

**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**



Tribunal File Number: 17-006736/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

N. B.

Applicant

and

Aviva Insurance Canada

Respondent

DECISION

ADJUDICATOR:

Jesse A. Boyce

APPEARANCES

Counsel for the Applicant:

Christopher Shiffmann

Jing Wang

Yu Jiang

Counsel for the Respondent:

Maia Abbas

Interpreter:

Clorie Ng (Cantonese)

Combination Hearing on:

October 9, 2018

OVERVIEW

- [1] The applicant, N.B., was injured in a motor vehicle accident on October 18, 2016. As a result of the accident, she sustained injuries to her back, shoulders, neck and head, as well as psychological impairments. N.B. sought benefits from the respondent, Aviva Insurance Canada (“Aviva”), pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*¹ (the “Schedule”).
- [2] Aviva denied N.B.’s claim for Non-Earner Benefits (“NEBs”) on the basis that she does not suffer from a complete inability to carry on a normal life and denied her claims for medical and rehabilitation benefits on the basis that the treatment plans were not reasonable and necessary. N.B. disagreed and submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.
- [3] A case conference was held but the parties were unable to come to a resolution and proceeded to a combination hearing, consisting of a one day in-person hearing, a teleconference cross-examination and written submissions.

ISSUES IN DISPUTE

- [4] The following are the issues to be decided, as per the Case Conference Order dated August 21, 2018:
 - 1) Is the applicant entitled to a non-earner benefit in the amount of \$185.00 per week from April 18, 2017 to present and ongoing?
 - 2) Is the applicant entitled to the following medical benefits?
 - a. \$188.71 for physiotherapy services, set out in an OCF-18 dated April 18, 2017, at Walsh Health and Wellness Centre;
 - b. \$2,229.60 for physiotherapy services, set out in an OCF-18 dated May 30, 2017, at Walsh Health and Wellness Centre;
 - c. \$1,819.53 for chiropractic, acupuncture, and massage services, set out in an OCF-18 dated October 7, 2017, at Easy Health Centre;
 - d. \$2,094.04 for chiropractic, acupuncture, and massage services, set out in an OCF-18 dated November 4, 2017, at Easy Health Centre;

¹ O. Reg. 34/10.

- e. \$215.20 for medication and medical expenses, set out in an OCF-6 dated April 18, 2017;

3) Is the applicant entitled to receive 1% compound interest as per Section 51?

RESULT

- [5] I find that N.B. is not entitled to NEB's for the period in dispute.
- [6] N.B. is entitled to all of the physiotherapy treatment in dispute, as well as the chiropractic, acupuncture and massage treatment in the \$2,094.04.
- [7] N.B. is not entitled to the chiropractic, acupuncture and massage treatment in the amount of \$1,819.53.
- [8] N.B. is entitled to interest on the payment of any overdue benefits, in accordance with s. 51 of the *Schedule*.

ANALYSIS

Non-Earner Benefits

- [9] In order to receive NEB's, N.B. must prove that she suffers a complete inability to carry on a normal life as a result of the accident.² A person suffers a complete inability to carry on a normal life as a result of an accident if 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.³ I find that N.B. is not entitled to NEB's for the period in dispute.
- [10] On review of the medical evidence, I find that N.B. does not suffer from a complete inability to carry on a normal life because her pain, while present, does not cause functional impairment and her day to day activities, while reduced, have not substantially changed as a result of the accident. Although I find she suffers from psychological impairments, I also find that these impairments do not render her completely unable to perform her stated activities of daily living or pursue the interests she had prior to the accident. While I find her reports of pain are credible and I note that she was in noticeable discomfort and quite emotional during the in-person portion of the hearing, the medical evidence and testimony provided does not amount, in my view, to a complete inability to carry on a normal life.

² The factors that inform the determination of NEB entitlement are outlined in the seminal case *Heath v. Economical Mutual Insurance Company*, 2009 ONCA 391 (CanLII).

³ O. Reg. 34/10, at s. 3(7)(a).

- [11] During the in-person portion of the hearing, N.B.'s testimony focused on her pain and how it impedes her day to day living. Where pain is a primary factor, it must be considered whether performing the activity with pain is such that the individual is practically prevented from engaging in those activities.⁴ On review of the medical documentation, N.B.'s affidavit and her testimony on her daily activities, I find that N.B. does suffer from pain but that this pain does not practically prevent her from independent self-care or engagement in daily activities. For example, on cross-examination, N.B. revealed that many of her reported pre-accident activities as a homemaker remained unchanged or were only slightly reduced post-accident: she performs some housekeeping, including sweeping, dusting, clearing the table and washing dishes; she wakes her children up and makes them breakfast; she is independent in her self-dressing, toileting and showering; she prepares her own meals and sometimes prepares lunches for her children; she goes grocery shopping with her husband; she attends at Temple and goes swimming, but not as often, and speaks to her family in Vietnam over the phone.
- [12] While reading, swimming and meeting up with friends were identified in her affidavit as activities that were important to her, there was limited evidence provided on the amount of time N.B. spent on each of these pre-accident activities and, in any event, N.B.'s testimony provided that she still engaged in these activities, although in a reduced capacity: she reads but finds it difficult, she swims but not as often and now only goes out with friends once a month or so.
- [13] *Heath* requires an assessment of the applicant's pre-accident activities and life circumstances over a reasonable period of time prior to the accident. The evidence led concerning N.B.'s pre-accident activities and how her impairments as a result of the accident have led to a complete inability to carry on with them post-accident was not persuasive. For instance, all of the activities listed above were similar to those that N.B. participated in pre-accident. While she provided testimony that she is unable to cook larger, more complex meals, drive her children to their after-school activities and do laundry, I find her inability to complete these activities does not amount to a complete inability to carry on a normal life, particularly in contrast to the activities that she can complete regularly.
- [14] N.B. underwent a Multi-Disciplinary Assessment at Aviva's request, consisting of assessments for orthopaedic surgery, neurology, psychology and in-home occupational therapy. Collectively, these reports offer some insight into N.B.'s pain and reduced capabilities but generally find no functional impairment and no clinical indication to impose any specific activity limitations on N.B. While it is evident that M.G. is still experiencing pain and I agree with her that the clinical notes and

⁴ *Heath*, at para 50.

records provide a clear history of pain, a reliance on medication, a fibromyalgia diagnosis and psychological impairments, the evidence provided does not meet the high threshold of the NEB test.

- [15] Instead, I find that N.B. herself provided the most accurate indication of her current state at paragraph 38 of her affidavit, when she said: “I am frustrated that I am less able to live my life.” On the evidence, I agree that N.B. is less able to live her life. However, I do not find that she is completely unable to carry on a normal life. This is the test she must meet. On this basis, I find that N.B. is not entitled to NEB’s for the period in dispute.

Medical and Rehabilitation Benefits

- a. \$188.71 for physiotherapy services from Walsh Health and Wellness Centre;**
- b. \$2,229.60 for physiotherapy services from Walsh Health and Wellness Centre;**
- d. \$2,094.04 for chiropractic, acupuncture, and massage services from Easy Health Centre**

- [16] In order for M.G. to receive payment for medical and rehabilitation benefits under the *Schedule*, the benefits in dispute must be reasonable and necessary, pursuant to ss. 14-17. As noted above, I find on the evidence that N.B. suffers from consistent pain and that the physiotherapy and chiropractic/acupuncture/massage treatments can assist in her ability to function and are therefore reasonable and necessary.

- [17] Aviva originally denied the treatment plans in dispute on the basis that N.B. was in the Minor Injury Guideline (the “MIG”). It later removed her on the basis of a psychological impairment and now argues that the plans are still not reasonable and necessary. I disagree. While I find that N.B.’s physical impairments have not resulted in a complete inability to carry on a normal life, I do find that she continues to suffer from lingering physical pain that warrants treatment. On multiple occasions in the file, N.B. reports that treatment is helpful in addressing her pain and that the pain is reduced after manual therapy. In clinical notes and records, it is reported that manual therapy helps reduce her neck and lower back pain, which helps her sleep. Further, at the in-person hearing, N.B. was in obvious physical discomfort, needed to take breaks and used a cane and a back brace. Pain reduction is a legitimate goal for treatment. In my view, it is reasonable to allow a professional to attempt to treat N.B.’s lingering pain for an extended period. Combined, these plans will provide a reasonable sample size to determine whether continuing treatment is

beneficial to N.B.'s long-term comfort and improvement or if she has achieved maximal recovery.

- [18] Accordingly, I find that the physiotherapy services in the amounts of \$188.71 and \$2,229.60 from Walsh Health to be reasonable and necessary. Additionally, I find the \$2,094.04 for chiropractic, acupuncture, and massage services from Easy Health Centre to be reasonable and necessary.

c. \$1,819.53 for chiropractic, acupuncture, and massage services from Easy Health Centre

- [19] In contrast, I find the second treatment plan from Easy Health Centre to be duplicative, and do not find it to be reasonable and necessary. As a result, N.B. is not entitled to the treatment plan in the amount of \$1,819.53.

e. \$215.20 for medication and medical expenses

- [20] In order for N.B. to receive payment for medication and medical expenses under the *Schedule*, the benefits in dispute must be reasonable and necessary, pursuant to ss. 14-17. I find that medication and medical expenses are not reasonable and necessary.

- [21] Aviva partially approved this expense for medication and transportation in the amount of \$88.47. The remaining \$126.73 of the OCF-6 pertains to transportation and an optometry assessment at the Waterloo School of Optometry on the basis of a referral from Jaclyn Witt. I find that neither of these expenses are reasonable and necessary as an insurer is not obligated to pay for transportation expenses to treatment that was not authorized.

- [22] Accordingly, I find N.B. is not entitled to the claim of \$215.20 for medication and medical expenses as the medication was paid in full and the remaining expenses were not authorized.

Interest

- [23] As I have found that N.B. is entitled to some of the benefits in dispute, she is also entitled to interest on those overdue benefits, pursuant to s. 51 of the *Schedule*.

CONCLUSION

- [24] For these reasons, N.B. is not entitled to NEB's for the period in dispute.
- [25] N.B. is entitled to all of the physiotherapy treatment in dispute, as well as the chiropractic, acupuncture and massage treatment in the \$2,094.04.

[26] N.B. is not entitled to the chiropractic, acupuncture and massage treatment in the amount of \$1,819.53.

[27] Interest is payable on all overdue benefits, pursuant to s. 51 of the *Schedule*.

Released: October 30, 2018



Jesse A. Boyce
Adjudicator