

Ability to Perform Your Job Doesn't Necessarily Mean a Normal Life

Galdamez v. Allstate Insurance, 2012 ONCA 508

MVC October 26, 2002. The Insured returned to work on modified duties four days following the MVC. She continued in the position for one year. Upon leaving her employment she claimed a non-earner benefit ("NEB"). The Insurer was successful on a motion for summary judgment, arguing that the Insured could not qualify for a NEB as she was able to return to work after the accident and therefore did not suffer a "complete inability to carry on a normal life."

Appeal allowed. The matter was remitted to trial court without prejudice to Insurer's right to renew the motion for summary judgment.

The Insured's employment status does not alone render her ineligible for a NEB. The test for IRB eligibility has two criteria: (1) the Insured was employed at the time of the MVC, and (2) within 104 weeks the Insured is substantially unable to perform the essential tasks of that employment. An Insured will be eligible for an IRB only where both criteria are met.

A NEB is payable where the Insured is not eligible for an IRB and is completely unable to carry on a normal life as a result of the MVC. Complete inability means the Insured is continuously prevented from engaging in substantially all of the activities in which she normally engaged prior to the MVC.

The Court of Appeal in *Heath v. Economical, 2009 ONCA 391* set out general principles for determining eligibility for a NEB. A comparison of pre and post activities and life circumstances might be considered. Greater weight ought to be assigned to

those activities which the Insured identifies as being important to her life. With these principles in mind, it is possible that an Insured can perform the essential tasks of her employment and yet be prevented from engaging in most of her pre-MVC activities of normal life. Such might be the case where the job is not of great importance to the Insured's pre-MVC life, however, she is prevented from returning to many of those activities which were.

Why is this case important? This case highlights the importance that an injured person's lawyer understands at an early stage the contrast between the Insured's pre vs. post MVC life. Hobbies, athletics and interests must all be explored to allow counsel to properly advise her client whether it is better to elect an IRB or NEB. This will be particularly important where the IRB payable would be substantially less than the fixed NEB amount.

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