



Citation: Butych v. Aviva General Insurance, 2023 ONLAT 21-014643/AABS

Licence Appeal Tribunal File Number: 21-014643/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:

Volodymyr Butych

Applicant

and

Aviva General Insurance

Respondent

DECISION

ADJUDICATOR: Kate Grieves

APPEARANCES:

For the Applicant: Kateryna Vlada, Counsel

For the Respondent: Sonya Katrycz, Counsel

HEARD: By Way of Written Submissions

OVERVIEW

[1] Volodymyr Butych, the applicant, was involved in an automobile accident on October 8, 2019, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “*Schedule*”). The applicant was denied benefits by Aviva General Insurance Company, the respondent, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

ISSUES

- [2] The issues in dispute are:
- i. Is the applicant entitled to a non-earner benefit in the amount of \$185.00 per week from November 12, 2019 to date and ongoing?
 - ii. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [3] The applicant is not entitled to a non-earner benefit, and no interest is payable.
- [4] The application is dismissed.

PROCEDURAL ISSUES

[5] The respondent requested that the Tribunal draw an adverse inference from the applicant’s failure to provide a complete Ontario Disability Support Program (“ODSP”) file, contrary to an order from the Tribunal. I decline to do so. There was no order for specific productions made at the case conference. The order stated that the parties agree to exchange all documents requested from the other within 90 days of the case conference. The respondent later filed a motion requesting a complete copy of the ODSP file, and then withdrew the motion, noting that all relevant records had been produced. It is unclear to me why the respondent withdrew their motion, which included a request for the complete ODSP file, if in fact it had not received it.

ANALYSIS

Non-Earner Benefits (“NEBs”) – The Law

[6] The test for entitlement to NEBs is set out in section 12(1) of the *Schedule*. The insured person must prove that they suffer from a complete inability to carry on a

normal life within 104 weeks of the accident. Section 7(b) of the *Schedule* states that a person suffers a complete inability to carry on a normal life as a result of an accident if, as a result of the accident, 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.

- [7] The 2009 decision from the Court of Appeal in *Heath v. Economical Insurance Company*¹ (“*Heath*”) outlined a set of guiding principles to be considered when determining an insured person’s entitlement to NEBs, which, generally focuses on a comparison of the applicant’s pre- and post-accident activities. To summarize paragraph 50 of the decision, the following are factors to consider when analyzing the test for NEB:
- a) A comparison between the applicant’s activities and life circumstances before and after the accident.
 - b) Assessing the applicant’s activities and life circumstances requires more than a snapshot in time but involves assessing it over a reasonable period prior to the accident and the duration after is case specific.
 - c) In proving “substantially all” requires looking at all the applicant’s pre-accident activities and life circumstances but greater emphasis can be placed on the ones that matter the most to the applicant.
 - d) “Continuously prevents” means that it’s of a nature, extent or degree that is and remains uninterrupted.
 - e) “Engaging in” refers to a qualitative perspective – going through the motions may not be “engaging in,” and if doing the activity is sufficiently restricted then it’s not “engaging in”.
 - f) If pain is a primary factor that prevents the applicant from engaging in their pre-accident activities, the question is not whether the applicant can physically do the acts, but are they practically prevented from engaging in those activities?
- [8] The applicant submits that he suffers a complete inability to carry on a normal life due to his physical and psychological impairments. He relies on a disability certificate, dated January 31, 2020, completed by Dr. B. Grossman (chiropractor), which indicates that he suffered a complete inability to carry on a normal life, and listed injuries including: concussion, suspected rib fractures, lung

¹ 2009 ONCA 391 at para 50.

contusion, sprain and strain injuries to the thorax, shoulder, ribs/sternum, injured hand and wrist, lumbar disc disorder with radiculopathy, knee contusion/internal derangement, abnormal gait/mobility/breathing, involuntary movement, state of emotional shock/stress, nervousness, restlessness, agitation, sleep disorder and whiplash associated disorder (WAD3) with neck pain and neurological signs. The applicant was diagnosed with a major depressive disorder with anxious distress, according to the psychological assessment report by Dr. E. Langis dated August 3, 2022. The applicant also relies on an attendant care assessment report dated December 3, 2019 completed by Mark Prigozhikh (registered nurse) in support of his claim.

- [9] I find that the applicant has failed to prove on a balance of probabilities that he suffers from a complete inability to carry on a normal life.
- [10] In order for an insured person to prove that he sustained injuries that continuously prevent him from engaging in substantially all of his pre-accident activities, he must first identify the activities in which he used to engage, along with their frequency and importance. I am persuaded by Adjudicator Pahuta's decision in *Sampson-Samuel v. Wawanesa Mutual Insurance Company*² where she held that a failure to identify activities the applicant values or provide evidence of the frequency and time commitments of his pre-accident activities means a failure to discharge the burden to prove entitlement to NEBs. Similarly, the applicant in this case has failed to make submissions on the particulars of his pre- and post-accident activities, as required by *Heath*. The applicant was unemployed and receiving ODSP for approximately five years pre-accident. He purports that he spent time caring for his daughter but fails to provide specifics. She would have been 12 years old at the time of the accident and in school full time. The applicant submits that he was involved in all manner of housekeeping as he felt it was his duty to share the burden with his family, and felt more obliged to carry out housekeeping and other tasks as a means of compensating for his unemployment. He submits that, his injuries "severely curtailed his housekeeping, caregiving and handyman capacity", however he fails to provide any explanation as to how he spent his time prior to the accident.
- [11] The occupational therapy report he relies on provides little insight into his life and activities prior to the accident, other than "doing various physical activity" and "hanging out with friends", caregiving to his daughter, and taking care of the household tasks. Mr. Prigozhikh notes that the applicant "enjoyed a particular lifestyle prior to the accident, but since the accident he has not been able to

² 2023 CanLII 26924 at para 33.

participate in his social & recreations & daily living activities in the manner he used to prior to the accident due to functional limitations”.

- [12] Without details regarding the activities he valued, or evidence of the frequency and time commitments of his pre-accident activities, as required by *Heath*, it is difficult to compare his pre- and post-accident ability to engage in activities he ordinarily engaged in or valued.
- [13] I am persuaded by the multi-disciplinary assessment report prepared by the insurer’s examination assessors, dated September 29, 2020. All four assessors (Dr. Bhargava, orthopaedic surgeon; Dr. Friedman, neurologist; Dr. Ratti, psychologist; and Nicholas Livadas, occupational therapist) found that the applicant did not suffer a complete inability to carry on a normal life.
- [14] In light of the foregoing, I find that the applicant has not established his entitlement to NEBs.

Interest

- [15] No benefits are payable or overdue, therefore no interest is payable.

ORDER

- [16] For the reasons set out above, I find that the applicant is not entitled to non-earner benefits, nor interest.
- [17] The application is dismissed.

Released: October 12, 2023



**Kate Grieves
Adjudicator**