CITATION: Heath v. Economical Mutual Insurance Company, 2009 ONCA 391
Date: 20090511
Docket: C46664

COURT OF APPEAL FOR ONTARIO

Simmons, Blair and Juriansz JJ.A.

BETWEEN

David Heath

Plaintiff/Respondent

and

Economical Mutual Insurance Company

Defendant/Appellant

James R. Adams, for the appellant

No one appearing for the respondent

Heard: January 29, 2009

On appeal from the judgment of Justice J.C. Kennedy of the Superior Court of Justice dated January 9, 2007.

Simmons J.A.:

I. Overview

[1] Mr. Heath was injured in a rear-end collision on March 10, 1998. At the time of the accident, he was 39 years old and had not worked steadily for several years. In

addition to suing the owner and the driver of the mini-van that hit his car, Mr. Heath started an action against his own insurer for non-earner benefits under the *Statutory Accident Benefits Schedule--Accidents On or After November 1, 1996*, O. Reg. 430/96 (the "1996 SABS").

[2] Following a trial in 2006, Kennedy J. granted Mr. Heath's claim for non-earner benefits to the date of his decision and also declared that Mr. Heath's "entitlement to non-earner benefits [shall] continue as long as he remains in the condition where he suffers from [a] complete inability to engage in substantially all of the activities in which he would ordinarily engage."

[3] Economical Mutual Insurance Company raises two main issues on its appeal from the trial judge's order:

i) Did the trial judge apply the wrong test for determining whether Mr. Heath is entitled to non-earner benefits?

ii) Was there evidence at trial capable of supporting Mr. Heath's claim for non-earner benefits?

[4] For the reasons that follow, I would allow the appeal, set aside the trial judge's order and dismiss Mr. Heath's action.

II. The Appeal Hearing

[5] Before turning to the issues on appeal, I will explain why we proceeded with the appeal hearing in Mr. Heath's absence.

[6] At the request of Mr. Heath who indicated that he could not travel to Toronto for this appeal, due to his medical condition, the appeal was scheduled to be heard by video-conference and the parties were to attend at the London Courthouse. Mr. Heath was not present when the hearing began. Counsel for Economical advised us that Mr. Heath left a message with his office earlier in the week indicating that he would not be attending.

[7] Prior to hearing argument, the court took a brief recess because we had determined that the court of appeal office did not accept for filing various documents Mr. Heath had served on counsel for Economical due to non-compliance with the *Rules of Civil Procedure*. When we resumed the hearing, counsel for Economical indicated that Mr. Heath had attended the London Courthouse during the recess but had elected not to remain.

[8] As it was apparent that Mr. Heath was aware of the hearing but chose not to attend, we proceeded with the hearing in his absence.

[9] Mr. Heath wrote to the court after the appeal was heard. His material does not satisfy the requirements for making submissions following an appeal hearing.

III. Background

i) The accident

[10] Mr. Heath's car was struck from the rear by a mini-van while stopped at a stop sign. The driver of the mini-van testified that she initially stopped behind Mr. Heath, but then took her foot off the brake because she saw his brake lights go off. Although she did not touch the accelerator, her mini-van moved forward. Mr. Heath's brake lights came back on and she was unable to stop before hitting him.

[11] According to the driver of the mini-van, the mini-van was not damaged in the accident. Mr. Heath acknowledged that his car was not moved forward as the result of the impact from the rear.

ii) Mr. Heath's claim for non-earner benefits

[12] Mr. Heath was unemployed but planning to attend school on the date of the accident. He started his action against Economical on May 30, 2002. He claimed that he was entitled to non-earner benefits under the 1996 SABS because he was completely unable to carry on a normal life as a result of injuries he sustained in the accident.

iii) The trial

[13] Mr. Heath's claim against Economical was heard together with his action against the owner and the driver of the mini-van that hit his car. Although there was some dispute over the severity of the collision, the owner and driver of the mini-van admitted liability for the accident.

[14] Mr. Heath was unrepresented at trial and did not call any expert witnesses to testify on his behalf. However, because the defence experts relied on Mr. Heath's treatment records in preparing their reports, counsel for the owner and the driver of the mini-van filed a brief at trial containing those records.

[15] Mr. Heath's treatment records included a Health Status Report completed by Mr. Heath's then family doctor, Dr. Courchene, on September 30, 1998 in relation to an application by Mr. Heath for income support under the Ontario Disability Support Program. The treatment records also included medical reports dated September 27, 1999 and November 3, 1999 from Dr. Garth Johnson, an orthopaedic surgeon who examined Mr. Heath on September 24, 1999 and subsequently reported on the outcome of various x-rays and tests.

[16] The Health Status Report indicated that Mr. Heath sustained a whiplash injury on March 10, 1998, that he suffers from degenerative disc disease and that his principal conditions were likely to continue for more than one year.

[17] The Health Status Report included an Activities of Daily Living Form. In that form, Dr. Courchene indicated that, six months post-accident, Mr. Heath was completely independent in most areas (mobility, situational responses, cognition, personal care, homemaking, communication, shopping, handling finances and community activities) but had modified independence (indicating a minimal impact on lifestyle) in a few areas: ability to participate in sustained activity connected with occupational activities; pain

limitations; and use of transportation (limitations on driving distance because of neck pain). Mr. Heath acknowledged at trial that Dr. Courchene completed the Activities of Daily Living form based on information supplied by Mr. Heath.

[18] Dr. Johnson indicated that Mr. Heath complained of neck pain, lower back and hip pain, and left foot pain. However, x-rays of Mr. Heath's left foot and ankle were "completely normal" as were x-rays of his pelvis. X-rays of Mr. Heath's cervical spine revealed "mild disc space narrowing at C5/6 and C6/7 and some very small anterior osteophytes" while x-rays of his lumbar spine showed "slight loss of his lumbar lordosis" and "disc space heights...intact." Dr. Johnson's November 3, 1999 report included the following comments:

> I believe that these results indicate, as I felt, that he has some mild mechanical and postural neck pain based on some very minimal degenerative changes. There is no neurological component to his problem. There is no indication to consider further investigation or surgery. I would suggest symptomatic treatment only. Certainly, I see no indication to consider narcotic analgesics. My impression is that he is certainly physically capable of performing light duties. I cannot identify a specific limiting factor other than deconditioning which would limit his physical capability.

[19] In contrast to these reports, Mr. Heath testified that he suffered numerous injuries as the result of the accident including:

- a radial lucid fracture[1] at C6-C7;

[1] Mr. Heath indicated this meant he sustained a chipped collarbone.

- subluxations on both the left and right sides of his neck;
- fractures at T7, T8 and T9;
- his right hip was twisted and his right leg is 2.2 cm. shorter than his left leg;
- lower back subluxations and slipped discs;
- cervical-cardiovascular associated stroke;
- myopia;
- cracking sounds in his feet and ankles; and
- tingling sensations, headaches and body pain.

[20] In cross-examination, Mr. Heath stated that he believed that his accident-related injuries began with a bump on the side of his neck that kept getting bigger and bigger, and that his neck pain had twisted his body sideways to the right and lifted his hip. He said his neck pain started to get worse in 1999, when it moved up into his head and down his legs and arms.

[21] Mr. Heath also confirmed in cross-examination that his 1999 application for Ontario Disability Support Plan Benefits had been turned down. However, he testified that he began receiving such benefits about four months prior to trial. As the result of this evidence, a decision of the Social Benefits Tribunal dated May 26, 2005 and a medical report referred to in that decision were filed. The medical report was dated February 15, 2005 and was prepared by Dr. Keith Sequeira, a specialist in physical medicine and rehabilitation, who saw Mr. Heath at the request of Mr. Heath's former counsel. Dr. Sequeira subsequently attended the trial for cross-examination by the defence.

[22] Dr. Sequeira's report indicates that Mr. Heath "sustained a neck injury consistent with a whiplash associated disorder grade II" in the accident. In his report, Dr. Sequeira also states:

> This has developed into a chronic neck soft tissue pain syndrome that has been caused by this accident. He then began to experience various other regions of pain over the subsequent years. The other body areas of impairment likely have a multifactorial etiology that may in part relate to the progression of this neck pain into a chronic pain syndrome over the subsequent years and the resultant splinting and altered body mechanics caused by these neck impairments.
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> ...
>
> From a physical standpoint, Mr. Heath is subjectively significantly disabled. He described his injuries as being quite intense and he is under the impression that he has sustained multiple fractures that have either been ignored or not addressed by medical personnel. I am not aware of any fractures that afflict Mr. Heath and opine that his injuries are of a soft tissue etiology. His impression of his own impairments is an important area that needs to be addressed, as his perception of his injuries is very relevant in that it impacts on his willingness or reluctance to participate in activity and his present state of deconditioning, impairments, and disabilities...
>
> Pragmatically, Mr. Heath has profound vocational and functional limitations. He has essentially not worked since 1998 because of subjective and objective impairments. His current prognosis for vocational return is poor given this passage of time, his present skill set, experience, training, and aptitudes. In my opinion, he is substantively restricted in this regard and is highly unlikely to successfully achieve any sustainable vocational return at this point. In my opinion, Mr. Heath also requires permanent physical restrictions for future vocational, avocational and day to day endeavors which constitute:

i) Limit sustained or repetitive neck postures;

ii) Avoid repetitive, moderate or heavy lifting and carrying;

iii) Limit work at or above shoulder height.

These restrictions need to be in place permanently for vocational, avocational, and day to day roles for Mr. Heath.

[23] In his trial evidence, Dr. Sequeira indicated that although it was possible Mr. Heath could have sustained a spinal wedge fracture referred to in a March 30, 1999 x-ray report in a low speed collision, it was not likely.

[24] In addition to filing various medical reports and playing videotaped surveillance of Mr. Heath during cross-examination, the defence called the driver of the mini-van and Dr. A.B. Deathe as witnesses. Dr. Deathe is a specialist in physical medicine and rehabilitation. He conducted a defence medical on December 1, 2004 and provided medical reports dated December 28, 2004 and May 18, 2005.

[25] Dr. Deathe testified that it was improbable that Mr. Heath had sustained a wedge fracture in the accident. He said if there was in fact a wedge fracture, it was a minor fracture that would generally heal in three to six months with minimal, if any consequences.

[26] Dr. Deathe disagreed with Dr. Sequeira's diagnosis of chronic, diffuse, soft tissue pain syndrome attributable to the accident. In his May 18, 2005 report, he said “[t]hat may be an apt description of this man's current physical complaints but I wouldn't attribute that chronic diffuse soft tissue pain syndrome to the [accident].” Rather, in his

view, Mr. Heath sustained "a mild soft tissue cervical strain which within weeks or months was basically back to normal range of motion."

[27] The videotaped surveillance of Mr. Heath was taken on December 1 and December 9, 2004 as well as November 7, 2005. Mr. Heath acknowledged that the surveillance taken on December 9, 2004 showed him walking, either pulling or pushing a shopping cart, over a period of two hours and 15 minutes, without using a cane.

IV. The Trial Judges' Reasons

[28] The trial judge concluded that Mr. Heath suffered a moderate flexion extension injury to his cervical spine in the accident. However, relying in large part on the evidence of Dr. Sequeira, the trial judge concluded that although moderate, Mr. Heath's injury seriously affected his ability to function and earn a living for two reasons.

[29] First, Mr. Heath experienced degenerative changes to his neck prior to the accident and this vulnerability aggravated the effects of his injury. Second, because of Mr. Heath's personality and coping skills, he had an unusual reaction to the injury and developed permanent chronic pain over a period of several years. In the result, the trial judge concluded that Mr. Heath will be "partially if not permanently disabled for his working life."

[30] The trial judge awarded damages in the tort action as follows:

Non pecuniary general damages	$125,000

Special damages for loss of income-8 years at $5,000 per year	$ 40,000
Pecuniary general damages (future loss of income)	$220,000

[31] Concerning Mr. Heath's claim against Economical for non-earner benefits, the trial judge found that Mr. Heath is entitled to a benefit "on the basis of his disability and the evidence of Dr. Sequeira." The entirety of the trial judge's reasons concerning this issue are as follows:

> I am satisfied that the plaintiff has met the onus of establishing that his injuries and his impairment from chronic pain have continuously prevented him from engaging in substantially all of the activities in which he ordinarily engaged before the accident.
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> He is a lonely man, who has few friends and contacts, whose activities are substantially impaired and I accept the fact that he must pace himself as a result of his continued, constant and chronic pain. I accept the fact that part of the problem is that he has de-conditioned.

V. Analysis

i) Did the trial judge apply the wrong test for determining whether Mr. Heath is entitled to a non-earner benefit?

[32] Section 12(1) of the 1996 SABS establishes the criteria for entitlement to a non-earner benefit. There are three critical ingredients: i) an insured must suffer an impairment as the result of an accident; ii) 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 iii) the insured must not qualify for an income replacement benefit:

> 12. (1) The insurer shall pay an insured person who sustains an impairment as a result of an accident a non-earner benefit if the insured meets any of the following qualifications:
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> 1. The insured person 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. [Emphasis added.]

[33] Section 2(4) of the 1996 SABS describes the meaning of "a complete inability to carry on a normal life." Essentially, it requires 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":

> 2. (4) For the purposes of this Regulation, a person suffers a complete inability to carry on a normal life as a result of an accident if, and only 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. [Emphasis added.][2]

[34] The trial judge dealt with Mr. Heath's claim for a non-earner benefit beginning at paragraph 277 of his reasons. He set out the test for qualifying for a non-earner benefit at paragraphs 278 and 279 as follows:

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[2] In addition, s. 12(7) of the 1996 SABS indicates that an insurer is not required to pay a non-earner benefit for the first 26 weeks after the onset of the complete inability to carry on a normal life. Section 12(7) reads:

> 12. (7) The insurer,
>
> (a) is not required to pay a non-earner benefit for the first 26 weeks after the onset of the complete inability to carry on a normal life; and
> (b) is not required to pay a non-earner benefit for any period before the insured person attains 16 years of age. [Emphasis added.]

> Under the regulations, the plaintiff is entitled to non-worker benefits for the first 156 weeks following his accident provided that he suffers 'a partial inability to carry on a normal life.
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> That test changes after 156 weeks to the following:
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> > The plaintiff must have sustained "a complete inability to engage in substantially all of the activities in which he or she would ordinarily engage." [Emphasis added.]

[35] Based on a review of s. 12 and s. 2(4) of the 1996 SABS, it is apparent that the trial judge did not set out the correct test for determining whether Mr. Heath is entitled to a non-earner benefit.

[36] In relation to accidents that happened on or after November 1, 1996, the test for qualifying for a non-earner benefit is more stringent than the test articulated by the trial judge. Rather than permitting benefits where a person suffers a partial inability to carry on a normal life within three years after the accident, s. 12(1) of the 1996 SABS stipulates that to qualify for a benefit a person must suffer a complete inability to carry on a normal life within two years of the accident.

[37] Further, in contrast to the test the trial judge said applies after three years, under s. 2(4) of the 1996 SABS, the question of whether a person has suffered a complete inability to carry on a normal life turns on whether the person has 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 (emphasis added)."

[38] Rather than focussing on whether the claimant sustained "a complete inability to engage in substantially all of the activities in which he or she would ordinarily engage [emphasis added]" as stated by the trial judge, the test set out in s. 2(4) focuses on "the activities in which the person ordinarily engaged before the accident (emphasis added)."

[39] At paragraphs 282 and 283 of his reasons, the trial judge framed the test in a different way that more closely approximates the test set out in the 1996 SABS. He said:

> The thrust of the defence evidence in this case is that the evidence of Dr. Courchene and Dr. Johnson do not substantiate a complete inability to carry on a normal life and further, after 156 weeks, a complete inability to engage in substantially all of the activities that he would normally engage in. These views were expressed by the experts in 1998 and 1999.
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> I have made it clear, that I find that the plaintiff did suffer a significant injury that has affected his lifestyle in a substantial way and the views of the experts are simply out of date based upon developments since then.

[40] Nonetheless, I reject any suggestion that these paragraphs of the trial judge's reasons somehow rehabilitate his misstatement of the test at paragraphs 278 and 279. For one thing, the reference in paragraph 282 to 156 weeks is plainly wrong; the correct time frame is 104 weeks. Moreover, the trial judge's reference to "a complete inability to engage in substantially all of the activities that he would normally engage in" is inaccurate.

[41] More importantly, in contrast to paragraph 282 in which the trial judge was summarizing the position of the defence, at paragraph 278 the trial judge was setting out the applicable test for the purposes of his judgment. Accordingly, in my opinion, it is the test set out at paragraph 278 of his reasons that the trial judge actually applied, which is not the correct test.

[42] Finally, I note that at paragraph 280 of his reasons, the trial judge expressed a general conclusion that appears to meet the correct test under s. 12(1) of the 1996 SABS. He said:

> I am satisfied that the plaintiff has met the onus of establishing that his injuries and his impairment from chronic pain have continuously prevented him from engaging in substantially all of the activities in which he ordinarily engaged before the accident.

[43] Despite this statement, I am satisfied that the trial judge's error in stating the test for qualifying for non-earner benefits taints his conclusion that Mr. Heath is entitled to such benefits. I say that for three reasons.

[44] First, it is clear that the trial judge concluded that it is Mr. Heath's chronic pain that gives rise to his ongoing disability and that this condition developed over time.

[45] In expressing his conclusion at paragraph 280 that Mr. Heath was entitled to benefits the trial judge said, "his injuries and <u>his impairment from chronic pain</u> have continuously prevented him from engaging in substantially all of the activities in which he ordinarily engaged before the accident (emphasis added)." At paragraph 210 of his

reasons, the trial judge explicitly stated, "over the past several years the plaintiff has developed chronic pain (emphasis added)."

[46] Second, the trial judge rejected the defence position that the evidence of Dr. Courchene and Dr. Johnson do not substantiate a complete inability to carry on a normal life by saying that the views of those doctors "are simply out of date based on developments since then."

[47] The trial judge's explanation of his reason for not relying on this evidence implies that Mr. Heath's disability arose subsequent to these reports. Notably, Dr. Johnson's report relates to an examination that occurred a little more than a year and a half after the accident well within two years of the accident as required by statute.

[48] Third, the trial judge did not make any finding concerning when Mr. Heath's disability arose. To repeat, to qualify for a non-earner benefit, s. 12(1) of the 1996 SABS requires that the disability arise within two years after the accident. Dr. Johnson's report did not support a finding of disability. His report was conducted about a year and a half after the accident. The trial judge rejected his report and instead relied on Dr. Sequeira's report because Dr. Johnson's conclusions were out of date. The trial judge found that Mr. Heath's disability arose from chronic pain that developed over time. In these circumstances, a finding concerning precisely when Mr. Heath's disability arose was essential to justify allowing his claim for benefits.

[49] In the circumstances, I accept Economical's submission that the trial judge applied the wrong test for determining whether Mr. Heath is entitled to a non-earner benefit under the 1996 SABS and that this error taints the trial judge's conclusion that Mr. Heath is entitled to a benefit.

2. Was there evidence at trial capable of supporting Mr. Heath's claim for a non-earner benefit?

a) The test for non-earner benefits

[50] Although s. 12 and s. 2(4) of the 1996 SABS have not been considered extensively by the courts, they have been considered in a number of arbitration decisions. Based on my review of various decisions, as well as a consideration of the language and purpose of the 1996 SABS, and a review of the predecessor provisions, I would adopt the following general principles as being part of a proper approach to the application of these sections:

- Generally speaking, the starting point for the analysis of whether a claimant suffers from 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.[3] This follows from the language of the section as well as a review of the predecessor provisions. That said, there may be some circumstances in which a comparison, or at least a detailed comparison, of the claimant's pre-accident and post-accident activities

[3] See *Natasha Maitland and State Farm Mutual Automobile Insurance Company*, [2006] O.F.S.C.D. No. 73, FSCO A05-000307, (Financial Services Commission of Ontario).

and circumstances is unnecessary, having regard to the nature of the claimant's post-accident condition.

- 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 preceding 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.[4]

- 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 pre-accident life.[5]

  Although this approach differs somewhat from the approach taken in *Walker v. Ritchie*, 2003 CanLII 17106 (Ont. S.C.), in which the trial judge focused on those activities that were "most important" to the claimant before the accident, in my

[4] *J.P. and Wawanesa Mutual Insurance Company*, [1997] O.I.C.D. No. 180, at para. 15, OIC A96-001312, at p. 5, (Ontario Insurance Commission).

[5] *N.I. and Allstate Insurance Company of Canada***, [2007] O.F.S.C.D. No. 128, at para. 19,** FSCO A04-002030, at p. 8, (Financial Services Commission of Ontario).

opinion, it better reflects the high threshold created by the language of the section and at the same time allows a claimant-focussed inquiry.

- It is not sufficient for a 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."[6]

- 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 a claimant who merely goes through the motions cannot be said to be "engaging in" an activity.[7] 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.[8]

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[6] *N.I. and Allstate Insurance Company*, [2007] O.F.S.C.D. No. 128, at para. 23**,** FSCO A04-002030, at p. 10 (Financial Services Commission of Ontario).

[7] *Marie Da Ponte and Motor Vehicle Accident Claims Fund,* FSCO A01-000486, at p. 5 (Financial Services Commission of Ontario).

[8] *Marie Da Ponte,* at p. 5.

- 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 in those activities.[9]

b) Was there evidence led in this case that was capable of satisfying the test?

[51] The difficulty with both the trial judge's approach in this case and the evidence led by Mr. Heath is that they focus on Mr. Heath's condition and activities during a time frame relatively proximate to the trial with little or no consideration of either his pre-accident condition and activities, or his condition and activities during the two-year post-accident period in which a claimant must qualify for a non-earner benefit.

[52] Mr. Heath provided virtually no evidence concerning his pre-accident activities or concerning the extent to which he was prevented from engaging in those activities within the two-year period following the accident. In cross-examination at trial, Mr. Heath agreed that he had said on discovery that he was prevented from working, bowling and skiing as the result of the accident.

[53] However, Mr. Heath also confirmed that that he was on social assistance at the time of the accident; that he had not worked steadily for a number of years prior to the accident; and that he did not work at all in the one-year period preceding the accident.

[9] *Marie Da Ponte*, at p. 5.

Mr. Heath gave no evidence that he was looking for work prior to the accident. Moreover, he provided no details about the extent of his bowling and skiing activities prior to the accident, nor any details about how he otherwise passed his time.

[54] As for his post-accident activities, Mr. Heath confirmed that he continued to live in an apartment after the accident; that he was independent as to self-care; that he was able to obtain his own groceries and make his own meals and that he did not experience driving anxiety. Although Mr. Heath said he did not usually do housework, he also said there is not much housework to be done.

[55] Mr. Heath produced a letter from Algonquin College confirming that he was accepted into a 64-week course in robotics for the summer term of 1998. He testified that he did not attend this program because he was in too much pain and because he was busy trying to find a doctor. However, he did not produce any medical evidence at trial confirming he was unable to attend the robotics program because of pain.

[56] In fact, contrary to Mr. Heath's evidence, the reports from Dr. Courchene and Dr. Johnson suggest that Mr. Heath was physically capable of attending the robotics program. Significantly, although the trial judge commented at one point in his reasons that "these doctors did not know and understand the full details of the plaintiff's degenerative and weathered cervical spine", the reason the trial judge gave for not relying on their evidence was that their reports were out of date.

[57] Importantly, there was no evidence at trial that Mr. Heath was actually in school or engaging in any similar form of activity prior to the accident. Although Mr. Heath testified that he passed an entrance examination for the Algonquin College robotics program, there was also evidence that he previously withdrew from an electronics program in the past with no courses completed, and that he received failing marks in a college program he attended for some period in 1993, but did not complete.

[58] Further, as already noted, the evidence at trial indicated that Mr. Heath had not worked steadily for a number of years prior to the accident, that he had not worked at all in the one-year period prior to the accident, and that he was on social assistance at the time of the accident.

[59] As the result of this evidence, the matter of Mr. Heath's pre-accident capacity to attend and complete a college program or to work full-time was far from clear. What is clear is that there was no evidence at trial indicating he was going to school or engaged in any form of similar activity in the period leading up to the accident.

[60] Although the trial judge preferred Dr. Sequeira's evidence to the evidence of Dr. Deathe concerning the level of Mr. Heath's disability and how it was caused, Dr. Sequeira did not see Mr. Heath until February 15, 2005, almost seven years after the accident. Significantly, Dr. Sequeira did not provide an opinion concerning whether Mr. Heath suffered a complete inability to carry on a normal life within 104 weeks after the accident.

[61] In my view, there is no indication that Dr. Sequeira was in a position to give such an opinion. It was apparent from his evidence that he did not have an accurate understanding of Mr. Heath's pre-accident work history. Further, there is no indication in his report or in his evidence that he had a clear understanding of Mr. Heath's pre-accident activities.

[62] Based on my review of the record, it appears that there was some evidence that may have permitted a trier of fact to draw an inference that the disability Dr. Sequeira described developed within 104 weeks of the accident. Mr. Heath testified that his neck pain started to get worse in 1999, when it moved up into his head and down his legs and arms.

[63] Nonetheless, on the facts of this case, proving the disability described by Dr. Sequeira was not sufficient to satisfy the requirements of s. 12(2) of the 1996 SABS. Rather, it was also necessary that Mr. Heath establish on a balance of probabilities that his disability prevented him from engaging in substantially all of the activities in which he engaged before the accident. Mr. Heath failed to establish a change to his activities after the accident. In my view, in the circumstances of this case, the dearth of evidence relating to Mr. Heath's pre-accident activities precludes a finding that Mr. Heath qualifies for non-earner benefits.

[64] Accordingly, I would allow the appeal, set aside the trial judge's order and dismiss the action against Economical. I would order costs of the appeal to the appellant in the

amount of $4,000 inclusive of G.S.T. and disbursements plus costs of the trial in the amount of $7,500 inclusive of G.S.T. and disbursements.

RELEASED: May 11, 2009 “JS”

“Janet Simmons J.A.”
“I agree R.A. Blair J.A.”
“I agree R.G. Juriansz J.A.”