



Citation: Shafai v Aviva Insurance Company, 2023 ONLAT 20-006570/AABS

Licence Appeal Tribunal File Number: 20-006570/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:

SHOKOH SHAFAI

Applicant

and

Aviva Insurance Company

Respondent

DECISION

ADJUDICATOR: Lyndra Griffith

APPEARANCES:

For the Applicant: Kenway Yu, Counsel

For the Respondent: Evan Argentino, Counsel

HEARD BY WAY OF WRITTEN SUBMISSIONS

BACKGROUND

- [1] The applicant, Shokoh Shafai, was injured in an automobile accident on **June 26, 2019** and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (“*Schedule*”)¹ from Aviva Insurance Company, the respondent.
- [2] The respondent denied the applicant’s claim for a non-earner benefit (“NEB”). As a result, the applicant submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (“Tribunal”).
- [3] A case conference was held on August 4, 2021, and the matter proceeded to a written hearing.

ISSUES IN DISPUTE

- [4] The issues to be decided in the hearing are:
 - 1. Is the applicant entitled to a NEB of \$185.00 per week from July 26, 2019 to June 26, 2021?
 - 2. Is the respondent liable to pay an award under s. 10 of O. Reg. 664 because it unreasonably withheld or delayed payments to the applicant?
 - 3. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [5] I find that the applicant:
 - (i) Is not entitled to a NEB;
 - (ii) Is not entitled to an award under *Regulation 664*; and
 - (iii) No interest is payable.

BACKGROUND

- [6] The applicant was 71 years old at the time of the accident and lived in a detached bungalow with her husband. She was a hairdresser for over 35 years and had stopped working several months before the accident, in October 2018.

¹ O. Reg. 34/10.

- [7] The accident occurred on June 26, 2019. The applicant was the seat-belted driver and struck the right side of her vehicle. The applicant does not recall striking any part of her body against the vehicle. She left the accident scene and drove to her sister's home.

Pre-accident medical history

- [8] The applicant denies any previously significant medical history but describes that she had an appendectomy at age 10, a C-section at about age 40, right shoulder and knee problems in 2016 which had fully resolved and that she suffered from arthritis.
- [9] The respondent however, describes the applicant's lengthy pre-accident medical history as the following: the applicant underwent an MRI on March 20, 2017 of her right shoulder, which revealed tendinosis and a distal supraspinatus tear. There were osteophytes at the AC joint, which may have caused the tear due to chronic irritation. She also had a superior labral tear and mild cartilaginous thinning to the glenohumeral joint.
- [10] On July 20 and 21, 2017 the applicant saw neurologist Dr. Usman Moghal, who suspected a cerebellar issue as a cause of her episodic ataxia, where she reported five prior falls. Dr. Moghal recommended that her memory be tested and she perhaps undergo a trial medication for her balance issues.
- [11] On February 15, 2019, four months pre-accident, the applicant followed up with her family physician, Dr. Naghibi again complaining of right shoulder pain with restricted range of motion. Dr. Naghibi noted distal supraspinatus tendinosis and referred her for physiotherapy.
- [12] On March 12, 2019, three months pre-accident, she attended Dr. Naghibi where she reported shoulder pain. Dr. Naghibi noted a tear of the supraspinatus and osteoarthritis. Dr. Naghibi referred the applicant to Dr. Ashely Esdaile on March 26, 2019, just three months pre-accident. The applicant was diagnosed with right rotator cuff syndrome with impingement and osteoarthritis of the right AC joint. She reported sleep difficulties, concentration difficulties, and fatigue. She reported limitations with lifting, carrying, reaching, domestic duties, recreational activity and social activity. The applicant rated her limit in function as a 7 out of 10 for all of the activities.

Post-accident medical history

- [13] A Disability Certificate (OCF-3) was completed by physiotherapist, Raksha Thakrar, on July 6, 2019 and it indicated that the applicant suffered from various injuries. Under “injury and sequelae information”, it lists: radiculopathy right side; bicipital tendinitis; sprain and strain of shoulder joint right side; sprain and strain of cervical spine; other anxiety disorders; injury of muscle (2) and tendon(s) of the rotator cuff of shoulder; sprain and strain of elbow, and sprain and strain of wrist.

ANALYSIS

The applicant’s entitlement to a NEB from July 26, 2019 to June 26, 2021

- [14] I find that the applicant has failed to prove on a balance of probabilities that she is entitled to a NEB for the period of July 26, 2019 to June 26, 2021.
- [15] The test for entitlement to a NEB is set out in s. 12(1) of the *Schedule*. It states that an applicant must prove that he or she suffers from a complete inability to carry on a normal life as a result of, and within 104 weeks of, an accident. Section 3(7)(a) of the *Schedule* states that a person suffers from “a complete inability to carry on a normal life” if, as a result of an accident, the person sustains an impairment that continuously prevents that person from engaging in substantially all of the activities in which that person ordinarily engaged before the accident.
- [16] The parties both rely on the case of *Heath v. Economical Mutual Insurance Company*² (“*Heath*”), which outlines several principles for the determination of entitlement to a NEB. These principles include:
- 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.

² 2009 ONCA 391 (CanLII) (“*Heath*”).

- 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 physically perform those activities.

[17] Based on these principles, the applicant must present a thorough analysis and comparison of activities she could do before and after the accident.

Applicant’s position

- [18] The applicant submits that she has developed chronic neck, back and shoulder pain, as well as psychological impairment due to the accident. As a result, she is unable to carry on normal life.
- [19] The applicant submits that the OCF-3 completed by Rakasha Thakrar indicates she had a complete inability to carry on a normal life on July 6, 2019. The estimated period of the disability was 5-8 weeks.
- [20] The applicant submits that her complete inability to carry on a normal life was affirmed in another OCF-3, completed by her new family physician, Dr. Naghid on October 9, 2020. However, no pinpoint reference was made to this document, and it could not be located in the applicant’s package of documents entitled “final documents of documents”. An OCF-3 dated June 9, 2020, completed by Dr. Glenn Watkins, was listed as a document reviewed as part of numerous assessments completed for the applicant, however this OCF-3 does not appear to be in the applicant’s materials.
- [21] The applicant submits that she was assessed by Dr. Marciniak on September 24, 2021 for a preliminary catastrophic impairment determination and he stated that she would easily meet the 55% Whole Person Impairment (WPI), rendering her catastrophically impaired.

- [22] The applicant submits that neurologist, Dr. Lance B. Majl, stated in an assessment dated on June 1, 2021, that the applicant continues to suffer from multiple impairments from the accident; that her limitations prevent her from performing personal care tasks and housekeeping and home maintenance chores and; that she has not resumed many pre-accident social and recreational activities. She says Dr. Lance stated that a return to the workforce is unlikely given her current pain and impairments.
- [23] The applicant submits that psychologist, Dr. Vinogradova, completed a psychological assessment on April 14, 2021. Dr. Vinogradova diagnosed her with the following: adjustment disorder with mixed anxiety and depressed mood, features of Posttraumatic Stress Disorder Somatic Symptom Disorder, with predominant pain, persistent specific phobia, situational type (motor vehicles).
- [24] Finally, the applicant submits that orthopedic surgeon, Dr. Tajedin Getahun, completed an orthopedic assessment on March 15, 2021 and opined that she had not returned to her usual activities of daily living from both a qualitative and quantitative perspective. This included her pre-accident level of self-care, housekeeping, home maintenance tasks, socialization, driving an automobile, swimming and going for walks. Dr. Getahun opined at the time that she suffered a complete inability to carry on her normal life.

Respondent's position

- [25] The respondent submits that the applicant bears the burden of proving her claim for NEB on a balance of probabilities and must provide evidence to show a causal link between the accident and her impairment, and that her impairment results in a complete and continuous inability to carry on a normal life.
- [26] The respondent submits that the applicant's pre-accident family doctor, Dr. Naghibi's, records demonstrate that she had a longstanding pre-accident history of right shoulder/arm pain and knee issues. Her diagnostic images revealed, and Dr. Esdaile and Dr. Naghibi diagnosed her with, osteoarthritis and rotator cuff syndrome of her right shoulder. The respondent submits that these issues resulted in significant limitations in the applicant's function and she reported to Dr. Naghibi that she had pain and limited range of motion in her right shoulder well before the accident. The respondent submits that the objective records demonstrate that the applicant's complaints and function were worse pre-accident; she attended her family doctor and Dr. Esdaile on a regular basis complaining of shoulder pain, reduced functioning and received injections. However, she had no follow ups with Dr. Esdaile post-accident and only few follow ups with her family doctor.

- [27] The respondent further submits that the applicant's complaints in the fall of 2020 that she could not use her right arm are unsupported by the medical records and surveillance. The diagnostic images revealed degenerative changes and made no reference to the accident.
- [28] The surveillance in September 2020 showed her walking, standing, balancing on one leg, picking up objects with her right arm and driving. The respondent submits that the applicant was clearly capable of engaging in such tasks in the fall of 2020.
- [29] The respondent submits that the surveillance conducted in May and June 2021 also contradict the applicant's subjective complaints. She did not use any assistive devices despite advising that she wore a splint and used a walker. She stood and walked for long periods of time. She socialized, despite advising Dr. Getahun and Mr. Ronald Findlay that she only visited her grandchildren. Lastly the respondent submits that the applicant did not exhibit any balance issues and used her right arm/shoulder when carrying bags and luggage and when taking photos.

Analysis of the applicant's pre-accident activities and post-accident activities

- [30] The applicant completed an Activities of Daily Living (ADL) OCF-12 on July 31, 2019. She indicated that she was able to do all of the listed tasks before the accident and that she could do all of the same activities after the accident with help. She also described driver and passenger anxiety after the accident.
- [31] On July 31, 2019, the applicant completed a questionnaire provided by the respondent determining her eligibility for non-earner benefits. The applicant stated that prior to the accident she was able to walk 3 kilometers in the afternoon, swim for 1.5 hours 2 times per week, vacuum and clean 2-3 times per week, lift her groceries, cook and sleep. She indicated that after the accident she continued to walk but the duration was reduced to 30 minutes. She could swim but the duration was reduced to 15 minutes, and she could cook but that she could only remain standing for 10-15 minutes at a time. She indicated that she could not vacuum and clean. She indicated that she could sleep but not straight through the night due to pain.
- [32] The applicant completed another ADL on October 22, 2020. She indicated that she could walk prior to the accident but could now only walk with help and she indicated that she used a walker. She also told occupational therapist, Varun Madan, during the in-home assessment completed on January 15, 2021, that she used a walker for mobility in the external environment. The surveillance of the

applicant 3 months prior however, showed her walking without a walker. Furthermore, surveillance conducted in May and June 2021 also contradicts the applicant's subjective complaints. She did not use any assistive devices despite advising that she wore a splint and used a walker, she stood and walked for long periods of time and she was socializing.

- [33] The applicant indicated that she could climb stairs before the accident but not post-accident. Varun Madan indicated that she was observed as able to navigate the steps at the entrance of her 2-level bungalow using external support and non-reciprocal gait while accessing the stairs. No assistance was recommended for this task.
- [34] The applicant listed that she was able to prepare and cook meals, clean the home and do the laundry pre-accident but can not perform these activities post accident. As part of an insurance examination (IE) multidisciplinary report completed on September 30, 2019, the applicant told orthopaedic surgeon, Dr. Michael Martin, that she was capable of light household activity and could make coffee or a sandwich for herself. She said she did some of the laundry if her husband would carry it down to the washer. As part of the same multidisciplinary report, she also told occupational therapist, Lisa Slapinsk, that dinner is prepared together with her spouse.
- [35] The applicant also indicated on the ADL dated October 22, 2020 that she was able to relate to others without irritability or anger prior to the accident but that she can no longer do this post-accident. She also indicated that she could participate in social activities prior to the accident but she can no longer do this after the accident. This also appears to be inconsistent as she reported to numerous assessors that she remains social, and she was also observed socializing with family.
- [36] Dr. Maneet Bhatia completed a psychological IE multidisciplinary report dated September 30, 2019. The applicant told Dr. Bhatia that she continues to remain interested in previously enjoyed activities and socializing. She reported no changes in her social life and interest; however, she finds that it is demanding on her due to her physical limitations and pain.
- [37] The applicant also completed an in-home assessment as part of the IE multidisciplinary report with occupational therapist, Lisa Slapinski. The applicant described her day as follows:
 - (i) Up between 6:30 and 7 am.

- (ii) Makes tea with help from her spouse to lift the kettle. He prepares breakfast and they sit at the table together.
- (iii) Watches television and cleans what she can using her left hand.
- (iv) A friend may visit and take her out.
- (v) Visit her children and she may stay for a few days.
- (vi) Dinner is prepared together with her spouse.
- (vii) Watches television after dinner.
- (viii) Retires to bed at approximately 10:30 pm.

[38] Neither party made submissions on what the reasonable time period was to examine the applicant's pre-accident activities as required by *Heath*. I find that examining the period of approximately one year prior to the accident to the accident itself would have been a reasonable amount of time to assess the applicant's pre-accident activities.

[39] The applicant also failed to identify the frequency in which she engaged in most of her pre-accident activities. However, the s.25 in-home assessment dated January 15, 2021, does give an idea of the frequency of her housekeeping activities in the "pre-accident" section but not the duration. The relevant the pre-accident section is as follows:

- (i) **Making Bed/ Changing Sheets** - Solely responsible, 1 time a week
- (ii) **Bathroom/Toilet cleaning** - Shared with her/ Solely responsible, 1 time a week
- (iii) **Meal Preparation /Dish washing** - Shared with her/ solely responsible, daily
- (iv) **Kitchen Cleaning** - Shared with her/solely responsible, daily
- (v) **Sweeping/Dusting/Mopping /Vacuuming Floors** - Shared with her/solely responsible, daily
- (vi) **Laundry/Ironing** – Solely responsible, 1 time a week
- (vii) **Groceries** - Shared with her husband 1 time a week

(viii) **Window cleaning (Inside only)** – Solely responsible, once every 2 weeks

(ix) **Pet Care- 1 Cat** – Solely responsible, daily

(x) **Financial Matters** – Solely responsible (no frequency noted)

[40] Apart from walking, swimming and the listed housekeeping activities above, the applicant has failed to identify the frequency in which she engaged in all of her pre-accident activities, I find that this does not satisfy the requirement described in *Heath*.

[41] Furthermore, the applicant did not lead any evidence as to what activities were more important to her pre-accident. However, the IE in-home assessment completed by Lisa Slapinski, described all of the tasks that the applicant was partially able to do and unable to do post-accident as “very important” to her.

[42] On the evidence, I find that the applicant does not suffer from a complete inability to carry on a normal life as a result of the accident from July 26, 2019 to June 26, 2021 and, as a result, she is not entitled to a NEB for this period. The applicant has not proven on a balance of probability that her accident-related injuries continuously prevent her from engaging in substantially all of her pre-accident activities. The applicant’s daily activities described in numerous reports do not depict someone who is substantially unable to engage in her pre-accident activities. On the contrary, she remains physically active, she socializes, and she enjoys recreational activities. The lack of detail and information addressing the applicant’s post-accident limitations and the inconsistencies in what she claims she can’t do post-accident has failed to persuade me of the applicant’s entitlement to a NEB.

Award

[43] Section 10 of *Regulation 664* provides that, if the Tribunal finds that an insurer has unreasonably withheld or delayed payment of benefits, the Tribunal may award a lump sum of up to 50 per cent of the amount in which the person was entitled.

[44] As I have found in that there are no payments of benefits or costs owing, there is no basis upon which to consider an award in this matter.

Interest

[45] As there are no benefits owing, no interest is payable.

CONCLUSION

[46] For the reasons outlined above, I find that the applicant:

- (i) Is not entitled to a NEB;
- (ii) Is not entitled to an award under Regulation 664; and
- (iii) No interest is payable.

[47] This application is dismissed.

Released: February 7, 2023



Lyndra Griffith
Adjudicator