that NF’s ability to perform the functions

³ Adult Safe Hockey League

⁴ IE Report of Jeff Perrier, dated August 31, 2017.

⁵ IE Report of Dr. Chris Friesen, dated January 29, 2018.

⁶ IE Report of Dr. Anthony Marchie dated November 2, 2017.

of sheet metal work are “profoundly inconsistent with someone would qualify for the NEB.”

[12] NF has not proven his entitlement to NEBs. I have reached this conclusion because:

- i. NF’s submission includes none of the analysis required to meet the criteria set out in *Heath*, despite the fact that he cites the case himself. His bald statements about his loss of pre-accident activities are not credible to me because of unexplained inconsistencies in his statements to various assessors (none of which he actually denies making) and because of the lack of any evidence to corroborate details relating to changes in his work and school life.
- ii. He acknowledges in Reply working as a sheet metal worker since February 2017 – as an apprentice -- after the accident in his submissions. His explanation that the job is highly automated does not disprove that full-time employment undermines his claim to NEB eligibility.
- iii. NF’s claim in Reply that other players were using his jerseys in ASHL games during the 2016-2017 season is unbacked by any proof. I find it more likely than not that NF played hockey after the accident and that, like sheet metal work, this is inconsistent with the eligibility criteria for NEBs.
- iv. NF’s psychological report from Dr. Vitelli relies heavily on self-reporting, which in this case I find unreliable. Dr. Vitelli did not conduct any validity testing to support basic psychological test results. In any event, even if Dr. Vitelli’s report were more compelling, I would not find that it offset the evidence that NF was in fact carrying on a normal life.

2. Medical Benefits

[13] Sections 14 and 15 of the *Schedule* provide that an insurer is only liable to pay for medical expenses that are reasonable and necessary as a result of the accident.

[14] The onus is on the applicant, in this case NF, to show that the proposed medical benefits are reasonable and necessary.

[15] NF’s submissions on medical benefits are confused and at some points almost incomprehensible. They lack any analysis of how the claimed treatment plans were reasonable and necessary to address his alleged injuries and chronic pain. They do not direct me to specific medical evidence to support any of his claims. I found nothing in his appended documentation to assist me.

[16] I find that NF has failed *prima facie* to meet the burden of proof with respect to his medical benefits claims. Accordingly, I do not find it necessary to set out Allstate's rebuttal evidence or arguments. I do note that Allstate provided evidence that all of its denials were based on medical evidence and reports from its own assessor and from NF's claims documents.

3. Interest

[17] Section 51 of the *Schedule* sets out the criteria for assessing and awarding interest on overdue payments.

[18] There being no overdue benefits payments, no interest is payable.

CONCLUSIONS

[19] NF has not proven his entitlement to any of the benefits he claims.

[20] There are no overdue benefits payments and accordingly no interest payable.

Released: June 4, 2019



Christopher A. Ferguson
Adjudicator