



Citation: Desai v. Intact Insurance Company, 2025 ONLAT 24-001115/AABS

Licence Appeal Tribunal File Number: 24-001115/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:

Shilpa Desai

Applicant

and

Intact Insurance Company

Respondent

DECISION

ADJUDICATOR:

Harouna Saley Sidibé

APPEARANCES:

For the Applicant:

Michael Rotondo, Counsel

For the Respondent:

Paras Gogna, Counsel

HEARD:

By way of written submissions

OVERVIEW

- [1] Shilpa Desai, the applicant, was involved in an automobile accident on February 17, 2021, 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 the respondent, Intact Insurance Company, 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 of \$185.00 per week from February 10, 2022, to February 17, 2023?
 - ii. Is the respondent liable to pay an award under s. 10 of Reg. 664 because it unreasonably withheld or delayed payment to the applicant?
 - iii. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [3] For the reasons below, I find that:
1. The applicant is entitled to an NEB of \$185.00 per week from February 10, 2022, to February 17, 2023, plus interest.
 2. The applicant is not entitled to an award.

PROCEDURAL ISSUE

- [4] On August 13, 2024, the applicant filed a motion to strike the respondent’s section 44 examination reports prepared by Dr. Stephen Bartol (orthopaedic surgeon) and Ms. Kelly Wendt (occupational therapist), alleging that the Notices of Examination (“NoE”) were invalid under s. 44 of the *Schedule*. The respondent opposed the motion, arguing that the applicant had consented to electronic service under s. 64(2)(e) of the *Schedule* and that the NoE provided sufficient medical and other reasons.
- [5] Through a letter dated March 5, 2025, the applicant officially withdrew the motion scheduled for April 11, 2025.

ANALYSIS

Is the applicant entitled to a NEB?

- [6] I find that the applicant is entitled to the NEB claim.
- [7] Section 12(1) provides that an insurer shall pay an NEB to an insured person who sustains an impairment as a result of the accident, if the insured person suffers a complete inability to carry on a normal life as a result of and within 104 weeks after the accident. Section 3(7)(a) defines a “complete inability to carry on a normal life” as “an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident.” The Court of Appeal set out the guiding principles for NEB entitlement in *Heath v. Economical Mut. Ins. Co.*, 2009 ONCA 391, which generally focuses on a comparison of the applicant’s pre- and post-accident activities.

Pre-accident activities

- [8] At the time of the accident, the applicant was not employed, having last worked as a general labourer in March 2020. Her primary responsibilities included housekeeping and childcare.
- [9] According to the section 44 assessments conducted by Dr. Stephen Bartol and Ms. Kelly Wendt, the applicant was independent with personal care and shared household responsibilities with her spouse. These included cooking, cleaning, laundry, dishwashing, sweeping, mopping, vacuuming, dusting, bed making, and bathroom cleaning. She also helped her husband with grocery shopping. She was not responsible for garbage, snow, or lawn maintenance. As a mother, she shared childcare responsibilities for her one-year-old daughter, including bathing, dressing, and playing.
- [10] The respondent relies on the NEB Insurer’s Examination conducted between December 7 and December 22, 2021, which corroborates the applicant’s independence with personal care and her shared responsibilities in housekeeping and childcare. She also enjoyed social visits with friends and family.

Post-accident activities

- [11] The applicant submits that following the accident, her functional abilities have significantly declined. Her husband has assumed the majority of housekeeping and childcare responsibilities. She is limited to light tasks such as folding laundry and washing dishes. She requires assistance with lower-body dressing, shaving, trimming toenails, and meal preparation. She has not resumed heavier

housekeeping tasks, such as sweeping, vacuuming, mopping, dusting, bed-making, bathroom cleaning, or grocery shopping.

- [12] Regarding childcare, the applicant is unable to dress or change her daughter, carry her, or load her into a vehicle. She can assist with bathing and styling her daughter's hair, and can play with her while seated on a bed, but cannot engage in activities at ground level. She also experiences anxiety as a motor vehicle passenger.
- [13] The respondent submits that the applicant remains capable of performing some housekeeping and childcare tasks. She is independent with upper-body personal care and can perform waist-level tasks such as dishwashing, dusting, and sweeping. She can assist with bathing and styling her daughter's hair and can play with her while seated. The respondent notes that the applicant continues to engage in social visits and describes her typical day as including walking, playing with her daughter, exercising, attending therapy, and completing her morning routine.

Complete inability to carry on a normal life

- [14] The applicant sustained acute, nondisplaced fractures to the L1–L4 transverse processes in her lumbar spine as a result of the accident, confirmed by CT imaging from Windsor Regional Hospital. Follow-up imaging in April 2021 indicated incomplete healing.
- [15] The OCF-3 dated March 18, 2021, completed by physiotherapist Danese Tenzer, identifies multiple injuries, including lumbar fractures, lumbar and cervical sprain/strain, and abdominal contusion. The report notes that the applicant experienced severe pain from the fractures, requiring her to spend much of each day lying down. The injuries were compounded by the fact that the accident occurred shortly after she had undergone a C-section.
- [16] On April 6, 2021, the respondent approved the applicant's entitlement to the NEB, effective March 18, 2021.
- [17] A subsequent OCF-3 dated June 10, 2021, completed by physiotherapist Jay Arora, documents continued pain in the thoracic spine, cervicogenic symptoms, and headaches. It notes that the applicant had difficulty lifting her seven-month-old daughter, required assistance with personal care, and walked slowly and cautiously.
- [18] On June 23, 2021, the respondent confirmed the NEB entitlement and began issuing biweekly payments of \$370.00.
- [19] On November 12, 2021, the respondent requested a section 44 assessment to determine ongoing eligibility for the NEB.

- [20] On January 21, 2022, the respondent advised that, based on the section 44 Insurer's Examination reports, the applicant no longer met the criteria for NEB entitlement.
- [21] Dr. Stephen Bartol, orthopaedic surgeon, authored a section 44 report dated January 10, 2022. He opined that the applicant was experiencing temporary physical limitations due to the accident, including difficulty bending, stooping, and lifting. These limitations affected her ability to perform specific childcare tasks and household chores. He noted that she could shop with assistance and avoid heavy lifting. He anticipated gradual improvement with full recovery expected within a year, subject to reassessment if symptoms persisted.
- [22] Ms. Kelly Wendt, occupational therapist, also completed a section 44 report dated January 10, 2022. She confirmed the applicant's injuries and noted that, as of June 2021, the applicant was actively engaged in biweekly rehabilitation and daily exercises. She demonstrated functional movement with moderate limitations in trunk mobility. While she was independent in many personal care and light household tasks, she required assistance with lower-body dressing, bathing, meal preparation, heavier cleaning, grocery shopping, and childcare involving lifting. Ms. Wendt concluded that the applicant did not suffer a complete inability to carry on a normal life, and her functional testing results supported this conclusion.
- [23] In contrast, Dr. Zeeshan Waseem, a physiatrist, in his report dated August 9, 2023, opined that the applicant's condition had become chronic and permanent. He noted persistent lower back pain, reduced sitting and standing tolerances, and difficulty with bending and lifting. The applicant continued to rely on family assistance for housekeeping and caregiving and had ceased participating in previously enjoyed activities such as road trips. He concluded that the applicant's impairments had significantly disrupted her daily routine and ability to engage in pre-accident activities, and that she met the criteria for a complete inability to carry on a normal life.
- [24] Applying the test set out in *Heath*, I must determine whether the applicant is continuously prevented from engaging in substantially all of the activities in which she ordinarily engaged before the accident. As para 50 of *Heath* emphasizes, the test is strict: it is not enough that the applicant experiences inconvenience or difficulty, nor is it sufficient that she can "go through the motions" of certain tasks. The question is whether she can meaningfully perform most of her pre-accident activities in a way that reflects her normal life.
- [25] I give greater weight to Dr. Waseem's report, which is the most recent and provides a comprehensive assessment of the applicant's current condition. His findings, combined with the applicant's testimony, establish that she is unable to meaningfully engage in childcare, household management, and recreational

activities that formed a substantial part of her pre-accident life. While she may attempt some tasks, *Heath* makes clear that superficial or token participation does not satisfy the test. For example, the applicant cannot lift her child, perform heavier cleaning, or participate in family outings such as road trips—activities that were integral to her normal life prior to the accident. These limitations are not temporary; they have persisted for more than two years, despite rehabilitation efforts. The section 44 assessors anticipated recovery, but those predictions have not materialized and do not reflect her current reality.

- [26] In light of *Heath*, I find that the applicant is continuously prevented from engaging in substantially all of her pre-accident activities. Her inability is not partial or intermittent; it is significant and ongoing. The evidence demonstrates that she cannot meaningfully resume the activities that defined her normal life, including childcare, housekeeping, and recreational pursuits.
- [27] Accordingly, on a balance of probabilities, the applicant meets the strict test set out in *Heath* and is entitled to the non-earner benefit.

Interest

- [28] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the *Schedule*. The applicant is entitled to interest on any overdue benefits payments in accordance with section 51.

Award

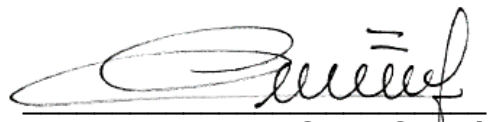
- [29] The applicant sought an award under s. 10 of Reg. 664. Under s. 10, the Tribunal may grant an award of up to 50 per cent of the total benefits payable if it finds that an insurer unreasonably withheld or delayed the payment of benefits.
- [30] The applicant submits that the respondent acted unreasonably in its handling of her claim for NEB. She argues that the respondent failed to properly instruct its section 44 assessors on the correct legal test for NEB entitlement. Specifically, she alleges that the assessors were directed only to the statutory definition of “complete inability” under section 3(7) of the *Schedule*, without any guidance on its legal interpretation. As a result, she contends that the assessors applied an incorrect standard, producing reports that aligned with the insurer’s interests and ultimately supported the termination of her NEB entitlement.
- [31] The applicant further argues that the respondent relied exclusively on the conclusions of the section 44 reports to deny ongoing entitlement to NEB, while disregarding substantive medical findings within those same reports that supported her claim. She submits that this constitutes a failure to properly adjust the file and fulfill the insurer’s obligations under the *Schedule*.

- [32] In response, the respondent denies that it unreasonably withheld or delayed payment of benefits. It submits that the file was adjusted in accordance with the *Schedule* and that any denial of benefits, even if later found to be incorrect, was not unreasonable to the extent that would justify an award. The respondent emphasizes that insurers are not held to a standard of perfection.
- [33] The respondent states the file was closed due to inactivity, noting the last treatment plan was in December 2021, with no updates until October 2023. Unanswered emails in December 2022 and May 2023 led to internal closure on August 30, 2023. They argue the Notices of Examination included clear reasons, citing the applicant's condition, expected disability duration in the June 14, 2021, OCF-3, and nine months since the accident.
- [34] I accept the respondent's submission that an award under section 10 is a high threshold. While the applicant raises concerns about the legal standard applied by the section 44 assessors, there is insufficient evidence to conclude that the respondent acted unreasonably or in bad faith. The respondent's reliance on the assessors' conclusions, even if ultimately incorrect, does not rise to the level of misconduct required to justify an award. The evidence does not demonstrate that the respondent deliberately ignored relevant medical information or failed to adjust the file in accordance with its obligations under the *Schedule*.
- [35] Accordingly, the applicant is not entitled to an award.

ORDER

- [36] For the above reasons, it is ordered that:
- i. The applicant is entitled to an NEB of \$185.00 per week from February 10, 2022, to February 17, 2023, plus interest.
 - ii. The applicant is not entitled to an award.

Released: November 27, 2025



Harouna Saley Sidibé
Adjudicator