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Non-Earner Benefits: What You Need To Know

Prior to the changes to the *Schedule* that came about on September 1, 2010 there were three available claims for weekly benefits, namely: (a) income replacement benefits, (b) caregiving benefits, and (c) non-earner benefits. Income replacement benefits were earmarked for someone who could not return to work, caregiving benefits for someone who could not provide for a person in need of care, and non-earner benefits for someone who did not qualify for the other two headings. Non-earner benefits was often the claim of last resort as it encompassed a smaller percentage of claimants, has the most onerous test for entitlement of the three, and includes a six month waiting period. Subsequent to the changes in the *Schedule* post September 1, 2010, the spotlight has now somewhat shifted as caregiving benefits have been rendered obsolete (for non-catastrophic claims) which thereby has reduced claims for weekly benefits to two choices: income replacement or non-earner.

While as the claim for this weekly benefit is certainly not new, it appears to be getting more attention. Between 2009 – 2012 the Court of Appeal has weighed in on this weekly entitlement on two occasions and there has been a fair number of trial / arbitration decisions interpreting the entitlement to same. In the coming period where claims for non-earner benefits will surely increase, knowledge of the test for entitlement is of vital importance.

Claims for non-earner benefit are often very difficult to assess. Since these claims are being advanced by people who are not working or taking care of children; very often these claimants have significant health problems prior to the motor vehicle accident. In a nutshell, we are left to determine to what extent the motor vehicle accident has impacted the claimant's pre-accident lifestyle. If prior to the accident a claimant spent all of his time watching television on account of a disability, then to what extent would the loss of a limb from a motor vehicle accident impact his daily activities. At the same time, if a claimant with significant pre-accident health problems is no longer able to do the little things that brought her pleasure due the accident, (such as a daily walk because of soft tissue pain), then she may very well meet the test for non-earner benefits.

The Basics

Section 12(1) of the *Schedule* sets out the three requirements for entitlement to this benefit:

(1) an insured must suffer an impairment as a result of an accident;

(2) the insured must suffer a complete inability to carry on a normal life as a result of and within 104 weeks after the accident; and

(3) the insured must not qualify for an income replacement benefit.

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Section 2(4) of the *Schedule* interprets "a complete inability to carry on a normal life" to require that the person suffer from an impairment as a result of the accident that "continuously prevents the person from engaging in substantially all the activities in which the person ordinarily engaged before the accident".

A claimant is not entitled is to claim for non-earner benefits for the first 26 weeks post loss. A person under the age of 16 is not entitled to a non-earner benefit. After the first 26 weeks the weekly claim for the entitlement is $185 until the two year mark. After the two year mark the weekly entitlement increases to $320 if the claimant was enrolled in school at the time of the loss. Unlike claims for income replacement benefits and caregiving benefits there is no change to the test at the two year mark. Also, unlike claims for income replacement and caregiving benefits, there is no fluctuation in terms of the weekly quantum. If you pass the test for entitlement the value of the entitlement is either $185 or $320 weekly.

The Test For Entitlement

Any contemporary analysis of the test for entitlement for non-earner benefits begins with the Court of Appeal decision of *Heath v. Economical* (2009). The Court of Appeal remarked that claims for non-earner benefits has not been considered extensively by the courts but that it had been by way of Arbitration decisions. The Court of Appeal then provided a set of guiding principles to be followed, (based primarily on its review of the key Arbitration decisions), as being part of a proper approach to determine entitlement to this head of benefit.

In short, the Court of Appeal advised that we must look at the claimant's pre-accident and post accident activities. When looking at the claimant's pre-accident activities we must do so over a reasonable time frame and not simply a one-time snap shot. Further, when we consider a claimant's pre-accident activities a certain amount of additional weight must be given to those activities that were most important to a claimant. Post accident we must assess whether the claimant is continuously prevented from engaging in her pre-accident activities. We must also consider if the claimant is engaging in her post accident activities in a qualitative basis and not simply going through the motions. Finally, the pain that the claimant feels when performing her pre-accident activities is a relevant consideration even if she is functionally able to do so.

In depth, the Court of Appeal provided the following six factors to be considered:

Generally speaking, the starting point for the analysis of whether a claimant suffers a complete inability to carry on a normal life will be to compare the claimant's activities and life circumstances before the accident to his or her activities and life circumstances after the accident.

Consideration of a claimant's activities and life circumstances prior to the accident requires more than taking a snap-shot of a claimant's life in the time frame immediately proceeding the accident. It involves an assessment of the appellant's activities and circumstances over a reasonable period prior to the accident, the duration of which will depend on the facts of the case.

In order to determine whether the claimant's ability to continue engaging in "substantially all" of his or her pre-accident activities has been affected to the required degree, all of the pre-accident activities in which the claimant ordinarily engaged should be considered. However, in deciding whether the necessary threshold has been satisfied, greater weight may be assigned to those activities which the claimant identifies as being important to his / her life.

It is not sufficient for the claimant to demonstrate that there were changes in his or her post accident life. Rather, it is incumbent on a claimant to establish that those changes amounted to him or her being continuously prevented from engaging in substantially all of his pre-accident activities. The phrase "continuously prevents" means that a claimant must prove "disability or incapacity of the requisite nature, extent, or degree which is and remains uninterrupted".

The phrase "engaging in" should be interpreted from a qualitative perspective and as meaning more than isolated post-accident attempts to perform activities that a claimant was able to perform before the accident. The activity must be viewed as a whole, and claimant who merely goes through the motions cannot be said to be "engaging in" an activity. Moreover, the manner in which an activity is performed and the quality of performance post accident must also be considered. If the degree to which a claimant can perform an activity is sufficiently restricted, it cannot be said that he or she is truly "engaging in" the activity.

In cases where pain is a primary factor that allegedly prevents the insured from engaging in his or her former activities, the question is not whether the insured can physically do these activities, but whether the degree of pain experienced, either at the time, or subsequent to the activity, is such that the individual is practically prevented from engaging on those activities.

In *Barnes v. Motor Vehicle Accident Claims Fund and TTC Insurance Company* (2011) (Arbitration) the Arbitrator applied the test set out above, and commented that "entitlement to non-earner benefits requires a claimant to satisfy one of the most

stringent tests in the *Schedule*".

In this case the claimant suffered from significant health problems prior to the herein loss. The Arbitrator opined that:

"When individuals whose health and functionality have already been compromised before an automobile accident apply for non-earner benefits one must compare their normal life before the automobile accident with their normal life afterwards. The difficulty is that the normal life of such an individual may already include a decreased level of functionality, mobility, etc. In some cases even a restriction on one aspect of life activity may be enough to meet the complete inability test due to the qualitative and personal importance of that activity to the specific person."

After conducting a thorough analysis of the claimant's life pre and post loss he found that while the claimant's life had been impacted by the accidents she continued to live "pretty much the same life" as she has prior to them. She was found not to pass the test for non-earner benefits.

Similarly, in Mangallon v. TTC Insurance Company (2009) (Arbitration) the Arbitrator had the following comments regarding the onus to prove non-earner benefits:

"The test for entitlement to non-earner benefits, as set out in the *Schedule*, is stringent. An impairment sustained in the accident must be one that continuously prevents Mrs. Mangallon from engaging in substantially all of the activities in which she ordinarily engaged before the accident."

In that case the Arbitrator found that the claimant's pre-accident activities had already been impacted on account of her significant pre-accident health problems. The Arbitrator considered the appropriate time period to assess the claimant's activities of daily living to be in the one year prior to the loss and two years post loss. Ultimately the Arbitrator found that the motor vehicle accident "pales into insignificance" when compared to her other health problems. Consequently she was found not entitled to non-earner benefits.

Earning Money And Entitlement To Non-Earner Benefits

By virtue of the act that this head of benefits is called a "non-earner" benefit one would perhaps assume that this benefit was earmarked for people who did not work. Indeed, one of the criteria for entitlement to this benefit is that a claimant does not qualify for an income replacement benefit. Two recent courts decision in 2011 and 2012 have challenged this assumption.

In *Martin v. TD General Insurance Company* (2011) the claimant worked for 4.5 months prior to the accident on a daily basis taking care of her friend's child and was paid $30.00 a day ($150.00 for the week). The claimant would have qualified for an income replacement benefit and her weekly rate would have been about $120.00 up until the two year mark and then increased to $185.00 a week thereafter. Instead, the claimant sought payment for non-earner benefits. The Court accepted the claimant's argument that her connection and commitment to the workforce at the time of the accident was sporadic, and that she was primarily a homemaker. The claimant did not regard the babysitting to be a job, did not report the money on her income tax returns, and was primarily doing this as a favour for a friend. Her babysitting activity was not considered to be employment.

Post accident the claimant received remuneration for two activities. First, she worked as a personal assistant to a businessman in which she was paid the equivalent to $100.00 as week for four months. She participated in this activity for therapeutic reasons at the suggestion of her doctor. She quit this position when her employer first verbally abused her. The Court found that she earned less at this position then when she worked as a babysitter and that it was not employment within the meaning of the *Schedule*. She was found entitled to non-earner benefits over the course of her "work" at this position.

Within a few weeks of ceasing to work as a personal assistant, she then obtained employment at a convenience store as a cashier/clerk. She initially worked 16-20 hours a week which was later increased to 25-30 hours a week. She worked there for a total of 2.5 years until she quit. The Arbitrator found that the work as a cashier was akin to working. However, despite the fact that the claimant was working as a cashier, her entitlement to non-earner benefits only came to an end once the insurer obtained the requisite medical assessments that found that she did not have a disability. This was about four years after the accident, despite the fact that the claimant had been working as a cashier consistently for 2.5 years. It was not enough that the claimant was working more hours then she had worked before the loss, but medical assessments were required to say that she was not disabled.

In Galdamez v. Allstate (2012) the Court of Appeal took the issue of entitlement to non-earner benefits when the claimant is earning money one step further. In that case, the Court found that a claimant can only qualify for a non-earner benefit if she does not qualify for an income replacement benefit. Technically the statutory language does not say that the claimant cannot be working. In theory a claimant could be working at the time of the accident and not be able to prove the test for entitlement to an income replacement

benefit but still be able to prove the test for non-earner benefits.

While the test for non-earner benefits appears to be much more onerous then the test for income replacement benefits; the court envisioned a scenario where there could occur. The Court of Appeal stated as follows:

"Although I consider it unlikely that persons who can work at their pre-accident jobs following an accident will often meet the disability standard for non-earner benefits, I do not rule out such a possibility.

For example, in jobs where mobility is not a requirement (e.g. department store greeter, telemarketer, etc) and the job was not of great importance in the claimant's pre-accident life, it may be possible for a claimant who returns to his or her pre-accident employment following an accident to satisfy the test for non-earner benefits."

As such, the Court of Appeal raised the possibility that a claimant could be working full time at a job he does not care for prior to the loss and still be found entitled to non-earner benefits if he continues with this job post loss. For instance, if a world class bicyclist works as a store greeter at Walmart pre and post loss, and subsequent to the accident can never bike again, then he may be found entitled to non-earner benefits. If it is determined that his biking was the paramount activity he was focussed on, and his job was simply an after-thought, then this would appear to pass the test as set-out by the Court of Appeal.

Conclusion

The test to prove an entitlement to non-earner benefits is undoubtedly onerous. However, the actual language of the *Schedule*, in which a claimant must prove a "complete inability to carry on a normal life", is not quite as strong as it may sound. A claimant does not have to prove that she cannot completely do anything, but rather an impairment for a significant amount of quality things that she did prior to the accident. A thorough analysis of the claimant's pre-accident life must be compared to what she has done post-accident. Indeed, a claimant may in fact earn money pre and post accident and still be found entitled to a non-earner benefit. Despite the complexity of the test, and the difficulty analysing a claimant's life, this remains a good statutory defence for an insurer. While I suspect that claims for non-earner benefits will increase in quantity, I believe that a good understanding of the test for entitlement will allow us to challenge the quality of these applications.

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