

**LICENCE APPEAL
TRIBUNAL**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**



**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**

Tribunal File Number: 16-003197/AABS

In the matter of an Application for Dispute Resolution pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

A.S

Applicant

and

Economical Mutual Insurance Company

Respondent

WRITTEN DECISION

ADJUDICATOR: Robert Watt

For the Applicant: Ray Di Gregorio

For the Respondent: Ashleigh Leon

Heard in writing on: August 10, 2017

OVERVIEW

- [1] The Applicant was injured in an automobile accident on November 18, 2015, and Sought benefits pursuant to the Statutory Accident Benefits Schedule - Effective September 1, 2010 ("*Schedule*").
- [2] The Applicant submitted an application for dispute resolution services to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal").
- [3] The parties participated in a case conference on May 16, 2017, but were unable to resolve the issue in dispute. With the consent of both parties, a written hearing was scheduled on August 10, 2017.

ISSUE

- [4] There is no issue between the parties as to the entitlement of an Income Replacement Benefit (IRB). The issue is whether the income earned post-accident by the applicant from his business in 2016, is deductible from the applicant's IRB, in accordance with section 7(3)(b) of the *Schedule*, for the period of November 29, 2015, to date and ongoing?

RESULT

- [5] I find that the insurer is entitled to deduct post- accident income earned from the applicant's business, from any entitlement of IRB, and therefore the applicant is not entitled to receive a weekly IRB in the amount of \$400 per week for the period November 29, 2015 to date and ongoing.

ANALYSIS

- [6] The issue in this hearing is whether the applicant's post-accident business income is considered "earned income" for the purposes of the *Schedule*.
- [7] Section 7(3)(b) of the *Schedule* provides for the deduction from any income replacement benefit, "70% of any income from self- employment earned by the insured person after the accident, and during the period in which he or she is eligible to receive an income replacement benefit".
- [8] An issue common to self-employed claimants is whether or not the post-accident income from their business could be characterized as "earned income" such that the Insurer would be able to deduct 70% of it from their IRBs. This determination turns on the claimant's participation in a business post-accident and whether a claimant was "actively engaged" in his/her business post-accident.

- [9] If a claimant continues to participate in managing their businesses, the business income can be considered “earned income” from self-employment for the purposes of paragraph 7(3)(b) of the *Schedule*.¹
- [10] The question I must address is whether the income earned post- accident by the applicant from the business in 2016, is deductible from the applicant’s IRB, in accordance with section 7(3)(b) of the *Schedule*?
- [11] The applicant’s position is that as the applicant was not actively engaged in the business post-accident, the moneys earned in 2016 from the business should not be deducted from the applicant’s Income Replacement Benefit.
- [12] The respondent’s position is that the moneys earned from the business in 2016 should be deducted from the Income Replacement Benefit.
- [13] There are two questions to be decided in this case.
- a. Was the applicant actively engaged in the business to generate earned income?
 - b. Do sections 4, and 7(3) (b) of the Schedule require active participation in a business, for the business income earned to be deducted against the Income Replacement Benefit?

A. Was the Applicant Actively Engaged in the Business?

- [14] I find that the applicant was self- employed and was active, (although to a much lesser extent of full professional practice) in the same business post- accident.
- [15] The applicant was injured in an accident on November 18, 2015. At the time of the accident, the applicant ran a business as owner/operator of Active Chiropractic. He provided chiropractic services to the clients of Active Chiropractic. He would also do some administrative tasks including signing cheques. Active had one full time receptionist and one part time administrative assistant at this time. The applicant saw an average of 120 patients a week over the course of 31.5 hours per week. The applicant performed all of the chiropractic treatments, examinations, and diagnosis. He was solely responsible for making all business decisions, including all business operations decisions.
- [16] Post- accident, the applicant through his affidavit sworn on July 14, 2017, indicates that he withdrew from the clinic as of February 12, 2016, and took no

¹ See *Surani and Perth* (FSCO A12-001274 & FSCO A12-001275, February 23, 2016)

part in the medical or administrative aspects of the clinic. He did continue to sign cheques. He hired another chiropractor, Dr. McCutcheon, who was responsible for the day to day operations of the business and who was put on a fixed salary as of February 12, 2016. The applicant's staff did the same work as they did before the accident.

- [17] The applicant's evidence is that he currently attends two hours per week on Monday and Friday mornings to sign cheques, chat with patients, review patient files with Dr. McCutcheon and administer minor treatments with an activator hand held instrument, under the supervision of Dr. McCutcheon. The applicant also assists the staff in ordering inventory. The applicant's position is that he is not actively engaged in the operation of the clinic and does not see any new clients.
- [18] Although Dr. McCutcheon was responsible for the day to day operations of the business, there is no evidence before me that the applicant gave up the right to make major business decisions as to the hiring and firing of staff, and as to whether the business should be sold or shut down or expanded etc. The applicant in his evidence clearly indicated "that I pay Dr. McCutcheon a fixed salary". The control of the major business decisions, as opposed to the day to day operations decisions means that the applicant was still involved in the essential tasks of the business.
- [19] The applicant's reported earned income from the business in the amount of \$63,175.08, for 2016, being almost half of his 2015 reported income in the amount of \$124,997.50, also means that he was still involved substantially in the running of the business, and not in a nominal manner.
- [20] Although the applicant hired someone else to assist with the business activities after the accident, the evidence showed that he was still actively participating and engaged in running his business.

B. Do sections 4, and 7(3) (b) of the *Schedule* require active participation in a business for the business income earned, to be deducted against the Income Replacement Benefit?

- [21] Section 4(2)(3) (4) of the *Schedule* sets out the method of calculation of income for self- employed persons, as well as the allowable deductions as determined under section 9(2) of the Income Tax Act (Canada). Income under this section is not defined as either active income, or passive income. Income is defined as the "amount of the person's income or loss from the business".
- [22] I find that Sections 4, 7(2), 7(3) (b) of the *Schedule* do not distinguish between active and passive income in the calculation of the insured's income. These sections refer to income earned from the business. This means that any net

income (active/passive) earned post-accident should be deducted, to avoid either a gross overpayment on the calculation of the Income Replacement Benefit or a gross underpayment of the Income Replacement Benefit.

- [23] Although I am not bound by previous FSCO decisions, previous decisions have made it clear that the applicant does not need to be active in the business, for income to be attributed to the applicant for the purposes of deductibility under the *Schedule*. In the case of *Garic and Markel Insurance Company of Canada*², in a similar fact case, the Arbitrator stated:

In the circumstances of this case, I note that a good portion of *Garic Haulage's* post -accident income has been generated by a replacement worker hired to replace *Mrs. Garic* active participation in the business. Although it would not be accurate to regard such work as having been performed for the partnership by *Mrs. Garic*, it is also clearly not work performed by *Mr. Garic*. It is work performed to replace *Mrs. Garic's* active participation in the business. It is work performed on her behalf. Therefore it seems to me to be more than "reasonable in the circumstances, "based on factors as [are] relevant "to allocate income derived by *Mrs. Garic's* replacement worker to *Mrs. Garic....*

....Although her active participation was diminished , the replacement worker largely made up for this shortfall and allowed the business to continue to operate much as it had before the accident.

- [24] In the case of *Zirger and Commercial Union Assurance Company* the Director's Delegate stated:

..."engaged in employment" refers to the status of being in an employer/employee relationship or being self- employed. An insured person is not required to be actively performing work tasks, in order to be considered employed for the purposes of the *Schedule*.³

- [25] I agree with the reasoning in the above decisions, and also the reasoning of a more recent decision of *Perth Insurance Company and Salim Surani*,⁴ where the Director's Delegate in a case similar to this case, made the following statements:

² *Lilijana Garic and Markel Insurance Company of Canada*, Robert Bujold, FSCO 07-000909 December 29, 2009 pages 12, 13 and 15.

³ *Zirger and Commercial Union Assurance Company*, Dirk Vanderbent FSCOA97-001386 September 16, 1999, p8

⁴ *Surani and Perth* (FSCO A12-001274& FSCO a12-001275, February 23, 2016

I find that the legislature could not have intended that an insured could continue to profit from a business, yet not have that profit deducted from her IRB as post-accident income. I find that just as with post-accident loss, post-accident income is broader than just the person's active participation in the business.

.. the company earns income thanks to the replacement person, so it makes no sense that the income earned can only be deducted from post-accident income if Mrs. Surani actively participates in the company.

Accordingly I find that the arbitrator erred in finding that the deduction of post-accident income from the IRBS is only available, if Mrs. Surani herself was "actively engaged" or actively participating in the business.

C. Calculation of deduction

- [26] Section 7(2) of the Schedule provides for the calculation of the Income Replacement Benefit for the self- employed. This is calculated as 70% of the amount that their weekly income from self- employment, exceeds the amount of the insured's person's loss from self- employment.
- [27] The applicant reported in 2013, and in 2014, self- employment professional income of \$98,318 and \$96,145.83 respectfully. In 2015 the applicant earned and reported \$124,997.90 in self- employment professional income. The applicant reported in 2016 \$63,175.08 in self- employment professional income earned from the business.
- [28] I find that 70% of the applicant post-accident business income as reported by him, is greater than the \$400/week policy maximum for income replacement benefits to which he may be entitled. Therefore, his post-accident income completely off sets his income replacement benefit quantum and yields an entitlement that is equal to zero from February 12, 2016, to the present. February 12, 2016, is the date when the applicant stopped working and hired Dr. McCutcheon. The applicant claimed after this date, that he was not working in the business.

ORDER

[29] The insurer is entitled to deduct post- accident income from the applicant's entitlement of IRB. Since there is a set- off, the applicant is not entitled to receive a weekly income replacement benefit in the amount of \$400 per week for the period November 29, 2015 to date and ongoing.

Released: January 10, 2018

A handwritten signature in black ink, appearing to read "Robert Watt", written in a cursive style.

Robert Watt, Adjudicator