



FSCO A05-002734

BETWEEN:

MARKUS HAIMOV

Applicant

and

ING INSURANCE COMPANY OF CANADA

Insurer

DECISION ON A MOTION FOR INTERIM BENEFITS

Before: Maggy Murray

Heard: September 25 and 27, 2006, at the offices of the
Financial Services Commission of Ontario in Toronto.
Written submissions received on October 13, 16, 18, 2006,
January 26 and February 9, 2007

Appearances: David MacDonald for Mr. Haimov
Chris T. J. Blom for ING Insurance Company of Canada

Issues:

I advised the parties of my decision in this matter on October 26, 2006 while reserving on the issue of the special award pending submissions. The following are my reasons.

The Applicant, Markus Haimov, was injured in a motor vehicle accident on February 22, 2005. He applied for and received statutory accident benefits from ING Insurance Company of Canada ("ING"), payable under the *Schedule*.¹ ING did not pay the Applicant any attendant care benefits because it believed that Mr. Haimov's attendant care needs were met by the various hospitals

¹The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

and the rehabilitation facility where he resided. The parties were unable to resolve their disputes through mediation, and Mr. Haimov applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

Mr. Haimov brought a motion pursuant to section 65 of the *Dispute Resolution Practice Code — Fourth Edition* (the “Code”) for interim benefits to be paid to him pending the resolution of his dispute with ING.

The issues on this motion are:

1. Is Mr. Haimov entitled to the following interim attendant care benefits pursuant to section 279(4.1) of the *Insurance Act*:
 - a. Payment of past attendant care benefits in the amount of \$1,053.50 per month, from March 22, 2005 until August 10, 2005;
 - b. Payment of past attendant care benefits in the amount of \$2,925.96 per month, from August 11, 2005 until March 27, 2006;
 - c. Payment of past attendant care benefits in the amount of \$5,289.00 per month, from March 28, 2006 to May 30, 2006; and
 - d. Payment of attendant care benefits in the amount of \$6,000.00 per month (amount on Form 1 was \$6,337.00 per month), from May 31, 2006 to the present and ongoing?
2. Is Mr. Haimov entitled to interest for the overdue payment of benefits pursuant to subsection 46(2) of the *Schedule*?

3. Is Mr. Haimov entitled to a special award pursuant to section 282(10) of the *Insurance Act*?
4. Is either party entitled to expenses in respect of the arbitration under subsection 282(11) of the *Insurance Act*?

Result:

1. ING shall pay Mr. Haimov interim benefits as follows:
 - a. Attendant care benefits in the amount of \$1,053.50 per month, from March 22, 2005 until August 10, 2005, in the total amount of **\$4,883.62**;
 - b. Attendant care benefits in the amount of \$2,925.96 per month, from August 11, 2005 until March 27, 2006, in the total amount of **\$21,932.68**;
 - c. Attendant care benefits in the amount of \$5,289.00 per month, from March 28, 2006 to May 30, 2006, in the total amount of **\$10,954.75**;
 - d. Attendant care benefits in the amount of **\$6,000.00** per month, from May 31, 2006 until further Order of an Arbitrator.
2. ING shall pay Mr. Haimov interest of 2 per cent per month compounded monthly on the above amounts from July 16, 2005 until the benefit is paid in accordance with subsection 46(2) of the *Schedule* in respect of the attendant care benefit.
3. The issue of a special award is reserved to the Arbitrator hearing the merits of the application.
4. The issue of expenses is deferred.

LAW:

a) Entitlement to Interim Benefits:

Section 279(4.1) of the *Insurance Act*² gives Arbitrators the discretionary authority to make interim orders pending the final order in any matter. The onus rests with the Applicant to show that there is a *prima facie* case supporting entitlement to the benefits in question and some urgency in the request. Such an award is also subject to review and revision by the hearing Arbitrator should the issue go to a final hearing on the merits.³ Interim Orders are generally only granted where the Applicant has established that he or she is: (i) entitled to the benefits claimed; and (ii) demonstrated a need, necessity, urgency⁴ or “irreparable harm”⁵. For the Applicant to establish a *prima facie* case, the Applicant must produce evidence, which, if unanswered and believed, is sufficient to render a conclusion in favour of entitlement.⁶

“Need” means an absence of cash flow as well as impairment of capital which would jeopardize the Applicant’s future security in order to meet day-to-day living expenses.⁷ “Urgency” is defined as “requiring immediate action or attention”.⁸ When considering urgency, Arbitrators

²R.S.O. 1990, c.I.8

³*Keyes and Personal Insurance Company of Canada*, QL at para. 7 (FSCO A06-001156, July 21, 2006)

⁴*Brown and Allstate Insurance Company of Canada* (1998), 40 O.R. (3d) 610, QL at 6 (Ont. Div. Ct.); *Boniface and Liberty Mutual Insurance Company* at 10 (FSCO A97-002106, July 6, 2000)

⁵*Traynor and Unum Life Insurance Co. of America* (2003), 65 O.R. (3d) 7, QL at 4, para. 13 (Ont. Div. Ct.)

⁶*Malaban and Canadian General Insurance Company* at 10 (FSCO A96-000084, July 26, 1996)

⁷*Osbourne and Allstate Insurance Company of Canada and York Fire & Casualty Insurance Company* (OIC A-009110, November 18, 1994); *Lucas and Dominion of Canada General Insurance Company* (OIC A-009670, March 23, 1995); *Malaban and Canadian General Insurance Company* (OIC A96-000084, July 26, 1996), *Harkness and Economical Mutual Insurance Company* (OIC A96-001420, December 10, 1996) as cited in *Ramalingam and State Farm Mutual Automobile Insurance Co.*, QL at 3 para. 12 (FSCO A02-001646, September 5, 2003)

⁸*Concise Oxford English Dictionary*, 11th Edition, Oxford University Press, at 1591

have considered evidence of an applicant's financial situation⁹, such as financial hardship.¹⁰

Urgency does not mean that a person must be in extremis before assistance is provided. Loss of a well-paying position creating a financial emergency within the family is an example of urgency.¹¹ "Irreparable harm has not been given a definition of universal meaning: its meaning takes shape in the context of each particular case."¹²

b) Attendant Care Benefits:

Under s.16(2) of the *Schedule*, ING is obliged to pay for all reasonable and necessary expenses incurred by or on behalf of the insured person as a result of the accident for services provided by an aide or attendant; or services provided by a long-term care facility or chronic care hospital. Section 16(4) of the *Schedule* provides that the monthly amount shall be determined in accordance with Form 1 (to a maximum of \$6,000.00 per month if the insured sustains a catastrophic impairment¹³), which was a form prescribed by Ontario Regulation 403/96 prior to March 1, 2006.

Pursuant to s.39(4) of the *Schedule*¹⁴, if the insurer refuses to pay for an attendant care benefit, the insurer is required to have the insured assessed in respect of the services at a designated assessment centre ("DAC") within 14 days of receiving either the application for the benefit or a

⁹*Kulasekarampillai and State Farm Mutual Automobile Insurance Co.*, QL at 2, para. 8 (FSCO A03-001063, January 21, 2004)

¹⁰*Boniface and Liberty Mutual Insurance Company*, QL at para. 14 (FSCO A97-002106, July 6, 2000)

¹¹*Singh and Coseco Insurance Co./HB Group/Direct Protect*, QL at 5 para. 32 (FSCO A01-000245, February 14, 2002)

¹²The Honourable Mr. Justice R. Sharpe, *Injunctions and Specific Performance* (Canada Law Book, 2002 at para. 2.450 as cited in *Traynor and Unum Life Insurance Co. of America* (2003), 65 O.R. (3d) 7, QL at 5, para. 4 (Ont. Div. Ct.)

¹³Section 16(5)2.ii.

¹⁴As it read prior to March 1, 2006

Form 1. Under s.43(13) of the *Schedule*¹⁵, the DAC must complete a Form 1 and make recommendations on the future provision of attendant care services the insured person needs. Under s.39(6) of the *Schedule*¹⁶, an insurer is required to pay the insured person the attendant care benefit pending receipt of a DAC report.

EVIDENCE:

Background:

Mr. Haimov was 67 years old at the time of the accident. The parties agreed that he sustained a catastrophic impairment pursuant to s.2(1.2)(e)(i) of the *Schedule* (ie., a brain injury) as a result of a pedestrian/motor vehicle accident. Ms. Fitzhenry-Bedard, an occupational therapist retained on behalf of Mr. Haimov, prepared the following Form 1's, together with narrative reports, that provided particulars of the attendant care that Mr. Haimov required, which were in addition to the nursing care and services provided:

- a) Form 1 dated March 22, 2005 in the amount of \$1,053.50 per month, for the period March 22, 2005 until August 10, 2005;
- b) Form 1 dated November 14, 2005 in the amount of \$2,925.96 per month, for the period August 11, 2005 until March 27, 2006;
- c) Form 1 dated March 27, 2006 in the amount of \$5,289.00 per month, for the period March 28, 2006 to May 30, 2006;
- d) Form 1 dated May 30, 2006 in the amount \$6,337.00 per month for the period May 31, 2006 to the present and ongoing. Mr. Haimov's counsel acknowledged that the maximum amount payable is \$6,000.00 per month under the *Schedule*.¹⁷

¹⁵As it read prior to March 1, 2006

¹⁶As it read prior to March 1, 2006

¹⁷Section 16(5)2.ii

ING received the first Application for Expenses for attendant care benefits on June 15, 2005.

Witnesses:

Affidavits on behalf of each of Ellina Rudnik (Mr. Haimov's wife), Victoria Sucholutsky (Mr. Haimov's daughter), Ann Fitzhenry-Bedard (occupational therapist) and Dr. Jane Gillett (neurologist) were filed as evidence and each appeared as a witness on behalf of Mr. Haimov. The affidavit of Michael Bennett (counsel at the law firm retained by Mr. Haimov) was also admitted into evidence.

An Affidavit of Joshua Theodore (occupational therapist) and an affidavit of Fotiny Sfyndilis (assistant to counsel Blom) were filed as evidence on behalf of ING. No one appeared as a witness on behalf of ING at the motion.

EVIDENCE:

I will now examine the evidence regarding attendant care benefits.

At the time of Mr. Haimov's accident, Mrs. Rudnik worked part time caring for young children and Mrs. Sucholutsky worked in a family business. Mrs. Rudnik and Mrs. Sucholutsky's evidence was that both of them, together with Ms. Rudnik's son Mikhael Khaymov, spent 24 hours a day, taking shifts on a rotating basis caring for Mr. Haimov during the night, and spoke with him in Russian to encourage brain activity while he was at Sunnybrook Health Sciences Centre ("Sunnybrook") between February 22, 2005 to May 11, 2005. The nurses taught them how to care for Mr. Haimov, which care included suctioning and assisting with skin integrity.

On May 11, 2005, Mr. Haimov was transferred to Toronto Rehabilitation Institute ("TRI"), a chronic care facility. Although Mr. Haimov's family wanted to continue providing 24 hour a day

attendant care, TRI only permitted them to visit between 11:00 a.m. and 9:00 p.m. While at TRI, Mrs. Rudnik, Mrs. Sucholutsky and Mr. Khaymov saw Mr. Haimov daily and ensured that between the three of them, at least one of them was always with Mr. Haimov, providing him with care throughout the entire time that visitors were permitted.

On January 25, 2006, Mr. Haimov was transferred to Baycrest Centre for Geriatric Care ("Baycrest"), a long term care facility, where Mr. Haimov continues to reside. His family provides care for him between 11:00 a.m. and 9:00 p.m. The staff at Baycrest are supportive of family members augmenting the care that their staff provide.

Although Baycrest permits 24 hour a day attendant care by family members or a private nurse, Mr. Haimov's family is completely exhausted in terms of their ability to provide additional attendant care. They are also financially unable to afford to pay for private attendant care. If ING funded attendant care for Mr. Haimov, his family will continue to care for him between 11:00 a.m. and 9:00 pm. and will hire an attendant to provide supervisory care between 9:00 p.m. and 11:00 a.m.

The attendant care services provided by Mr. Haimov's family members while he was at TRI include the following:

(a) Level 1 care:

- (i) Assisting Mr. Haimov with range of motion exercises;
- (ii) Putting splints on and off Mr. Haimov's hands which he wears 2-3 hours per day;
- (iii) Washing Mr. Haimov's hands, face and mouth throughout the day to ensure his comfort;
- (iv) Changing Mr. Haimov's feeding bag three times a day;

- (v) Adjusting Mr. Haimov while he is in his wheelchair to ensure his comfort, skin integrity and to make sure he did not lose proper muscle tone.

(b) Level 2 care:

- (i) Remaining with Mr. Haimov between 11:00 a.m. and 9:00 p.m. (ie., throughout the entire time they were permitted to remain);
- (ii) Speaking to Mr. Haimov in Russian which they feel he is more responsive to than English;
- (iii) When the weather is good they wheel him outdoors in a wheelchair.

(c) Level 3 care:

- (i) Monitoring Mr. Haimov's oxygen levels throughout the day. They also suction Mr. Haimov 6-8 times per day. When they suction his tracheotomy, Mr. Haimov appears more comfortable;
- (ii) Providing range of motion exercises for Mr. Haimov;
- (iii) Massaging Mr. Haimov's arms, legs and back on a consistent basis.

In addition to the above, while at Baycrest, Mr. Haimov's family members take him to and from music concerts, closely monitor his skin condition, launder his clothing and pillow cases at least twice weekly and cut his fingernails regularly to ensure that he does not dig his nails into his hands and cause further skin breakdown.

The staff-to-patient ratio at Baycrest is as follows: (1) between 7:00 a.m. - 3:00 p.m., 1:5 which results in 12 minutes per hour for each patient, or, 84 minutes of direct care to each patient; (2) between 3:00 p.m. - 11:00 p.m., 1:7 which results in 8.5 minutes per hour of direct care to Mr. Haimov over the entire shift, or, 60 minutes of direct care to Mr. Haimov over the entire shift; (3) between 11:00 p.m. - 7:00 a.m., 1:12 and 1:15-17 which results in 3.5 minutes per hour for each patient, or, 25 minutes of direct care to Mr. Haimov over the entire shift. If the attending

nurse is dealing with another patient, it would take some time before he or she noticed that Mr. Haimov needed assistance.

On March 18, 2006, Mr. Haimov suffered a severe and prolonged seizure and he was transported by ambulance from Baycrest to Sunnybrook for emergency treatment. Mrs. Rudnik and Mrs. Sucholutsky were with Mr. Haimov when the seizure occurred and were able to ensure that he received emergency assistance at the outset of this seizure by notifying nursing staff immediately. On May 18, 2006, Mr. Haimov was transferred by ambulance back to Baycrest where he resides to this day.

At Baycrest, Mr. Haimov's vital signs are not monitored electronically. Although Baycrest provides a device to its patients that allows them to call for assistance using an electronic call device, Mr. Haimov is unable to operate it due to his injuries. Consequently, if Mr. Haimov suffers another seizure or medical emergency, he must wait for the night nurse to complete his or her rounds before learning of Mr. Haimov's need for emergency care.

When Ms. Fitzhenry-Bedard prepared the Form 1 on August 10, 2005,¹⁸ she noted that Mr. Haimov was more responsive when attendant care services were provided by his family who spoke to him in Russian.

When Ms. Fitzhenry-Bedard prepared the Form 1 dated March 27, 2006, she received information from Ms. Rudnik, Ms. Sucholutsky and Leslie Inacovipz (the social worker assigned to Mr. Haimov at Baycrest). Ms. Fitzhenry-Bedard found that Mr. Haimov's family members were providing Mr. Haimov with the following attendant care assistance:

- a) Monitoring Mr. Haimov's need for suctioning his ventilator;
- b) Positioning Mr. Haimov to prevent skin break down;

¹⁸Referred to in her Affidavit sworn July 31, 2006 at para. 9

- c) Talking and reading to Mr. Haimov in Russian to stimulate brain activity;
- d) Washing Mr. Haimov's hands and face to ensure proper hygiene;
- e) Combing Mr. Haimov's hair daily;
- f) Cutting Mr. Haimov's hair every other week;
- g) Trimming Mr. Haimov's fingernails and toenails weekly;
- h) Monitoring Mr. Haimov's feeding and providing assistance with feeding daily;
- i) Providing laundry for Mr. Haimov to ensure he has fresh clothing twice weekly;
- j) Wheeling Mr. Haimov to activities and concerts within Baycrest to stimulate his brain activity;
- k) Wheeling Mr. Haimov outside for fresh air to stimulate his brain activity;
- l) Suctioning and cleaning Mr. Haimov's tracheotomy several times daily;
- m) Assisting Mr. Haimov with exercises to ensure Mr. Haimov continues to experience an adequate range of motion;
- n) Massaging creams and ointments into Mr. Haimov's back, hands and feet to ensure Mr. Haimov's skin integrity;
- o) Turning and checking Mr. Haimov throughout the day to ensure that he does not suffer from pressure sores;
- p) Washing Mr. Haimov's underarms which become sweaty on a consistent basis;
- q) Constantly monitoring Mr. Haimov's medical equipment to ensure it is clean and in good working order.

On May 30, 2006, Ms. Fitzhenry-Bedard prepared another Form 1 for Attendant Care in light of Mr. Haimov's greater needs after suffering a focal seizure on March 18, 2006. According to the Form 1 dated May 30, 2006, Mr. Haimov requires 24 hour per day, 7 days per week basic supervisory care assistance in order to ensure that he is treated immediately if he suffers another focal seizure. The Haimov family members are unable to provide this 24 hour per day support for Mr. Haimov as their resources are physically, mentally and financially stretched too thin.

Therefore, Mr. Haimov is not receiving the attendant care assistance that Ms. Fitzhenry-Bedard has recommended for his dignity, health and safety.

According to Dr. Jane Gillett (Neurologist), Mr. Haimov requires 24 hour a day attendant care in addition to the care provided by Baycrest. Dr. Gillett felt that the supervisory care that family members provide is crucial because it is “likely” that Mr. Haimov will suffer another seizure. By alerting the nursing staff immediately upon the onset of a seizure, Mr. Haimov will receive immediate treatment to decrease his discomfort and minimize the negative effect of the seizure on his long term health.

Joshua Theodore (occupational therapist) was retained by ING to conduct a s.42 Independent Medical Examination of attendant care needs which was conducted on June 23, 2006 and he completed a Form 1 as well as a report to ING dated June 29, 2006 summarizing the attendant care needs assessment of Mr. Haimov. Mr. Theodore determined that Mr. Haimov required \$154.63 per month of attendant care, which consisted of exercise. Mr. Theodore further determined that “Given that (Mr. Haimov) is in a specialized unit, and under the direct care and supervision of a nurse, no additional attendant care is indicated for activities which fall under the responsibilities of nursing.”

ANALYSIS:

i) Entitlement to the Benefits Claimed:

Mr. Haimov’s family performs the attendant care tasks that Ms. Fitzhenry-Bedard concluded Mr. Haimov requires as set out in her Form 1's (with the exception of night time care).

Mr. Haimov's family also supplements the services provided by Baycrest with their own services.¹⁹

ii) Need, Necessity, Urgency²⁰ or Irreparable Harm ²¹:

I find that there is a "substantial likelihood"²² of danger to Mr. Haimov's life and health caused by inadequate attendant care because someone is not with him 24 hours a day. The attendant care that Mr. Haimov's family is providing helps ensure his safety and maintain his health by ensuring his ongoing comfort and quality of life. Mr. Haimov has demonstrated that there is a need, necessity, and urgency in the provision of 24 hour a day attendant care. In addition, because it is "likely"²³ that Mr. Haimov will suffer another seizure, there is a realistic potential that if 24 hour a day attendant care is not provided, Mr. Haimov will suffer irreparable harm.

iii) Attendant Care:

I find that Mr. Theodore's assessment of Mr. Haimov's attendant care needs is unreliable for reasons that include the following:

- a) On Part 1 of Form 1, Mr. Theodore allocates no time under "grooming" such as washing, rinsing and drying Mr. Haimov's face. However, due to Mr. Haimov's injuries, he is unable to wash, rinse and dry his face. Mrs. Rudnik also provides

¹⁹ See also *Bellavia and Allianz Insurance Co. of Canada/ING*, QL at 3 para. 12 (FSCO A05-000807, February 21, 2006) in which attendant care was provided by family members because there lacked "specific, individualized services at Baycrest", QL at 6, para. 28, upheld on appeal, *Bellavia and ING Insurance Company of Canada* (FSCO P06-00010, December 15, 2006)

²⁰ *Brown and Allstate Insurance Company of Canada* (1998), 40 O.R. (3d) 610, QL at 6 (Ont. Div. Ct.); *Boniface and Liberty Mutual Insurance Company* at 10 (FSCO A97-002106, July 6, 2000)

²¹ *Traynor and Unum Life Insurance Co. of America* (2003), 65 O.R. (3d) 7, QL at 4, para. 13 (Ont. Div. Ct.)

²² *Traynor and Unum Life Insurance Co. of America* (2003), 65 O.R. (3d) 7, QL at 4, para. 15 (Ont. Div. Ct.)

²³ Based on Dr. Gillett's evidence

finger nail and toenail trimming in addition to what the nursing staff provide to ensure that Mr. Haimov does not cut himself;

- b) Mr. Theodore failed to include the time Mrs. Rudnik spends putting on and removing Mr. Haimov's splints and massaging his hands (so that they are loose enough to put his splints on);
- c) Mr. Theodore failed to consider that Mrs. Rudnik monitors Mr. Haimov's feedings which are done through a tube to ensure that there are no problems; (Mr. Haimov is fed four times per day through a tube that connects to his stomach and sometimes: (i) the food leaks, in which case Mrs. Rudnik calls the nurse on duty to reconnect the tube; or (ii) the feeding tube gets clogged and the food stops moving to Mr. Haimov's stomach, in which case Mrs. Rudnik calls the nurse on duty to flush the feeding tube so that feeding can continue);
- d) On Part 2 of Form 1, Mr. Theodore allocates no time for Mr. Haimov's inability to respond to an emergency. In addition, Mr. Theodore's report of June 29, 2006 states: "Mr. Haimov lacks the ability to respond to an emergency or need" and goes on to state: "As he is in a medical facility and is medically supervised, the staff will be able to handle any emergency (*sic*) as and when they arise". Mr. Theodore failed to appreciate the staff to patient ratio and that if a nurse is with another patient, Mr. Haimov will not receive immediate nursing assistance. For example, when Mr. Haimov had a seizure on March 18, 2006, Ms. Rudnik and Ms. Sucholutsky were with him and alerted the staff to ensure that Mr. Haimov received emergency assistance quickly;
- e) Mr. Theodore allotted no time for bowel or tracheotomy care but noted in his report, dated June 29, 2006, that Mr. Haimov has approximately two urinary/bowel accidents per day and that Mrs. Rudnik, her daughter or son complete suctioning for Mr. Haimov's tracheotomy a total of 6-8 times per day;
- f) Mr. Theodore did not speak to any of the hospital staff regarding Mr. Haimov's needs and assistance that Mr. Haimov's family members provide.

ING submitted that because Mr. Haimov has never had a seizure in the middle of the night, he does not require 24 hour a day attendant care. ING provided no evidence that Mr. Haimov was not at risk of another seizure in the middle of the night. In contrast, Dr. Gillett's evidence was that because of the severity of Mr. Haimov's brain injury, he is at risk of another seizure and he requires 24 hour a day attendant care. I prefer Dr. Gillett's evidence to ING's assertion because: (a) she is a neurologist specializing in the treatment of acquired brain injury and neurorehabilitation; (b) she assessed Mr. Haimov; (c) she reviewed Mr. Haimov's medical records both prior to and following his seizure before she opined that Mr. Haimov is at risk of another seizure.

In a letter dated June 23, 2005 from Ms. Anne Utley, Manager, Subrogation Unit (Special Projects) of the Ministry of Health and Long Term Care, to Mr. Haimov's counsel's office, she states:

Simply put, attendant care (or personal support service) is not a service provided by a nurse; is not an insured services under the HIA (*Health Insurance Act*); is not an insured hospital service under the Act and lastly is not an OHIP insured service.

The evidence of Ms. Rudnik and Mrs. Sucholutsky was clear, consistent and persuasive concerning the attendant care tasks they performed for Mr. Haimov. The evidence of Ms. Rudnik, Mrs. Sucholutsky, Ms. Fitzhenry-Bedard, and Dr. Jane Gillett was not shaken in cross-examination, nor were they prone to exaggeration. Based on the foregoing, I found that Mrs. Rudnik and Mrs. Sucholutsky, Ms. Fitzhenry-Bedard and Dr. Gillett were all credible. Based on their evidence, as well as Ms. Utley's letter dated June 23, 2005, I find that Mr. Haimov's attendant care benefits are reasonable and necessary.

Attendant care was not provided 24 hours per day as recommended in Ms. Fitzhenry-Bedard's Form 1's dated March 27, 2006 and May 30, 2006 because Mr. Haimov's family was physically unable to provide this care themselves and were financially unable to hire someone to provide this care to Mr. Haimov. However, in accordance with *Belair Insurance Company Inc. and*

*McMichael*²⁴, ING is required to pay Mr. Haimov in accordance with Ms. Fitzhenry-Bedard's Form 1's. As outlined in *McMichael*, to order anything else "would mean that an arbitrator has no authority to order payment of benefits to which the claimant has proven entitlement".²⁵ Furthermore, if benefits are "not payable unless the services were received, the insurer stands to benefit from refusing to pay for services claimed, whether for medical, rehabilitation, attendant care, housekeeping or other services."²⁶

Co-payments to Baycrest:

ING submitted that the co-payment it made in the approximate amount of \$1,500.00 monthly to TRI and Baycrest is deductible from any attendant care benefits awarded rather than from medical benefits.²⁷ Under s.14(2)(a) of the *Schedule*, an insured is entitled to a medical benefit to pay for all reasonable and necessary hospital services.

What is a Co-Payment?

According to the Ministry of Health for Long Term Care's Chronic Care Co-Payment 2004 circular²⁸, a co-payment is: "the Chronic Care patient's contribution towards **accommodation and meals**" (emphasis added) which is "charged by the hospital".²⁹

²⁴at 19-24 (FSCO P05-00006, March 14, 2006)

²⁵*McMichael* at 23

²⁶*McMichael* at 23

²⁷The distinction between whether a co-payment is classified as a medical benefit or an attendant care benefit was not addressed in: (a) *Da Rosa and Allstate Insurance Co. of Canada*, QL at 17, para. 94 (FSCO A99-000110, December 20, 2000); (b) *Da Rosa and Allstate Insurance Co. of Canada*, QL at 1 para. 1; QL at 3, para. 10 (FSCO P01-00007, May 16, 2002, Appeal); (c) *Da Rosa and Allstate Insurance Co. of Canada, Minister of Health and Long-Term Care, Intervenor*, QL at 1, para. 1; QL at 2, para. 6 (FSCO P04-00033, May 25, 2006); *Bellavia and Allianz Insurance Co. of Canada* (FSCO A05-000807, February 21, 2006); or (e) *Bellavia and ING Insurance Company of Canada* (FSCO P06-00010, December 15, 2006)

²⁸At 1

²⁹O.Reg. 552, R.R.O. 1990, s.10(4)

Section 10 of Ontario Regulation 552³⁰ states:

- (1) A co-payment for **accommodation and meals** that are insured services shall be made by or on behalf of an insured person who, in the opinion of the attending physician, requires chronic care and is more or less permanently resident in the hospital or other institution (emphasis added).
- (2) This section applies only with respect to an insured person receiving:
 - a) Insured in-patient services provided in a hospital ... graded under the *Public Hospitals Act* as a Group F ... hospital;”

During the motion, the parties agreed that, pursuant to the *Health Insurance Act*³¹ and the *Public Hospitals Act*,³² the “Baycrest Centre for Geriatric Care” is a “Group F **hospital**” (emphasis added).

Form 1

Form 1³³ is the only procedure under the *Schedule* for determining the monthly amount of attendant care benefits payable.³⁴ Section 39(1) of the *Schedule* states:

³⁰R.R.O. 1990 made under the *Health Insurance Act*

³¹R.S.O. 1990, c.H-6

³²R.S.O. 1990, c.P-40

³³Which was prescribed by Ontario Regulation 403/96 prior to March 1, 2006

³⁴Section 16(4) of the *Schedule*

An application for attendant care benefits for an insured person must be in the **form of an assessment of attendant care needs** for the insured person that is **prepared** and submitted to the insurer **by a member of the health profession who is authorized by law to treat the person's impairment** (emphasis added).

Section 39(17) of the *Schedule* states:

an assessment of attendant care needs under this section in respect of accidents occurring before March 1, 2006 **shall be in Form 1**, as it read on February 28, 2006 (emphasis added).

There is nowhere on the Form 1 for an assessor to attribute any amount for “accommodation and meals.”³⁵ Therefore, Form 1 does not provide for assessment of any “accommodation and meal” expenses as an attendant care expense.

Form 1 determines the maximum amount payable for attendant care.³⁶ If one were to accept ING's submission that a payment towards accommodation and meal expenses is deductible from the insurer's contribution towards attendant care, an absurd result would occur in the following example.

If a person was hospitalized in a chronic care hospital and the Form 1 that was completed indicated that the attendant care needs were \$0 (which could occur since there is no provision for payment of either accommodation or meal expenses under the Form 1), because attendant care is only payable “in accordance with the Form 1”, pursuant to ss.16(4), 39(4) and 39(17) of the *Schedule*, the amount payable for the attendant care benefit would be \$0. If the attendant care assessment was \$0, the insurer could not pay the co-payment as an attendant care payment.

³⁵O.Reg. 552, R.R.O. 1990, s.10(1)

³⁶Sections 16(4), 39(1) and 39(17) of the *Schedule*

Using the same example, if a co-payment made to a hospital is payable pursuant to s.14(2)(a) of the *Schedule* as a medical benefit, then the insurer would continue to have the responsibility to make the co-payment under s.14(2)(a) of the *Schedule* for accommodation and meals which are the basis for the co-payment responsibility under s.10(1) of Ontario Regulation 552.

ING's Conduct

By letter dated April 15, 2005, ING notified Mr. Haimov that ING would “not consider payment” of attendant care expenses. ING’s Response to the Application for Arbitration states that the claim for attendant care expenses “is not necessary and reasonable”. ING’s submission that the co-payment it made to TRI and Baycrest is deductible from any attendant care benefits found owing is inconsistent with its letter dated April 15, 2005 denying the claim and the basis upon which it defended this claim.

ING conceded it has not paid the attendant care benefit in the amount of \$154.63 in accordance with the Form 1 completed by Joshua Theodore. ING’s evidence was that it made a co-payment of approximately \$1,500.00 per month separately and apart from the Form 1 completed by Joshua Theodore and not in accordance with the amount identified as payable on the Form 1 by Joshua Theodore.

Conclusion

The co-payment (ie., accommodation and meals³⁷) is not quantifiable on the Form 1, which is the only method used under the *Schedule*³⁸ to determine the monthly attendant care benefit entitlement. Consequently, I find that the monthly co-payment is a medical benefit pursuant to s.14(2)(a) of the *Schedule* for “hospital ... services” rather than an attendant care benefit.

³⁷Ministry of Health for Long Term Care’s Chronic Care Co-Payment 2004 circular at 1

³⁸Sections 16(4), 39(1), 39(17)

Special Award:

During the motion, the Applicant submitted that ING should pay a special award because ING contravened the procedural requirements of the *Insurance Act*³⁹ and the *Schedule*⁴⁰ when it did not arrange a DAC, pay Mr. Haimov attendant care benefits pending a DAC assessment⁴¹ or pay Mr. Haimov in accordance with the Form 1 prepared by Mr. Theodore. Section 282(10) of the *Insurance Act* mandates an Arbitrator to order a special award in cases where an insurer has unreasonably withheld or delayed payments to the Applicant. The parties provided written submissions on this issue following the interim benefits hearing. ING submitted that the issue of a special award should be determined at the main hearing by the hearing Arbitrator.

Although there are cases in which a special award was awarded on a motion for interim benefits,⁴² I am not bound by the decisions of other Arbitrators.⁴³ A special award is a discretionary item and not a benefit. Because an interim benefits hearing is not as extensive as a full hearing, I find that it is more appropriate for the Arbitrator hearing the merits of the case to determine the issue of a special award.⁴⁴

³⁹R.S.O. 1990, c. I-8, s.268(8) which states: “Where the *Statutory Accident Benefits Schedule* provides that the insurer will pay a particular statutory accident benefit pending resolution of any dispute between the insurer and an insured, the insurer shall pay the benefit until the dispute is resolved.”

⁴⁰*Schedule*, s.39(4)

⁴¹*Schedule*, s.39(6)

⁴²*Slater and Loyalist Insurance Company*, QL at 3, para. 16 (FSCO A00-000358, August 31, 2000 and October 5, 2000); *Simpson and Trafalgar Insurance Co. of Canada*, QL at 10-11, para.’s 36 and 37 (FSCO A98-000215, July 16, 1998)

⁴³*Vo and Maplex General Insurance Company*, QL at 7, para. 31 (OIC, P-002777, December 12, 1997)

⁴⁴*Brown and Allstate Insurance Company of Canada* at 9-10 (OIC, A97-000579, May 29, 1997; appeal dismissed, 40 O.R. 3d 610 (Ont. Div. Ct.); see also *Boniface and Liberty Mutual Insurance Company* at 14 (FSCO July 6, 2000, A97-002106)

EXPENSES:

Expenses were not addressed at the motion. If the parties are unable to agree on the issue of entitlement to or amount of the expenses, they may make submissions on both issues in accordance with Rule 79 of the *Code*.

Maggy Murray
Arbitrator

May 9, 2007

Date



FSCO A05-002734

BETWEEN:

MARKUS HAIMOV

Applicant

and

ING INSURANCE COMPANY OF CANADA

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. ING shall pay Mr. Haimov interim benefits for attendant care in the amount of \$1,053.50 per month, from March 22, 2005 until August 10, 2005, in the total amount of **\$4,883.62**;
2. ING shall pay Mr. Haimov interim benefits for attendant care in the amount of \$2,925.96 per month, from August 11, 2005 until March 27, 2006, in the total amount of **\$21,932.68**;
3. ING shall pay Mr. Haimov interim benefits for attendant care in the amount of \$5,289.00 per month, from March 28, 2006 to May 30, 2006, in the total amount of **\$10,954.75**;
4. ING shall pay Mr. Haimov interim benefits for attendant care in the amount of **\$6,000.00** per month, from May 31, 2006 until further Order of an Arbitrator.
5. ING shall pay Mr. Haimov interest of 2 per cent per month compounded monthly on the above amounts from July 16, 2005 until the benefit is paid in accordance with subsection 46(2) of the *Schedule* in respect of the attendant care benefit.

6. The issue of a special award is reserved to the Arbitrator hearing the merits of the application.
7. If the parties cannot agree on the issue of entitlement to or amount of the expenses of this Arbitration proceeding, they may request a determination of these issues in accordance with Rule 79 of the *Dispute Resolution Practice Code — Fourth Edition*.

Maggy Murray
Arbitrator

May 9, 2007

Date