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

Ontario

Date: 2017-12-06
Tribunal File Number: 17-000848/AABS
Case Name: 17-000848 v Echelon General Insurance Company

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

Between:

J. C. C.

Applicant

and

Echelon General Insurance Company

Respondent

DECISION

ADJUDICATOR: **Avvy Go**

APPEARANCES:

Counsel for the Applicant: Michael Ferrante

Counsel for the Respondent: Jamie Pollack

HEARD: Written Hearing: July 10, 2017

REASONS FOR DECISION AND ORDER

OVERVIEW

1. The applicant, J.C.C. was injured in an automobile accident (the accident) on October 3, 2016 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*"). The applicant, who is Hispanic, sought to hire a Personal Support Worker (PSW) who shares his cultural and linguistic background to provide him with attendant care services. His request was refused by the respondent. The Applicant submitted an application for dispute resolution services to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal").

2. The parties attended a case conference and by an order dated May 11, 2017. The Tribunal ordered a written hearing to be held on July 10, 2017.[1] The following substantive issues to be decided at the hearing were identified in the order:

    - Is the applicant entitled to attendant care benefits in the amount of $3,000.00 for the period October 3, 2016 to March 3, 2017?
    - Is the applicant entitled to interest on any overdue payment of benefits?
    - Is the respondent entitled to costs in this matter?

3. For the reasons set out below, I find that the applicant is entitled to the attendant care benefits in the amount of $3,000.00 for the period October 3, 2016 to March 3, 2017 and the interest on these benefits. I find no costs should be awarded in this matter.

FACTS

4. On October 3, 2016, the applicant was operating a motorcycle when another vehicle attempted to make a U-turn in front of him and came to a stop in the middle of the road. The applicant struck that vehicle and fell off his motorcycle.

5. Following the accident, the applicant was transported to hospital by ambulance where he underwent surgery to repair his fractured left femur. The applicant remained in hospital for several days.

[1] At the case conference hearing, the parties also raised a preliminary issue, namely whether the applicant was disentitled to payment of attendant care benefits for the five-month period of October 3, 2016 to March 3, 2017 because he failed to provide documents requested from the respondent under section 33(6) of the *Schedule*. In their subsequent submissions to the Tribunal, the respondent advises that it no longer disputes the applicant's entitlement to attendant care benefits on the basis of section 33 of the *Schedule*. As such, there is no need for me to address the preliminary issue.

6. On October 7, 2016, after having been discharged from the hospital, the applicant underwent an Occupational Therapy Attendant Care Assessment pursuant to an OCF-18 approved by the respondent. The assessment concluded that the applicant's monthly level of attendant care needs amounted to a total of $8,977.68.

7. By a letter dated November 22, 2016, the respondent advised the applicant that it would consider expenses for attendant care services to a maximum of $3,000.00 for non-catastrophic injuries.

8. The applicant hired Ms. Paula Moya Salazar to provide him with attendant services, with a view to help him overcome cultural and linguistic barriers in accessing care. The applicant and Ms. Salazar met each other through work. The respondent subsequently refused to pay Ms. Salazar for the attendant care services she has provided from October 3, 2016 to March 3, 2017, on the basis that Ms. Salazar was not employed as a Personal Support Worker (PSW) at the time she provided care to the applicant.

THE LAW AND ANALYSIS

9. Pursuant to section 19 of the *Schedule*, an insurer is required to pay for all reasonable and necessary expenses that are incurred by an insured person as a result of the accident for services provided by a personal support worker. The amount of a monthly attendant care benefit is determined in accordance with the Assessment of Attendant Care Needs (Form 1).The applicant has the burden to establish entitlement to attendant care benefits. In the present case the amount of the attendant care benefit shall not exceed $3,000.00 per month, as per s.19 (3) of the *Schedule*.

10. Another relevant section is s.3(7)(e)(iii) of the *Schedule* which differentiates between care providers who provide care in their professional capacity, and family and friends who are not employed as a professional health provider, and the resulting differences in the insured person's entitlement to benefits.

11. I will review these provisions in more detail in my analysis below when I examine how they should apply to the present case.

Issue 1: Is the applicant entitled to attendant care benefits in the amount of $3,000.00 for the period October 3, 2016 to March 3, 2016?

The Parties' Positions

12. The main contention between the parties regarding the entitlement of attendant care benefits is the classification of the service provider, Ms. Salazar. The applicant submitted that Ms. Salazar is a PSW and was providing care to the

applicant in that capacity. The respondent argued that Ms. Salazar was a non-professional service provider and as such, should only be compensated for economic loss actually incurred. The parties, however, do agree on a number of facts about Ms. Salazar's credentials and work history, as outlined in their Agreed Statement of Facts:

- Ms. Salazar had already completed her studies and successfully received her Personal Support Worker certificate in February 2012, when she was retained by the applicant;
- Ms. Salazar worked at Walt Disney World Resorts as a housekeeping supervisor; employed at Summer Bay Resorts as a housekeeper and Private Care CAN for the Perez family, while she resided in the USA;
- At the time she was hired by the applicant, Ms. Salazar was not working as a PSW;
- Ms. Salazar's last position as a PSW was in 2013;
- Ms. Salazar returned to school and graduated as a Lab Technician and worked in a walk-in clinic for a time period of one and a half years;
- At the time of her hire, Ms. Salazar was working part-time setting up events;
- Prior to her being hired, the applicant and Ms. Salazar worked together at one of the applicant's part-time employers and this is how they met;
- Ms. Salazar submitted invoicing to the respondent for attendant care services she provided to the applicant for the months of October 2016, November 2016, December 2016, January 2017 and February 2017; and
- Ms. Salazar has been working as a PSW since April 2017 at Spectrum Health Care.

13. The respondent cited section 3(7)(e)(iii) of the *Schedule* which provides that an expense (in this case for attendant care) is not incurred unless the person who provided the goods or services:

    a. did so in the course of the employment, occupation or profession in which they would ordinarily have been engaged, but for the accident, or
    b. sustained an economic loss as a result of providing the goods or services to the insured person.

14. Relying on this section, the respondent argued that for the attendant care benefits to be payable, Ms. Salazar must have provided the applicant with attendant care services: a) in the course of the employment, occupation or profession that she was engaged in prior to the accident; or b) she must have sustained an economic loss as a result of providing the attendant care services.

15. Previously, the Court of Appeal for Ontario has held that if an economic loss on behalf of the attendant care service provider could be made out, the attendant care benefits would be payable in accordance with the Form 1.[2] The respondent

[2] Henry v. Gore Mutual Insurance Company, 2013, ONCA 480

pointed out that, the Ontario Government had amended the pre-2010 Statutory Accident Benefits Schedule such that if a person who provided attendant care services did not do so in the course of their employment, occupation or profession, the amount of the attendant care benefit payable shall not exceed the amount of the economic loss sustained by the attendant care provider during the period while, and as a direct result of, providing the attendant care.[3]

16. As such, the respondent submitted, if Ms. Salazar's services fell under a definition of a professional service provider, then the applicant would be entitled to the maximum potential amount owing. If however, her services fall under the definition of a non-professional service provider, then the applicant would only recover the amount of economic loss actually incurred.

17. The respondent submitted that Ms. Salazar was not providing services in the course of her employment and therefore must show she suffered an economic loss. The applicant has not submitted any evidence that Ms. Salazar suffered an economic loss as a result of providing attendant care services to the applicant, and accordingly the applicant has not met his burden of proof on this issue.

18. The respondent also cited *Shawnoo v. Certas Direct*[4] in which the Ontario Superior Court concluded the service provider in that case (the applicant's mother) was not employed as a PSW prior to the accident and was not actively seeking such employment, and as such, the insured must prove economic loss having been incurred.

19. The applicant, on the other hand, took the opposite position that Ms. Salazar was providing care to the applicant as a PSW and the applicant is therefore entitled to the maximum $3,000.00 per month in benefits. The applicant distinguished the *Shawnoo* case in that the service provider in *Shawnoo* was the mother of the insured, who had not worked in the capacity as a PSW for some time and there was no evidence to suggest she would be returning to that field of employment.

20. The applicant relied on section 19(1)(a) of the *Schedule* which provides in part that attendant care benefits shall pay for all reasonable and necessary expenses that are incurred for services "provided by an aide or attendant". The applicant cited Lerner's Dictionary which defines an "aide" as a person whose job is to assist someone, and an "attendant" as an assistant or servant. The applicant argued that Ms. Salazar is a PSW who meets the criteria as set out by s.19(1)(a) of the *Schedule*.

21. The applicant further argued that nowhere is it stated in the *Schedule* that the aide or attendant cannot be working, before, during, or after providing services, in any other occupation other than that of an aide or attendant. Nor does the

[3] S.19(3) of the *Schedule*
[4] Shawnoo v. Certas Direct Insurance Company, 2014 ONSC 7014

Schedule state the aide or attendant must stop working in any other occupation while providing the services of a PSW.

22. The applicant made the further argument that while amendments have been made, the *Schedule* was not meant to "discriminate or prejudice against persons providing aide or to an attendant". The applicant cited a hypothetical example of a recently graduated PSW who, according to the respondent's argument, would not be compensated because the graduate was previously a student and not employed at the time of hire as a PSW. Such an interpretation, submitted the applicant, would not be in keeping with the public policy behind the insurance benefits scheme.

Analysis

23. Whether the applicant is entitled to the benefits he claims and if so, how much, depends on how the provision under s.3(7)(e)(iii) should be interpreted and applied to his case.

24. In a recent decision of this Tribunal[5], Adjudicator Truong gave a detailed analysis of s.3(7)(e)(iii) in general and subsection (A) in particular. Applying the principles of statutory interpretation, Adjudicator Truong concluded that a professional service provider as defined by the *Schedule* may be eligible for attendant care payment even if they are not in an arm's length relationship with the insured. Further, a professional service provider needs not have to be someone who has been employed in that profession prior to the accident or is employed in that profession at the time of the accident, so long as he or she is "ordinarily engaged in" the profession through other means such as training, professional certification and job search. While this decision is not binding on me, it provides a clear analysis of the section in question which I find helpful in my analysis of the facts before me.

25. In *Shawnoo v. Certas Direct*, after citing *Henry v. Gore Mutual Insurance Company*[6], Justice M. A. Garson confirmed that coverage provisions are to be interpreted broadly, in favour of the insured.[7] Moreover, Justice Garson noted that the statutory provisions "must be interpreted in their entire context, having regard to the grammatical and ordinary sense of the provisions, harmoniously alongside the scheme and object of the Act, and the intention of the drafters."[8]

26. Justice Garson also noted that the court must be "mindful of the need to give such fair and liberal interpretation to this wording so as to best ensure the attainment of the objects" of the *Schedule.*[9] He then noted the Court of Appeal in *Monks*[10]

[5] A.P. and Coseco Insurance Company, 2017, 16-004363/AABS
[6] *Henry v. Gore Mutual Insurance Company*, 2013 ONCA 480 (CanLII)
[7] *Shawnoo v. Certas Direct*, *supra*, at para 23
[8] *Ibid*, at para.47
[9] *Ibid*, at para.45

rejected a narrow interpretation of the phrase "incurred" in the context of that case, finding that a broader interpretation is consistent with the policy objective that accident victims properly receive benefits to which they are entitled.

27. In *Shawnoo*, the Court concluded that the applicant's mother was not employed for remuneration as a PSW prior to the accident; she was receiving social assistance and there was no evidence that she was actively seeking such employment or likely to receive an offer for such employment. As such, the Court was not satisfied that, but for the accident, the applicant's mother would ordinarily have been engaged in health care services employment.

28. The case before me has some similarities with the *Shawnoo* case; but there are differences as well. With respect to the similarities: Ms. Salazar was not working as a PSW at the time she provided care to the applicant and her last position as a PSW was in 2013. With respect to the differences: Ms. Salazar was working at the time, albeit in a non-PSW position. She went back to school, graduated as a Lab Technician and worked in a walk-in-clinic for one and a half years. Ms. Salazar also found work as a PSW in April, 2017, right after she stopped providing care to the applicant. Another main difference, I note, is that Ms. Salazar and the applicant met each other through work, and there is no evidence of any other relationship between the two. This factor is relevant in determining whether Ms. Salazar is providing care to the applicant in her professional capacity or in her personal capacity as a friend.

29. Are these facts sufficient to find Ms. Salazar as someone who provided the care "in the course of the employment occupation or profession" that she would "ordinarily have been engaged, but for the accident"? The answer, I find, is yes.

30. As Justice Garson noted, the amendment to the *Schedule* was brought in to "exclude family members and friends from eligibility for payment for attendant care services unless they suffer an economic loss"[11]. However, as noted by Adjudicator Truong in A.P., just because the professional service provider may be a family member or friend also does not automatically exclude them from eligibility for payment. The provision under Clause (A) of the *Schedule* does not specifically state that a professional service provide must be at arm's length with the insured, and that "had the drafters intended to prevent professionally trained family members from providing attendant care, they could have expressly stated so, but they did not."[12]

31. Further while Ms. Salazar was not employed at the time of the care as a PSW, there is evidence showing not only that she has worked as a PSW in the past, but more importantly, she worked as a PSW right after providing care to the applicant. In fact, according to the applicant, "due to [the respondent's] failure to pay Ms.

[10] *Ibid*, at para.46, citing *Monks v. ING Insurance Co. of Canada,* 2008 ONCA 269 (CanLII)
[11] *Ibid*, para. 63
[12] A.P. su*pra,* at paras 16, 19

Salazar for her services, she could no longer afford to provide any additional services to [the applicant], who consequently has had to hire a subsequent attendant." I note that Ms. Salazar then immediately found work as a PSW in April, 2017, after leaving the employ of the applicant. This, I find, is further evidence demonstrating that Ms. Salazar was providing care to the applicant in her professional capacity as a PSW.

32. I accept the applicant's submission that the fact that Ms. Salazar has also worked in non-PSW positions does not mean she was not providing care to the applicant in a capacity as a PSW. The *Schedule* does not provide that the care provider must be ***exclusively*** employed as a health professional for an insured person to obtain the maximum amount of benefits. Nor is the provision limited to a health professional who is engaged in the profession though employment alone. As pointed out by Adjudicator Truong in A.P., the phrase "ordinarily engaged in" is not restricted to employment, but also includes profession and occupation, which can be demonstrated through training and professional certification.[13] Ms. Salazar has the qualifications of a PSW. The fact that she had not been working as a PSW immediately prior to the time in question should not disqualify her from providing such services to the applicant.

33. Further, I note the applicant's submission that he had hired Ms. Salazar to provide care because he needed someone who could help him overcome cultural and language barriers. This is not a case of an insured retaining the help of a family or friend and pretending they have hired a professional care provider. The applicant, as the respondent has conceded, is entitled to attendant care benefits. The person he has hired has a PSW certificate and is working as a PSW. The applicant should not be disadvantaged by his choice of service provider who not only provided him with the professional care he needed, but did so in a manner that also met his cultural and language needs.

34. Taking into account the public policy behind the *Schedule*, and the need to interpret the provisions within broadly in favour of the insured, while narrowly construing exclusions or restrictions, I therefore find the applicant entitled to receive attendant care benefits in the amount of $3,000.00 while under the care of Ms. Salazar.

Issue 2: Is the applicant entitled to interest on any overdue payment of benefits?

35. Based on the above finding, I find interest is payable with respect to the attendant care services that the Applicant is entitled to receive.

[13] A.P. *supra*, at para 29

Issue 3: Is the respondent entitled to payment of its costs in this matter?

36. The respondent sought costs against the applicant on the basis that the applicant has been "unreasonable and frivolous because the applicant has refused to acknowledge that the service provider was not acting in the course of her employment at the time of the accident", and as such this proceeding "was unnecessary and unreasonable". I note that whether or not the service provider was acting in the course of her employment is at the heart of the dispute between the parties. Just because that the parties may have different positions on an issue does not necessarily mean that one's position is unreasonable and frivolous and the other not.

37. I note that under Rule 19 of the Tribunal Rules, a party who believes another party has acted unreasonably, frivolously, vexatiously, or in bad faith during a proceeding may make a request to the Tribunal for costs.

38. As I have found in favour of the applicant on the issue that the respondent deemed to be "unreasonable", I find that no costs should be awarded.

39. Even if I were to have found against the applicant, a cost order in my view would not have been appropriate. Just because the applicant disagreed with the respondent on the classification of the care provider in question did not, by definition, render his behaviour unreasonable, frivolous or vexatious. The very mandate of this Tribunal is to resolve disagreement among parties. Taking the respondent's position to its logical conclusion, cost will have to be awarded in every case. Clearly, that is not the intent behind the Tribunal Rules on the issue of cost.

CONCLUSION

40. Pursuant to the authority vested in this Tribunal under the provisions of the Act, the Tribunal finds that the applicant is entitled to the attendant care benefit and interest claimed for the reasons set forth. No costs will be awarded.

Released: December 6, 2017

_____

Avvy Go, Adjudicator