

**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: **N.Y. vs. Dumfries Mutual Insurance Company, 2019 ONLAT 17-005913/AABS**

Date: October 31, 2019

Tribunal File Number: 17-005913/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:

N.Y.

Appellant(s)

and

Dumfries Mutual Insurance Company

Respondent

AMENDED DECISION

PANEL: Daniela Corapi, Adjudicator
Paul Gosio, Adjudicator

APPEARANCES:

For the Appellant: N.Y., Applicant
Gary Mazin, Counsel
Joseph Filice, Counsel

For the Respondent: Dumfries Mutual Insurance Company
Lisa Armstrong, Counsel

HEARD: In-Person: August 20, 21, 28, September 4, 5, and 6, 2018

ISSUE

- [1] The applicant seeks a determination that she is entitled to an attendant care benefit in the amount of \$6,000.00 per month for the time period from August 1, 2014 to date. The respondent concedes that the applicant is entitled to an attendant care benefit but takes issue with respect to the quantum; claims that some of the past attendant care services were not incurred pursuant to section 3(7) of the *Schedule*¹; and claims that some of the attendant care services claimed for are housekeeping services.

RESULT

- [2] Based on a totality of the evidence before us and the reasons set out below, we find that the applicant is entitled to an attendant care benefit in the amount of:
- I. \$6,000.00 per month from August 1, 2014 to May 26, 2016.
 - II. \$2,568.17 per month from May 27, 2016 to July 16, 2017.
 - III. \$6,000.00 per month from July 17, 2017 to date.
- [3] We also find that the unpaid portion of attendant care services provided by the applicant's sister and Key Rehab from August 2014 to March 2017 were incurred pursuant to the *Schedule*. We reject the respondent's claim that some of the attendant care services claimed for were actually housekeeping services and find that an award under section 10 of Regulation 664 is not warranted.

Attendant Care Benefit

- [4] The applicant was involved in a motor vehicle accident on July 14, 2014, in which she was the seat-belted driver of a stopped vehicle that was rear-ended by a pick-up truck. She attended the Emergency Department at St. Mary's Hospital and was discharged that same day with soft tissue injuries as well as a possible head injury.
- [5] The applicant continued to be assessed for these complaints and was found to have sustained significant injuries and impairments as a result of the motor vehicle accident. She has pain in her neck, back and stomach and was diagnosed with post concussive syndrome resulting in dizziness, nausea and vomiting, sleep disturbances and headaches. She requires a rollator walker for mobility. The applicant was also diagnosed with a Mild Neurocognitive Disorder

¹ *Statutory Accident Benefits Schedule* – Effective Accidents on or after September 1, 2010

due to a Traumatic Brain Injury with assessed difficulties in short term memory, concentration and multi-tasking. She has become sensitive to noise and light and has been experiencing pain behind her eyes and an ocular disfunction which includes double vision. She has been diagnosed with Somatic Symptom Disorder, Major Depressive Disorder and a Generalized Anxiety Disorder. In November 2016, the applicant was determined to be catastrophically impaired as defined by the *Schedule*.

- [6] The parties agree that the applicant is entitled to an attendant care benefit but disagree with respect to the quantum of the benefit. The applicant bears the onus of establishing, on a balance of probabilities, that she is entitled to the attendant care benefit in the quantum as claimed.

August 1, 2014 to February 26, 2016

- [7] The applicant submitted Form 1's dated October 14, 2014 and January 12, 2016. Both Form 1's were completed by Ms. Wahl and recommended more than \$6,000.00 a month in attendant care services. Ms. Wahl's 2014 Form 1 indicated that the applicant required assistance with dressing and undressing, grooming, serving meals and assistance with navigating stairs. At this time, the applicant lived in a multi-level townhouse complex with two flights of stairs outdoors and multiple levels indoors. Ms. Wahl concluded that the applicant's home was inaccessible, and that the applicant would require someone to assist her navigate the stairs as well as carry her walker up and down the stairs. As a result, Ms. Wahl concluded that it was unsafe for the applicant to exit her residence alone in an emergency and therefore required 24-hour basic supervisory care. Ms. Wahl's 2016 Form 1 recommended similar care but considered the applicant's "episodes", which cause her to lose cognitive, visual and physical function. Ms. Wahl concluded that these episodes further support the applicant's need for 24-hour basic supervisory care. Ms. Wahl also concluded that moving to a more accessible home environment would help improve the applicant's safety and independence.
- [8] The respondent's first attendant care assessment and Form 1 were completed by Mr. Ghatas on May 26, 2016. Mr. Ghatas' Form 1 recommended \$2,288.68 per month in care. The respondent agrees that Ms. Wahl's Form 1's outlined the applicant's required needs and services from August 1, 2014 to February 26, 2016.

February 27, 2016 to May 26, 2016

- [9] The applicant moved into a new apartment in a condominium building on February 27, 2016, where she continues to reside. The applicant's apartment is one level and more accessible than her previous residence. The respondent argues that because this residence is more accessible, it displaces the applicant's need for 24-hour basic supervisory care as outlined in Ms. Wahl's 2014 and 2016 Form 1's. The respondent submits that the applicant should be entitled to the attendant care services as outlined in Ms. Wahl's Form 1's less the 24-hour basic supervisory care.
- [10] The applicant submits that she is entitled to \$6,000.00 per month in attendant care services during this time and continues to rely on Ms. Wahl's 2014 and 2016 Form 1's.
- [11] We find that the applicant is entitled to \$6,000.00 per month in attendant care services during this time. The respondent's position that the applicant's new residence is more accessible and displaces the need for 24-hour basic supervisory care was not supported by an assessment and Form 1. Ms. Wahl's Form 1's continued to provide the only direction regarding the applicant's required needs and services. Even though Ms. Wahl's assessments were conducted at the applicant's previous residence, we find that a new assessment and Form 1 considering the applicant's new living arrangement would be necessary for us to find that the need for 24-hour basic supervisory care was no longer needed.

May 27, 2016 to July 16, 2017

- [12] The applicant submits that she is entitled to \$6,000.00 per month in attendant care services from May 27, 2016 to July 16, 2017. The applicant relies on Ms. Soosar's assessment and Form 1 dated July 17, 2017, which recommended more than \$6,000.00 per month in attendant care services.
- [13] Ms. Soosar's Form 1 indicates that the applicant requires assistance with dressing and undressing, grooming and preparing and serving meals. Ms. Soosar's Form 1 also indicates that the applicant requires 24-hour basic supervisory care due to the applicant's inability to safely deal with emergency situations, such as a fire, to ensure that the applicant does not remove her CPAP machine during the night and depending on the applicant's pain levels and dizziness, to assist with mobility within her apartment. The applicant submits that Ms. Soosar's Form 1 should be retroactively applied to this time period.

- [14] The respondent submits that Ms. Soosar's Form 1 should not be retroactively applied to this time period and that the applicant should be entitled to \$2,568.17 per month in attendant care service. The respondent relies on Mr. Ghatas' Form 1, dated May 26, 2016. Mr. Ghatas' Form 1 indicates that the applicant requires assistance with grooming, feeding, to attend to hygiene issues and to assist with mobility within her apartment. Mr. Ghatas does not recommend 24-hour basic supervisory care. He found that the applicant presented with adequate insight into her abilities and limitations and her awareness of safety responses was noted to be intact. This led Mr. Ghatas to conclude that the applicant presented with sufficient cognitive/mental abilities that would support her ability to be able to respond independently in the case of an emergency.
- [15] Ms. Soosar's Form 1 will not be retroactively applied to this time period. It was the applicant's decision not to get a new assessment and Form 1 completed until July 2017. No reason was given for this delay. Given this finding, the applicant's needs would have to be assessed by comparing Ms. Wahl's Form 1's with that of Mr. Ghatas'. We find that Mr. Ghatas' Form 1 more reasonably addresses the applicant's needs at this time as he was the only one to assess the applicant in her new home environment. This is crucial given that Ms. Wahl's recommendation for 24-hour basic supervisory care was largely based on the accessibility issues posed by the applicant's multi-level home environment at that time.

July 17, 2017 to date

- [16] The applicant submits that she is entitled to \$6,000.00 per month in attendant care services from July 17, 2017 to date. She relies on Ms. Soosar's assessment and Form 1 dated July 17, 2017, which recommended more than \$6,000.00 per month in attendant care services including 24-hour basic supervisory care.
- [17] Ms. Soosar's Form 1 indicates that 24-hour basic supervisory care is required to assist the applicant with mobility within her apartment which can vary depending on the applicant's pain levels and dizziness, to ensure the applicant does not remove her CPAP machine during the night, and due to the applicant's inability to safely deal with emergency situations such as a fire.
- [18] The respondent submits that the applicant is entitled to \$2,568.17 per month in attendant care service from May 27, 2016 to date. The respondent relies on the assessments and Form 1's completed by Mr. Ghatas on May 26, 2016 and Ms. Robbins on August 1, 2017. Both Form 1's recommend that the applicant receive assistance with dressing and undressing, grooming, feeding, to attend to

hygiene issues and to assist with mobility within her apartment, but do not recommend 24-hour basic supervisory care.

- [19] Mr. Ghatas' conclusion was based in part on his finding that the applicant presented with sufficient cognitive/mental abilities that would support her ability to be able to respond independently in the case of an emergency. Ms. Robbins allotted 210 minutes in assistance each day for basic supervisory care under the heading 'applicant lacks the ability to respond to an emergency or needs custodial care due to changes in behaviour', taking into consideration the applicant's ongoing mental health difficulties and her functional and emotional perspective. Ms. Robbins clarified that she could have also allotted this time under the Hygiene section – Bathroom under the heading ensures comfort, safety and security. She was also transparent when acknowledging that her clinical decision to recommend this time was arbitrary but supported by several factors.
- [20] The parties agreed that the competing opinions regarding the need for 24-hour basic supervisory care is the essential difference between the parties' Form 1's.

Discussion

- [21] Based on a totality of the evidence before us, we prefer Ms. Soosar's recommendation and find that the applicant is in need of 24-hour basic supervisory care.
- [22] The applicant testified that she experiences "episodes" which cause her to lose cognitive, visual and physical function. We were persuaded by her testimony in this regard and find that the applicant would be unable to safely deal with an emergency situation when experiencing one of these episodes.
- [23] We were not persuaded by the respondent's submission that these episodes only occur when the applicant encounters cognitive and visually challenging stressors, that they are not severe and frequent enough to warrant 24-hour basic supervisory care and are not related to the type of situation the applicant would encounter in her home.
- [24] The applicant described two instances wherein she experienced one of episodes. One episode occurred at a vision clinic appointment and another episode at the end of a meeting at her lawyer's office. On both occasions, the applicant experienced visual and cognitive stressors, in addition to mobilizing from her home and commuting to the respective offices. These two incidents, however, were not the only times the applicant experienced these episodes. The

applicant's husband and sister provided additional evidence with respect to these episodes. Based on a totality of the evidence before us, we find that these episodes can last anywhere from 5 to 20 minutes in length and are unpredictable but seem to occur during stressful situations. These episodes put the applicant at a significant risk of harm given that stressful situations can occur at any time and even in the home. It is the unpredictable nature of these episodes that support the applicant's need for 24-hour basic supervisory care as the onset of one of these episodes cannot be predicted.

- [25] When assessing the competing Form 1's, we find that Ms. Soosar's analysis and understanding of these episodes is more consistent with the totality of the evidence. For this reason, we find on a balance of probabilities, that Ms. Soosar's recommendation for 24-hour basic supervisory care is reasonable and necessary.

Assistance with Mobility and the CPAP Machine

- [26] Ms. Soosar's recommendation for 24-hour basic supervisory care was also based on the applicant's need for assistance with her mobility and to ensure that she did not remove her CPAP machine during the night. We find that these two issues do not lend support to the applicant's need for 24-hour basic supervisory care.
- [27] The applicant requires assistance with mobility and uses a rollator walker for assistance. The evidence before us establishes that the applicant has fallen on multiple occasions due to her mobility issues. The applicant's mobility issues are further complicated by her issues of double vision and dizziness. The applicant submits that her need for assistance with mobility within her apartment becomes amplified when she goes out on her balcony for fresh air or a cigarette. She submits that it is difficult for her to independently travel to the balcony and maintain balance without falling on or over the railing and that this supports her need for 24-hour basic supervisory care. We are not persuaded by the applicant's submission in this regard as no objective evidence was put forward to support the notion that the applicant would actually be at risk of falling on or over the railing if she lost her balance and fell. Furthermore, the applicant has shown that she is capable of modifying her behaviour in order to address mobility issues as she explained that she only sits near the balcony door when she wants to smoke or get fresh air during the winter months when the balcony becomes slippery.
- [28] The applicant submits that she suffers from obstructive sleep apnea. She submits that because she accidentally disconnects her CPAP machine at night,

she is potentially at risk of dying and this supports her need for 24-hour basic supervisory care.

- [29] We are not persuaded by the applicant's submission in this regard. The applicant has never been diagnosed with obstructive sleep apnea and none of her health care practitioners noted any concerns with respect to the CPAP machine being accidentally disconnected during sleep. Furthermore, the evidence before us does not support the finding that the applicant's CPAP machine is providing life-saving services as suggested by the applicant. As a result, we find that the applicant's use of her CPAP machine does not add any further support for her need for 24-hour basic supervisory care.

Were the Past Attendant Care Services Incurred?

- [30] The respondent submits that the unpaid portion of past attendant care services billed for by the applicant's sister and Key Rehab were not incurred pursuant to section 3(7) of the *Schedule*. Section 3(7)(e) of the *Schedule* sets out the definition of "incurred" and states that an expense is not incurred unless:
- I. The insured person has received the goods or services to which the expense relates;
 - II. The insured person has paid the expense, has promised to pay the expense, or is otherwise legally obligated to pay the expense, and;
 - III. The person who provided the goods or services:
 - (A) Did so in the course of the employment, occupation or profession in which he or she 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.
- [31] The applicant bears the onus of establishing, on a balance of probabilities, that the past attendant care services billed for by the applicant's sister and Key Rehab were incurred.

Did the Applicant Receive the Attendant Care Services Billed For?

- [32] The first prong of the incurred test requires the applicant to establish, on a balance of probabilities, that she received the attendant care services billed for. The respondent makes two arguments with respect to this requirement. First, the

respondent submits that the applicant failed to establish that she received the attendant care services billed for by the applicant's sister from August 2014 to March 2017. The respondent relies on the fact that the applicant's sister failed to keep detailed records and/or log notes reflecting the nature and time of the services provided.

- [33] We were not persuaded by the respondent's submission in this regard. The applicant and her sister testified with respect to the services provided during this time period. We find their testimony to be compelling and consistent with the submitted OCF-6's which we find to be accurate. As a result, we find that the applicant established that she received the attendant care services billed for by the applicant's sister from August 2014 to March 2017.
- [34] Second, the respondent takes issue with some of the invoices submitted by Key Rehab for the attendant care services provided from March 2017 to date. Specifically, the respondent submits that it is being billed for services that the applicant could not have received.
- [35] The applicant's sister, through Key Rehab, submitted an invoice for attendant care services provided for on June 12, 2017, from 9 a.m. to 5 p.m. The respondent claims that these services could not have been provided as the surveillance evidence shows that the applicant's sister arrived at the applicant's residence at 8:25 a.m. and left at 10:24 a.m. The applicant's sister also submitted an invoice for services provided on June 15, 2017 from 9 a.m. to 5 p.m. Again, the respondent submits that's these services could not have been provided as the surveillance evidence shows that the applicant's sister arrived at the applicant's residence at 9:20 a.m. and left at approximately 3:00 p.m. The respondent has made similar submissions regarding the invoices submitted for June 13-15 and 19-21, 2018.
- [36] We are not satisfied by the respondent's submission in this regard. The surveillance evidence shows the applicant's sister entering and leaving the condominium building at the times suggested but it does nothing more than that. For example, the surveillance evidence does not provide clarity as to where the applicant's sister went on June 12, 2017 after she exited the condominium building. It is possible that she returned shortly thereafter through a different entrance. The snapshot provided by the surveillance evidence does not displace the evidence provided by the applicant's sister and Key Rehab regarding the services provided. We have accepted the applicant's evidence that the services were provided for as billed on these dates.

[37] We do have concerns, however, with the invoices submitted for services provided on July 18, 2017 and March 2, 2018. On July 18, 2017, the applicant attended an assessment with Ms. Robbins, yet the invoice submitted for that day indicates that attendant care services were provided to the applicant in her home. Similarly, the applicant attended an in-person case conference related to this matter on March 2, 2018, until at least 1 p.m.; however, the invoice submitted for that day indicates that attendant care services were provided to the applicant in her home from 10 a.m. to 2 p.m. We do not find that these services were incurred.

Promise to Pay

[38] The second prong of the incurred test requires the applicant to establish, on a balance of probabilities, that she paid the expense, has promised to pay the expense, or is otherwise legally obligated to pay the expense. The respondent submits that there was no promise to pay and that if there was one, it was made after the services had already been provided. In support of its position, the respondent points to the fact that the applicant's sister failed to keep detailed records and/or log notes reflecting the nature and time of the services provided. The respondent submits that the applicant's sister would have kept records if there was a promise to pay in order to ensure that she got paid.

[39] We find that a promise to pay was made between the applicant and her sister. Both the applicant and her sister testified that there was a promise to pay and that it was made after the applicant's sister had already begun to provide attendant care services. We accept this testimony and find it as fact. We are not concerned with the lack of record keeping by the applicant's sister, as this can be reasonably expected between sisters. Furthermore, the *Schedule* does not require that the promise to pay come before the services are rendered. Again, the fact that the promise to pay was made after the attendant care services had already begun can be reasonably expected between sisters.

Professional v. Non-Professional Service Provider

[40] The third prong of the incurred test is laid out in section 3(7)(e)(III) of the *Schedule*. Section 3(7)(e)(III) of the *Schedule* provides for two different classes of service provider: the professional and non-professional service provider. Non-professional service providers must show that they sustained an economic loss as a result of providing their services, in order to satisfy the incurred definition. The benefit is then payable up to the amount of the economic loss, regardless of the amount or level of care determined to be necessary by a health care provider or outlined in an Assessment of Attendant Care Needs.

- [41] The respondent submits that the attendant care services provided by the applicant's sister from August 2014 to March 2017 were done in a non-professional sisterly capacity and directs us, in part, to the following.
- [42] First, the respondent relies on the fact that the applicant's sister failed to keep detailed records and/or log notes reflecting the nature and time of the services provided during this time period. The respondent notes that when the applicant's sister joined Key Rehab in March 2017, she began keeping detailed records and log notes reflecting the services she provided, which the respondent submits is indicative of her providing her services as a professional.
- [43] Second, the respondent points to the fact that the applicant's sister began providing various housekeeping duties for the applicant after the applicant was involved in an unrelated motor vehicle accident in 2012. The respondent submits that the applicant's sister's role and duties did not change or evolve into that of a personal support worker until she joined Key Rehab in March 2017.
- [44] Third, the respondent submits that the applicant's sister was not attending to the applicant's needs on a daily basis during this time, but instead, would occasionally attend to the applicant's needs after her paid work day was done.
- [45] Finally, the respondent further submits that the applicant failed to adduce any evidence that her sister sustained an economic loss as a result of the attendant care services she provided, and as such, has failed to satisfy the third prong of the incurred test.
- [46] The applicant disagrees with the respondent's position and submits that the applicant's sister provided her with attendant care services in a professional capacity. The applicant further submits that if the Tribunal finds that the applicant's sister provided the services in a non-professional capacity, then the services should be deemed incurred pursuant to section 3(8) of the *Schedule*.
- [47] We find, based on a totality of the evidence before us, that the applicant's sister provided her services in a professional capacity and has therefore satisfied the third prong of the incurred test. The parties agree that the applicant's sister was properly qualified as a personal support worker from August 2014 to March 2017. Although this is not determinative of the issue, it supports the applicant's position that the services were provided in a professional capacity.
- [48] Furthermore, we do not agree with the respondent's submission that the lack of recording keeping is indicative of a non-professional sisterly relationship. The

lack of record keeping can be reasonably expected between sisters, even when services are provided in a professional context.

- [49] Finally, we accept the evidence provided by the applicant and her sister which supports our finding that the applicant's sister began providing attendant care services during this time period. We reject the respondent's submission that the applicant's sister simply continued attending to the housekeeping duties as she had been doing since 2012. In fact, we find that the services provided by the applicant's sister during this time are similar to those provided while under employment with Key Rehab; this supports our finding that the services were provided in a professional capacity.
- [50] Given the above, we find that the unpaid portion of the attendant care services provided by the applicant's sister and Key Rehab from August 2014 to March 2017 were incurred pursuant *Schedule*.

Award

- [51] The applicant claims an award under Section 10 of Regulation 664 (O. Reg. 43/16, s. 4), which reads as follows:

If the Licence Appeal Tribunal finds that an insurer has unreasonably withheld or delayed payments, the Licence Appeal Tribunal, in addition to awarding the benefits and interest to which an insured person is entitled under the *Statutory Accident Benefits Schedule*, may award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the Schedule.

- [52] An award claim must be linked to a disputed benefit which is ordered payable. The applicant bears the onus of establishing, on a balance of probabilities, that the respondent acted unreasonably in withholding or delaying the payment of a disputed benefit. We do not find that the respondent acted unreasonably when it withheld payment of the attendant care benefit, and as such, we do not find that an award under section 10 of Regulation 664 is warranted.
- [53] The lack of records, delayed submissions of invoices and requested documentation, and numerous accounting issues led to the delayed payment of the benefit which was reasonable given these issues.

CONCLUSION

[54] Given the discussion above and based on a balance of probabilities, we find that the applicant is entitled to an attendant care benefit in the amount of:

- I. \$6,000.00 per month from August 1, 2014 to May 26, 2016.
- II. \$2,568.17 per month from May 27, 2016 to July 16, 2017.
- III. \$6,000.00 per month from July 17, 2017 to date.

We also find that the unpaid portion of attendant care services provided by the applicant's sister and Key Rehab from August 2014 to March 2017 were incurred pursuant to the *Schedule*. We reject the respondent's claim that some of the attendant care services claimed for were actually housekeeping services and find that an award under section 10 of Regulation 664 is not warranted.

Released: October 31, 2019

**Daniella Corapi
Adjudicator**

**Paul Gosio
Adjudicator**