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

Ontario

File Number: 18-002735/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:

M. K.

Appellant

and

Aviva Insurance Canada

Respondent

DECISION

PANEL:	**Thérèse Reilly, Adjudicator**
APPEARANCES:	
For the Applicant:	Loreto Scarola, Paralegal
For the Respondent:	Jennifer Cosentino, Counsel
Court Reporter:	Michael Vargas
HEARD:	**In writing and by Teleconference on December 10, 2018**

OVERVIEW

[1] M.K., the applicant was injured in a motor vehicle accident on October 31, 2015 and applied for accident benefits to RBC insurance Company of Canada ("the respondent") under the *Statutory Accident Benefit Schedule – Effective September 1, 2010* (the "*Schedule*"). The applicant applied for a non-earner benefit from April 20, 2016 to date and ongoing. The benefit was denied by the respondent on the basis that she did not meet the test for a non-earner benefit.

[2] The applicant relied on the clinical notes and records of her family doctor and reports from both a psychologist and orthopaedic surgeon who concluded that as a result of the injuries sustained in the accident the applicant meets the test for a non-earner benefit. The applicant did not testify at the hearing or provide an affidavit. The applicant attended several insurer examinations (IEs) in April and May 2016 which concluded that the applicant failed to meet the test for a non-earner benefit. In addition, the respondent relies on video surveillance taken in April 2017 and a report from another IE assessor in June 2017 to support its position that the applicant does not meet the test for a non-earner benefit.

[3] The test for entitlement to a non-earner benefit requires proof that the injured person sustained an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident. To be successful with her claim, the applicant has to establish that as a result of her injuries from the accident she suffers from a complete inability to carry on a normal life within 104 weeks of the accident.

[4] The evidence at this hearing was submitted by way of oral and written submissions and affidavit evidence from the applicant's son, John Kanakis[1] and Ms. Julie Anne McDonald, [2] the Claims Adjuster and Litigation Specialist, and by cross examination held by teleconference on December 10, 2018.

ISSUES

[5] The following are the issues to be decided:

[1] Affidavit of John Kanakis, written submissions of the applicant, tab 16.
[2] Affidavit of Ms. Julie Anne McDonald, written submissions of the respondent, tab 13.

a. Is the applicant entitled to a non-earner benefit in the amount of $ 185.00 per week from April 30, 2016 to date and ongoing denied on May 27, 2016?

b. Is the applicant entitled to an award because the respondent unreasonably withheld or delayed payments pursuant to section 10 of Ontario Regulation 664?

c. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

[6] For the reasons set out below, I find that the applicant is not entitled to a non-earner benefit from April 30, 2016 to date and ongoing. The applicant is not entitled to an award under Ontario Regulation 664. Interest is not payable as there is no overdue payment of benefits.

PRELIMINARY ISSUES

[7] Several procedural issues were raised by the parties during written and oral submissions.

Admissibility of Video Surveillance Evidence

[8] The applicant objected to the admissibility of video surveillance taken of the applicant over 5 days between April 13, 2017 and April 24, 2017. The applicant argues the respondent failed to disclose that it intended to rely on video surveillance at the hearing contrary to Rule 9(2)(a) of the *Licence Appeal Tribunal Rules of Practice and Procedure*. The respondent also did not send the video surveillance in its raw unedited form to the applicant. The applicant argues if it is admitted, this evidence should be given little weight.

[9] Ms. McDonald testified during cross examination that a copy of the video was provided to the applicant on June 30, 2017 in respect of another claim for benefits advanced by the applicant involving the same accident and parties. Ms. McDonald stated the video surveillance was used as part of the respondent's claim in that file. The applicant was also provided the video surveillance and investigation report as part of the written submissions and disclosure of documents for this hearing.[3] The respondent argues the applicant has been aware of the video for at least two years prior to this

[3] Tab 10 of the written submissions of the respondent, Video Surveillance from April 13, 2017 to April 24, 2017 with Investigators Report dated April 26, 2017.

hearing. I find the applicant had the opportunity to ask questions about the video or ask for the raw edited version. No evidence was led that the applicant made the request prior to the hearing.

[10] After reading and hearing the submissions of the parties, I allowed the admission of video surveillance into evidence. I find the applicant had notice of the video surveillance since 2017 and from the disclosure of documents for this hearing.

Updated Clinical Notes and Records of the Family Doctor received October 2, 2018

[11] The respondent objected to the admissibility of the updated clinical notes and records of the applicant's family doctor which are dated from June 8, 2018 to September 24, 2018. (Updated Notes) [4] These were not produced to the respondent until October 2, 2018 being one day after the deadline in the Order of Adjudicator Corapi dated August 16, 2018. [5] The applicant prior to the hearing brought a motion to the Tribunal for an Order allowing the applicant to file these records into evidence at the hearing which was granted by the Tribunal. The Order stated the respondent could raise its objections to the applicant's motion at the hearing. The respondent maintains it was denied procedural fairness as it has not had an opportunity to review these updated records and obtain an independent medical opinion. I advised the parties that in these circumstances I will admit the updated CNRs as they are relevant to the issue in dispute and assess the weight to be given to this evidence in arriving at my decision.

Non-compliance with Section 44 Insurer Examination

[12] The respondent submits that the applicant was non-compliant with the *Schedule* as she failed to attend a section 44 insurer examination. The applicant cross examined Ms. McDonald on this issue and the award claim. Updated family doctor records were made available to the respondent on June 26, 2018. On receipt of the updated medical records, and additional OCF3s, the insurer scheduled three independent medical examinations (IEs) under section 44 of the *Schedule*. On August 14, 2018, notice was provided to the applicant.[6] The IEs were scheduled for September 18, 25 and 27, 2019. Despite notice being provided, the applicant failed to attend the scheduled IEs. The applicant's representative advised the respondent by

[4] Written submission of the applicant, tab 14.
[5] LAT Order of Adjudicator Corapi, written submissions of the respondent, tab 1.
[6] Written submissions of the respondent, tabs 13k.

letter dated August 20, 2018 that the applicant would not be attending because the respondent had assessed and denied the non-earner benefit in May 2016 and no legislation allowed for a re-assessment of a benefit already assessed and denied.[7] The parties exchanged further letters about the IEs which were cancelled on September 26, 2018.

[13] The applicant denies the respondent suffered any prejudice as a result of the non-attendance and stated the IE was also not scheduled until after the hearing date was set. The respondent alleges further prejudice arising from the failure to attend the section 44 IEs and as a result of the non-compliance under section 37(2)(c) of the *Schedule*, any entitlement to a non-earner benefit should be limited to the date the respondent acknowledged the non-attendance, being September 26, 2018.[8] Section 37(2)(c) states an insurer shall not discontinue paying a specified benefit unless,

> (a) the insured person fails or refuses to submit a completed disability certificate if requested to do so under subsection (1);
>
> (b) the disability certificate submitted on behalf of the insured person does not support the insured person's continuing entitlement to the benefit;
>
> (c) the insurer has received the report of the examination under section 44, if the insurer required an examination under that section, and has determined that the insured person is not entitled to the benefit;

Section 44 (1) states that for the purposes of assisting an insurer to determine if an insured person is or continues to be entitled to a benefit under this Regulation for which an application is made, but not more than is reasonably necessary, an insurer may require an insured person to be examined under this section by one or more persons chosen by the insurer.

[14] I find it was reasonable in the circumstances to schedule the IEs under section 44 (1). The respondent argues that, should the applicant be found to be entitled to the non-earner benefit, a negative inference should be drawn from the applicant's failure to attend the IE. I concur.

Non-Earner Benefit

[15] The test for entitlement to a non-earner benefit is set out in sections 7(b) and 12(1) of the *Schedule.* Section 12 (1) states the insurer shall pay a non-

[7] Written submissions of the respondent, tab 13l and 13n.
[8] Written submissions of the respondent, tab 13P.

earner benefit to an insured in the amount of $185 per week who sustains an impairment as a result of an accident if the insured person satisfies that the applicant suffers a complete inability to carry on a normal life as a result of and within 104 weeks after the accident and does not qualify for an income replacement benefit. 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.

[16] The parties referred to the case of *Heath v. Economical Mutual Insurance Company,* [9] which outlines several principles to assess entitlement to a non-earner benefit. In summary, these include:

i. A comparison of the applicant's daily life activities before and post-accident.

ii. A consideration of all the applicant's pre-accident activities but greater weight can be placed on activities seen as more important to the applicant pre accident.

iii. 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.

iv. The accident related injuries must continuously prevent an insured from engaging in substantially all of their pre-accident activities. The disability has to be uninterrupted.

v. The evidence must demonstrate that the insured has significant restrictions in performing an activity as a result of the injuries sustained in the accident.

vi. "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.

[9] *Heath v. Economical Mutual Insurance Company,* 2009 ONCA 391, tab 4, written submission of the respondent. See also the LAT Tribunal decisions in Applicant and Aviva, 2017 CanLII 39433, tab 2, written submission of the respondent and G.V. and Northbridge General Insurance 2017 CanLII 77389 at tab 3.

vii. 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] The issue is whether the evidence presented by the applicant is sufficient to establish entitlement to a non-earner benefit.

[18] Based on the totality of the evidence and for the reasons set out below, I find that the applicant has not established that she is entitled to a non-earner benefit from April 30, 2016 to date and ongoing.

ANALYSIS

Disability Certificates – OCF3s

[19] The applicant submitted several disability certificates (OCF3s) to support the claim for the non-earner benefit which includes the OCF 3s of Dr. Gordanpour, chiropractor, who completed two Disability Certificates (OCF 3s) one dated November 9, 2015 [10] and another September 27, 2016 [11]

[20] The OCF3s did not assist in providing evidence of both pre and post-accident activities and functionality. The OCF 3s other than the OCF 3 dated September 27, 2016 do not provide a comparison of the applicant's pre and post-accident activities. Although the OCF-3s state the applicant is unable to perform housekeeping and home maintenance there is no outline, as is required in *Heath,* of the pre-accident activities performed by the applicant and how they are impacted by the injuries from the accident. As such, the OCF 3s are limited in their evidentiary value. The OCF 3 dated September 27, 2016 by Dr. Gordanpour is the only OCF 3 that outlines the activities the applicant cannot perform as a result of the injuries. The OCF 3 states the applicant's inability to carry on a normal life from her injuries prevent her from lifting, carrying, bending, sitting and standing for prolonged periods of time. However, as described below, by April 2017 the applicant is observed bending, standing and lifting. I agree with the respondent in its submissions that the OCF3s do not confirm entitlement to the non-earner benefit.

Family Doctor Records

[10] Written submissions of the applicant, tab 2. Two additional OCF3s dated May 19, 2016 by Dr. Sabharal, the treating chiropractor, found at tab 8 of the applicant's written submissions and the OCF 3 by Dr. Russi Anger, chiropractor dated July 26, 2017 found at tab 15 provide similar statements and description of injuries.

[11] Written submissions of the applicant, tab 12.

[21] Family doctor records (the Notes) [12] were also submitted by the applicant to support the claim for a non-earner benefit. The Notes immediately following the accident indicate the applicant sustained soft tissue injuries to her shoulder, neck, upper back, bruising of her right knee (described as a small bruise) and right leg. On November 27, 2015, the right knee pain was described as improving. Throughout 2015 and 2016, the Notes state the applicant:

1. suffered from anxiety and had difficulty with sleep;
2. was anxious about falling;
3. spent less time with her family and grandsons;
4. suffered chronic pain (she was not diagnosed by the family doctor with chronic pain);
5. had normal shoulder movement; and
6. developed a pre-occupation with the accident.

The applicant had x-rays taken of her neck, back, shoulders and hands and a CTscan of her head. All results were normal.

I find the Notes do not provide a sufficient description of the applicant's pre accident and post-accident activities of daily living to support her claim for non-earner benefits.

[22] No Notes were introduced into evidence from the family doctor for 2017. The last entry in the Notes relating to the injuries and impairment is dated December 2016. The Notes begin again in March 2018. The Notes become silent in 2017 on the injuries and impairment suggesting the applicant did not see her family doctor in 2017 about the injuries.

[23] From June 5, 2018 to September 24, 2018, the Updated Notes show a change in the applicant's condition and describe serious and severe physical pain suffered by the applicant as a result of the accident. They also refer to three falls the applicant had at her home and a fall and injury to the left leg in 2018 which had resolved. The Updated Notes refer to severe pain in the left knee and hip. The injuries noted immediately after the accident outlined above indicate the applicant injured her right knee, not the left knee and hip.

[12] Clinical notes and records of the family doctor, applicant written submissions, tab 14.

This suggests something else may have occurred in 2018 to cause the applicant pain in the left leg and hip. In summary, the Updated Notes were not produced until 2.5 years after the accident and as outlined above the respondent objected to their admissibility and was not given an opportunity to examine the applicant. I assign the Updated Notes little weight to support the applicant's entitlement to a non-earner benefit in 2018. I also note that on September 6, 2018, the doctor states the applicant is independent with her self-care activities such as bathing and dressing. The applicant did not testify at the hearing. Her testimony could have explained why there are no Notes in 2017 or how the impairment in 2018 is as a result of the accident.

Psychological and Orthopaedic Assessment in 2016

[24] The applicant's position is that she is entitled to a non-earner benefit based on the reports of Dr. Pilowsky and Dr. Benmoftah. Both concluded that the applicant as a result of the injuries sustained in the accident meets the test for a non-earner benefit.

[25] Dr. Judith Pilowsky, psychologist in her Psychological Report dated April 30, 2016, diagnosed the applicant with Major Depressive Disorder, Post-Traumatic Stress Disorder (PTSD) and at risk of developing a Somatic Symptom Disorder. Dr. Pilowsky concluded in her report that the applicant suffers from an ongoing disability which *significantly impairs her ability to perform her activities of daily living which includes household chores, spending time with her family and friends and enjoying a rich and full lifestyle (*my italics*).* Dr. Pilowsky also diagnosed the applicant with emotional deficiencies including depression. She sees the applicant as no longer viewing herself as purposeful. She has progressively deteriorated from a psychological standpoint. In her opinion, the applicant suffers from a complete inability to engage in her activities of daily living "*with the same ease and comfort as before*".

[26] One of the limitations in Dr. Pilowsky's statements on the pre and post-accident activities is that they are based on the self-reporting of the applicant who reported to Dr. Pilowsky that she enjoyed going to the movies, church, playing video games and housekeeping. Dr. Pilowsky reports the applicant is no longer able to do these activities and participate in social and recreational activities as she has lost her motivation due to her pain and physical limitations.[13] Her psychological injuries also prevent her from participating in family, social and recreational activities as she used to. In her re-

[13] Written submissions of the applicant, Report of Dr. Pilowsky, tab 7, page 11.

assessments[14] dated September 27, 2016 and November 3, 2016, Dr. Pilowsky concluded the applicant is having severe difficulty coping with her pain.

[27] The Orthopaedic Assessment by Dr. Osama Benmoftah dated August 24, 2016 [15] diagnoses the applicant with post traumatic headaches, myofascial strain of the cervical spine, right shoulder, thoracic and lumbar spine and chronic pain syndrome. In his assessment, the applicant was functioning without limitation prior to the accident but as a result of her injuries her functionality is limited as follows:

1. Unable to do cleaning, prepare meals, wash windows, do laundry;
2. Unable to take care of 20 plants growing on her balcony;
3. Unable to take a 30 minute walk twice daily;
4. No longer visits friends and goes to the movies;
5. Has lost her desire to engage in hobbies such as embroidery, reading, cooking, baking and playing video games and cards;
6. Has become totally dependent on her friends for assistance in doing household tasks and with her personal care; and,
7. No longer attends church.

I agree with the respondent that Dr. Benmoftah's findings should be questioned in light of the fact that three months prior the IE determined she did not meet the test for a non-earner benefit.

Entitlement to a Non-earner Benefit in 2016

[28] I find the conclusions in the Psychological and Orthopaedic Assessments noted above are contradicted by the findings and conclusions reached by the IE assessors as outlined in the May 26, 2016 Multi-Disciplinary Assessment report.[16] Numerous IEs were completed by the respondent in 2016 and a further medical examination was completed mid 2017 in response to the claim for a non-earner benefit. All concluded the applicant did not meet the

[14] Written submissions of the applicant, Re-Assessment Reports of Dr. Pilowsky, tabs 12, 13.
[15] Report of Dr.Benmoftah, Orthopaedic Surgeon, written submissions of the applicant, tab 9.
[16] Written submissions of the respondent, tab 6. Written submissions of the applicant, tabs 4, 5 and 6.

non-earner benefit test. The IE reports submitted and discussed below include:

a. Dr. Jugnundan, who saw the applicant on May 12, 2016 and completed an orthopaedic consultation report. [17]

b. Dr. Valentin, neuropsychologist, completed a psychological assessment in mid-2016 [18]

c. Ms. Maddix, occupational therapist completed an in home assessment on April 19, 2016 [19] and,

d. Dr. Tepperman, general practitioner, completed an assessment of the applicant on May 29, 2017 and issued a report dated June 7, 2017.[20]

[29] Dr. Jugnundan's IE dated May 12, 2016 notes that the applicant enjoyed knitting and embroidery prior to the accident and continued doing these after the accident but not on a regular basis. The applicant also reported being independent with her self-care but needed assistance getting in and out of the bath from her husband. Further, she was able to do housekeeping chores but avoided heavier tasks. She enjoyed baking but was not able to do this after the accident. He concluded the applicant sustained soft tissue injuries to her neck, shoulders, upper and lower back and palms. I find the activities listed in relation to the applicant's functioning supports the doctor's conclusion that the applicant did not suffer a complete inability to carry on substantially all of her pre-accident activities.

[30] Dr. Valentin, neuropsychologist, noted that post accident the applicant reported pain in her hands, elbow and back which is why she could not cook, wash dishes, mop, laundry, and grocery shop. Her husband did the grocery shopping. She could only make light meals for her and her husband. Dr. Valentin found she suffered from an adjustment disorder with anxious mood. Dr. Valentin did not find her results supported a diagnosis of depression, PTSD or somatization disorder as diagnosed by Dr. Pilowsky. She concluded the applicant had physical limitations but did not have psychological limitations. I agree with the doctor that these limitations did not result in the applicant suffering a complete inability to carry on a normal life.

[17] Written submission of the applicant, tab 4.
[18] Written submissions of the applicant tab 5.
[19] Written submissions of the applicant tab 6.
[20] Written submissions of the respondent, tab 12.

[31] Ms. Maddix in the In-Home IE stated the applicant reported that she was independent with personal care. She reported her husband helped her in and out of the shower. She had partially resumed meal preparation. She cleaned the bathroom. She did laundry with the help of her husband and friend. She also reported to Ms. Maddix that since the accident she had travelled to Niagara Falls. The activities which the applicant is able to do support the conclusion reached by Ms. Maddix, that although there were some changes in the applicant's current abilities, it did not result in the applicant suffering a complete inability to carry on a normal life.

[32] I prefer the reports of the IE assessors noted above and conclusions reached by them in April and May 2016. To begin with, Dr. Pilowsky provided an opinion on the psychological condition of the applicant but did not conduct any validity testing. On that basis I prefer the psychological assessment of Dr. Valentin as it is based on validity testing. Dr. Valentin found no objective evidence to substantiate the applicant's subjective reports of psychological impairment. Dr. Valentin did not find a diagnosis of depression, PTSD or somatization disorder. From a psychological perspective, the applicant did not suffer from a complete inability to carry on a normal life.

[33] Moreover, some of the daily activities were reported to some doctors but not others. As stated by the respondent in its submissions [21] the applicant was selective in her reports to the doctors. For example, she reported to Dr. Pilowsky that she could maintain 20 flower pots on her balcony before the accident, go to parties, play video games and go to church weekly. The applicant did not report activities to Dr. Jugnundan or Dr. Valentin. I find the selective reporting leads me to question the accuracy of the pre and post activities reported by the applicant to Dr. Pilowsky.

[34] I find the evidence of the applicant's activities before and after the accident as reported to the family doctor, Dr. Pilowsky and Dr. Benmoftah conflict with the evidence of Dr. Jugnundan, Dr. Valentin, and Ms. Maddix and the video surveillance described below. There are conflicting reports of what the applicant can and cannot do after her accident. For example, Dr. Benmoftah reports the applicant is totally dependent on her family and friends for self-care yet this is contrary to the findings of Dr. Jugnundan and Ms. Maddix who in May and April 2016 reported that the applicant was independent with self-care. The applicant reported to Dr. Pilowsky that she could not participate in family and household activities yet this is contrary to what was told to Dr. Valentin and Ms. Maddix.

[21] Written submissions of the respondent, page 4.

[35] I find some consistency between the evidence and reporting to the IE assessors with the Notes. I find however the contradictions in the evidence of the various assessors do not support the applicant's claim of what she can and cannot do as a result of the accident and do not establish that she has significant restrictions in performing an activity as a result of the injuries sustained in the accident.

Entitlement to the Non-Earner Benefit in 2017 to date and ongoing

[36] The applicant's evidence in support of her claim included the Notes, the reports of Dr. Pilowsky and Dr. Benmoftah and an affidavit from her son. There is a gap in the medical evidence on the state of the applicant's impairment in 2017 and 2018. No additional medical reports were submitted by the applicant from 2017 and early 2018. The Notes of the family doctor become silent in 2017 on the injuries and impairment and do not resurface until March 2018.

[37] Moreover, the respondent submitted 16 minutes of video surveillance of the applicant taken for 5 days between April 13, 2017 and April 24, 2017 and submitted a Surveillance Report dated April 26, 2017. I watched the entire footage and I found the report to be an accurate depiction of what occurs in the video. The applicant is seen with her husband at a Costco store, where she walks with and without a cane, shops in the store, stands outside for several minutes in the smoking area. She is seen bending and reaching over to put what appears to be her purse or a bag into the back seat of the vehicle unassisted. She is also seen lifting a grocery bag from the rear of the vehicle and placing it into a cart and then pulling the cart to her home. She enters in and out and sits in the vehicle unassisted. Her walk has a normal gait. She is also observed going to church. The applicant in April 2017 is observed shopping, walking and entering and exiting a car without assistance. She can bend, lift and twist and enter and exit a car with no difficulty or assistance. The video evidence has to be compared with the statement in the OCF 3 which states that in September 2016 she cannot bend, stand, lift or twist. She does not drive a car but she never drove a car before the accident. The applicant has made several statements that her husband did the grocery shopping. This is opposite to what she is observed doing in the video on that occasion. This is also the case in respect of her claim she cannot go to church.

[38] The applicant's son was also questioned about the surveillance during cross examination and given an opportunity to view the video. He noted that his mother in the video was seen:

1. Shopping at Cosco
2. Not shuffling her feet
3. Holding the cane
4. Using left hand to lift a bag
5. Pushing a small cart on her own

[39] The applicant's son indicated his mother is strong and independent. Seeing her walk with a cane is out of character. He also testified that she and a friend can do household tasks (dusting) and laundry. In paragraph 91 of his affidavit, he stated for one year after the accident, his mother rarely left the home, mostly to attend appointments. When questioned of how he knew this, he stated he learned of it when he talked to his dad. His cross-examination established that his observations were not from his own observations or from talking to his mother but from talking to his father. The bulk of the time his conversations were with his father and not the applicant. Although hearsay evidence may be permitted, I find his personal observations about his mother's functioning before and after the accident would have been of more value.

[40] Dr. Tepperman in his assessment report dated June 7, 2017 indicated the applicant reported independence with her self-care. She reported that her husband did all the cooking, cleaning laundry and shopping. Yet the applicant in April 2017 is observed shopping, Dr. Tepperman found the applicant suffered soft tissue injuries only with no neurological impairment. He concluded there was no impairment rendering the applicant incapable of performing all of her pre–accident activities.

[41] There is no doubt the applicant was active before the accident. She loved social and homemaking activities. I find that based on the video surveillance and the report of Dr. Tepperman, that in April 2017 the applicant had returned to many of her pre accident activities such as shopping and going to church. Dr. Tepperman reports she is independent with her personal care. The principles in *Heath* indicate that if the applicant is experiencing significant restrictions, it may not count as "engaging in" that activity. I find

that this is not the case here. The applicant by April 13, 2017 had resumed many of her pre-accident activities.

[42] The test for a non-earner benefit requires that the accident related injuries must completely and continuously (my emphasis) prevent an insured from engaging in substantially all of their pre-accident activities. The disability has to be uninterrupted. I find the evidence does not establish this.

[43] The applicant submitted the Updated Notes into evidence for the period of June 5, 2018 to September 2018 which appear to reflect that the applicant is some 2.5 years post- accident suffering severe pain and limitations. As indicated above, I assign these Notes little evidentiary value given the missing Notes prior to this period. They are also inconsistent with the evidence from 2017 which indicates the applicant had resumed functionality. Moreover, I am not able to reconcile the video surveillance evidence showing she can walk freely with and without a cane, is able to stand, reach overhead, bend and move smoothly with unrestricted range of motion with the Updated Notes.

[44] Based on the totality of the evidence, there is insufficient evidence to support a claim by the applicant that she suffers a complete inability to carry on a normal life as a result of an accident. For the reasons stated, I find that the applicant is not entitled to a non-earner benefit from April 30, 2016 to date and ongoing.

An Award Under Ontario Regulation 664

[45] Section 10 of Ontario Regulation 664 states that an amount of up to 50 per cent with interest on all amounts owing may be awarded if an insurer has unreasonably withheld or delayed payments.

[46] The test for this award is a particularly onerous one: has an insurer unreasonably withheld or delayed payment? I do not find that the respondent's actions in adjusting this file rose to the threshold of "unreasonable" behaviour. There has been no evidence submitted that would lead me to conclude that the respondent acted in bad faith, nor do I find that the respondent unreasonably withheld or delayed payment necessary for treatment. Thus, the claim for an award pursuant to section 10 of Ontario Regulation 664 is dismissed.

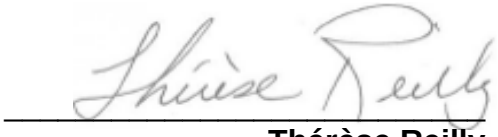
INTEREST

[47] Given that there has been no finding that the applicant is entitled to any further payment of benefits, interest is also not an issue. Any claims of interest on overdue benefits owed are hereby dismissed.

CONCLUSION

[48] For the reasons outlined above, I find that the applicant is not entitled to a non-earner benefit from April 30, 2016 to date and ongoing. The claim for an award pursuant to section 10 of Ontario Regulation 664 is dismissed. The claim for interest is dismissed.

Released: March 18, 2019



Thérèse Reilly
Adjudicator