

## INSURANCE LAW BULLETIN

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### STATUTORY ACCIDENT BENEFITS: ENTITLEMENT TO NON-EARNER BENEFITS CLARIFIED

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The Ontario Court of Appeal recently released a decision clarifying the test to be used in determining whether an individual qualifies for non-earner benefits under the *Statutory Accident Benefits Schedule – Accidents On or After November 1, 1996*.<sup>1</sup> The test for non-earner benefits for accidents occurring under the 1996 SABS requires that a person suffer a **complete inability** to carry on a normal life *within two years* of the accident.

In *Heath v. Economical Mutual Insurance Co.*<sup>2</sup>, the appellant, Economical, appealed the decision of the trial judge on the basis that the wrong test was applied to determine entitlement to non-earner benefits. The Court of Appeal agreed, set aside the trial judge's order and dismissed the action.

Mr. Heath was injured in a rear-end collision in 1998 when he was stopped at a stop-sign. In his reasons, the trial judge stated that the regulations entitled Mr. Heath to payment of non-earner benefits for the first three years following the accident provided that he suffered a partial inability to carry on a normal life. This was incorrect. A person must suffer a complete, not partial, inability to carry on a normal life within two years of the accident. Furthermore, the test for what constitutes a 'complete inability' must focus on the activities in which the person ordinarily engaged before the accident, not on whether the claimant suffered a complete inability to engage in the activities which they would normally engage.

#### COMMENTARY

In determining an individual's eligibility for non-earner benefits, the court must

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<sup>1</sup> O.Reg. 430/96 ("1996 SABS").

<sup>2</sup> 2009 ONCA 391

consider a number of factors. The Court of Appeal reviewed a number of decisions with respect to non-earner benefits and the 1996 SABS and concluded that the following principles provided the 'proper approach' to the application of this section:

- The starting point when analyzing whether an individual suffers from 'a complete inability to carry on normal life' is to compare the claimant's activities and lifestyle before the accident to his or her post-accident status;
- An analysis of the claimant's activities and lifestyle before the accident requires an assessment over a reasonable period of time and not just a "snap-shot" of his or her life immediately before the accident. The length of time required for an assessment of an individual's life before the accident will be dependent on the facts of each case;
- All pre-accident activities must be considered in assessing the degree to which an individual's ability to engage in 'substantially all' of their pre-accident activities is affected. However, in order to satisfy the threshold greater weight may be placed on the activities that were important to the individual's pre-accident life;
- The claimant must establish that the accident continuously prevents him or her from engaging in *substantially all* of his or her pre-accident activities;
- The term 'engaging in' must be viewed with a preference towards quality. It is not enough for a claimant to attempt and go through the motions of pre-accident activities. If there are significant restrictions when performing an activity, this will not constitute 'engaging in' that activity.
- Where pain is the primary factor that prevents the insured from engaging in former activities, the question is whether the degree of pain practically prevents them from performing those activities. The focus should not be on whether the individual can physically perform them.