

**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**



Citation: J.W. vs. Security National Insurance Company, 2020 ONLAT 18-008988/AABS

Tribunal File Number: 18-008988/AABS

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. W.

Applicant

and

Security National Insurance Company

Respondent

DECISION

ADJUDICATOR:

Brian Norris

APPEARANCES:

For the Applicant:

William Keele, Counsel

For the Respondent:

Yulia Barsky, Counsel

HEARD:

In Writing on: June 3, 2019

OVERVIEW

- [1] The applicant was injured in an automobile accident on October 20, 2014 and sought benefits from the respondent pursuant to O. Reg. 34/10, known as the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the “*Schedule*”). The respondent refused to pay for certain attendant care benefits (“ACBs”). As a result, the applicant applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of this dispute.

ISSUES

- [2] The disputed issues in this hearing are:
- (1) Is the applicant entitled to an ACBs in the amount of \$803.99 per month for the period spanning October 14, 2016 to-date and ongoing?
 - (2) Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [3] The applicant is entitled to up to \$803.99 per month for attendant care services. However, he is not entitled to payment for any expenses to-date because the amounts do not meet the definition of an “incurred expense” within the meaning of section 3(7)(e) of the *Schedule*, nor can they be deemed incurred within the meaning of section 3(8) of the *Schedule*. My reasons follow.

BACKGROUND

- [4] The applicant was driving a motorized scooter which was struck on the left side by a sport utility vehicle. The collision left him with numerous injuries which include a brain injury and fractures to the skull, spine, ribs, leg, and wrist. The applicant’s impairments were determined to be catastrophic by the respondent.
- [5] The applicant was hospitalized following the accident and, after being released from the hospital, claimed and received ACBs from the respondent.
- [6] In May 2016, the respondent requested the applicant submit a new Assessment of Attendant Care Needs (“Form-1”). He complied and, on June 16, 2016, provided an updated Form-1 dated June 1, 2016. The new Form-1 recommended a monthly ACBs in the amount of \$803.99.

- [7] The respondent commissioned an insurer's examination ("IE") following receipt of the June 1, 2016 Form-1. The IE took place on August 22, 2016 and it determined he no longer required attendant care services.
- [8] The crux of this matter is whether the applicant is entitled to attendant care benefits for the period claimed and, if so, the quantum of his entitlement. Also at issue is whether the attendant care expenses claimed by the applicant qualify as an "incurred expense" pursuant to section 3(7)(e) of the *Schedule*. The onus is on the applicant to prove on a balance of probabilities that his entitlement and expenses are reasonable and necessary. Any expenses must be proven to have been incurred or deemed to be incurred because the respondent unreasonably delayed or withheld payment of a benefit.

ENTITLEMENT

- [9] The applicant claims entitlement to ACBs in the amount of \$803.99 per month due to ongoing physical, emotional, psychological and cognitive difficulties. The primary needs of the applicant are evening meal preparation due to fatigue, and emotional support, cues and reminders due to forgetfulness and irritability, all of which are a result of the brain injury suffered in the accident. The respondent submits no amount of ACBs are reasonable and necessary as a result of the applicant's accident-related injuries.
- [10] I find the applicant is entitled to the ACBs for the following reasons.
- [11] The optics of this matter may seem unusual; here, the applicant experienced catastrophic cognitive injuries and claims entitlement to ACBs, but has since returned to an intellectually challenging vocation which requires long work days. On its face, that does not seem correct. However, upon review of the evidence, I conclude he experiences notable fatigue, which is affected by his return to work as a litigation lawyer. I find he suffered a traumatic brain injury and numerous serious injuries as a result of the accident and these injuries cause the applicant to require assistance as a result of fatigue, forgetfulness, and irritability.
- [12] The record for this hearing includes numerous medical reports and clinical records which support my finding. Some of the documents included are;
- 1) The occupational therapy report dated June 1, 2016 which recommended a monthly ACBs in the amount of \$803.99;
 - 2) The social work assessment report by S. McManus, dated October 17, 2018, which recommended advocacy and support for the applicant to

assist in gaining control of his daily life and to prevent him from feeling overwhelmed;

- 3) The mental behavioural evaluation by Dr. D. Becker, dated November 30, 2017, which notes the applicant's forgetfulness and inability to focus and concentrate;
- 4) The occupational therapy report by B. Ahuja dated November 24, 2017, which noted the applicant complained of needing his wife to "constantly remind me to do things";
- 5) The physiatry report by Dr. M. Unarket, dated February 10, 2017, which noted the applicant experiences debilitating fatigue from a cognitive and physical perspective. It also forecasted that the applicant would have difficulty participating in activities of daily living that require a moderate level of physical demands;
- 6) The orthopaedic surgeon report of Dr. M. McKee, dated April 18, 2018, which determined the applicant will have a permanent decrease in his ability to perform daily living tasks like cooking, cleaning, and laundry; and
- 7) The neurological report of Dr. M. Rathbone, dated April 1, 2016, which found the applicant's fatigue is a direct result of his traumatic brain injury and it has a significant impact on his ability to complete activities of daily living.

[13] The respondent refutes the applicant's submissions and relies, primarily, on the following information;

- 1) Assessment of attendant care needs prepared by J. Abraham, dated September 2, 2016, which found the applicant did not require attendant care because he demonstrated the physical tolerances to complete his self-care independently.
- 2) Occupational therapy in-home evaluation prepared by B. Ahuja, dated November 17, 2017, which found the applicant had functional physical tolerances;
- 3) Cognitive screen assessment by G. Braganza, dated October 2, 2017; which noted the applicant's physical independence.
- 4) Occupational therapy assessment by L. Youm, dated March 14, 2018, which found the applicant physically able to complete his self-care.

- [14] In my view, the respondent's reports do not upset, and are outweighed by, the evidence presented by the applicant. For example, the Abraham report dated September 2, 2016 did not adequately evaluate the applicant's cognitive difficulties. The assessment did not include any testing of his issues such as forgetfulness, irritability, and disorganization.
- [15] The Ahuja report may have found functional physical tolerances but it also noted the applicant's reduced cognitive and emotional capacity to tolerate daily work demands. The report also states he showed significant difficulty with paying attention to cognitively demanding tasks, and frequently modified or withdrew from tasks.
- [16] While the Braganza report dated October 2, 2017 noted the applicant's physical independence, it also commented on his cognitive issues. Notably, it found his cognitive symptomology is likely related to residual cognitive impairment that are the result of his traumatic brain injury, pain, fatigue, and emotional distress.
- [17] The respondent neglects to appreciate that the Youm report dated March 14, 2018 noted the applicant's work pace during cognitive tests was slow and performance during distraction tests was poor and required cueing. The report also noted the complex reading test results signaled reduced planning or organization.
- [18] On a balance of probabilities and considering the submissions and evidence, I find the applicant has established he requires ACBs to address his fatigue and cognitive issues such as forgetfulness, irritability, and disorganization. I agree with occupational therapist Gereghy's recommendation for ACBs in the amount of \$803.99 per month. I find this is a reasonable amount to provide the necessary evening meal preparation, emotional support, cues, and reminders due to fatigue, forgetfulness and irritability as a result of the brain injury he suffered in the accident.
- [19] Having found the applicant is entitled to ACBs, I must determine the amount, if any, payable by the respondent.

WERE THE EXPENSES "INCURRED"?

- [20] The applicant claims entitlement to expenses for attendant care services provided by MP and his wife SK. The respondent submits the applicant has not incurred expenses for attendant care services. The applicant has the onus to prove on a balance of probabilities that the services were incurred.

- [21] For the following reasons, I agree with the respondent and find the applicant has not incurred any compensable attendant care expenses.
- [22] Section 19(1) of the *Schedule* states that ACBs shall pay for all reasonable and necessary expenses that are incurred by the applicant as a result of the accident for services provided by an aide, attendant or a long-term care facility.
- [23] Also relevant to this matter is section 3(7)(e)(iii) of the *Schedule*. It states that an expense is not incurred unless the person who provided the goods or services: (A) did so in the course of their employment, occupation, or profession for which they would normally be engaged in but for the accident, or (B) sustained an economic loss as a result of providing the goods or services to the insured person.
- [24] Regarding section 3(7)(e)(iii)(A), I find both providers, MP and SK, provided services which were not within the course of their employment, occupation, or profession.
- [25] MP's resumé defined the services provided as that of a "house helper." It notes MP assisted "with household tidying and basic maintenance" and assisted with "childcare when required." The resumé shows experience in the food industry and education in the visual arts. Considering the characterization of the services provided, as well as the education and professional experience, I find MP was not providing a service which she would normally be engaged in but for the accident. This is also the case for the applicant's wife, SK. There is no evidence she was providing services she would normally do so in the course of her employment, occupation or profession.
- [26] If I am wrong, and MP was providing attendant care services as part of her occupation, I find insufficient evidence to show MP provided the services as recommended in the Form-1 dated June 1, 2016. MP's resumé notes the work provided to the applicant and characterized it as assistance "with household tidying and basic maintenance" as well as "childcare when required." I find this work falls outside of the services the applicant requires for his cognitive and other issues as a result of the brain injury. There is no evidence to show MP provided any emotional support, cues, or reminders as suggested in the Form-1. I do note, however, MP's resumé noted occasional meal preparation.
- [27] I am unable to determine how much of MP's time was for meal preparation. MP's invoices only provide the amount of time worked per day and do not specify how much time was spent providing attendant care services. The invoices for MP's

work lack the requisite detail required to determine the amount of compensable attendant care services provided.

- [28] In regard to section 3(7)(e)(iii)(B), the applicant led no evidence or submissions showing MP incurred an economic loss as a result of providing attendant care services to him. Instead, he suggests SK incurred a compensable economic loss as a result of hiring MP to provide childcare and other services, freeing up SK to provide his requisite care.
- [29] In respect of this argument, I find no evidence to show the amounts paid to MP constitute an economic loss sustained by the applicant or SK as required by section 3(7)(e)(iii)(B). I am unable to determine whether the services provided by MP enabled SK to provide the applicant's attendant care or if the services provided were assistance with managing a home with several children, including a newborn. In other words, there is no evidence to show the applicant or SK incurred MP's services to allow SK to provide attendant care as a result of the accident. While the applicant made submissions stating SK required MP's help in order to provide ACB services to the applicant, there is no affidavit or other evidence to support the claim. Submissions are not evidence.
- [30] That does not end the analysis: if the Tribunal finds an expense was not incurred because the respondent unreasonably withheld or delayed payment of a benefit in respect of the expense, the Tribunal may deem the expense to have been incurred, pursuant to section 3(8) of the *Schedule*.
- [31] The respondent concludes that ACBs are not reasonable and necessary for the applicant and, therefore, no benefits were unreasonably withheld. The applicant submits, pursuant to *Belair Insurance Co. v. McMichael*¹, it is open to the Tribunal to deem an expense to have been incurred for the purpose of determining an insured person's entitlement to a benefit. He submits the respondent's failure to consider his need for emotional and psychological support is unreasonable.
- [32] I find no reason to deem ACBs were incurred. There is no evidence the payments were unreasonably withheld or delayed by the respondent. Instead, there is evidence of competing professional opinions. It is reasonable to follow the recommendations from a healthcare professional unless the recommendations are unreasonable. While I have found the respondent's in-home assessment and Form-1 failed to fully examine the applicant's cognitive and other issues, I find this is not unreasonable considering the applicant's

¹ 2007 CanLII 17630 (ONSCDC)

recovery at the time the benefits were denied. He returned to engaging in many or most of his pre-accident activities, including work as a litigation lawyer.

- [33] In addition, there is no evidence the applicant went without ACBs because they were denied. Instead, the applicant incurred expenses that he considered to be under the umbrella of ACBs. However, I found they were not for the reasons given above.

INTEREST

- [34] Having found the applicant is not entitled to payment for the services provided, I conclude he is not entitled to interest pursuant to section 51 of the *Schedule*.

CONCLUSION

- [35] The applicant is entitled to up to \$803.99 per month for attendant care services but is not entitled to payment for any expenses to-date because they do not meet the definition of an incurred expense nor are they deemed incurred pursuant to the *Schedule*.

Released: March 13, 2020

**Brian Norris
Adjudicator**