



Citation: Micu v. The Personal Insurance Company, 2021 ONLAT 20-006746/AABS

**Released Date: 10/19/2021
File Number: 20-006746/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:

Maria Micu

Applicant

and

The Personal Insurance Company

Respondent

DECISION

ADJUDICATOR: Theresa McGee, Vice-Chair

APPEARANCES:

For the Applicant: Ryan Moriarty and Arthur Semko, Counsel

For the Respondent: Jonathan B. White, Counsel

HEARD: By way of written submissions

OVERVIEW

- [1] The applicant, Maria Micu, was involved in an automobile accident on March 2, 2020, when she was struck by a vehicle while crossing at a pedestrian crosswalk, sustaining injuries to her head, face, left eye and left shoulder. She sought benefits from the respondent, The Personal Insurance Company, pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010*¹ (the “*Schedule*”).
- [2] The respondent denied her claim for attendant care benefits. The applicant then applied to the Licence Appeal Tribunal (“Tribunal”) for resolution of the dispute.

ISSUES

- [3] The issues to be decided in the hearing are:
- i. Is the applicant entitled to attendant care benefits of \$3,079.00 per month from March 2, 2020 to date and ongoing?
 - ii. Is the applicant entitled to an award under Regulation 664 because the respondent unreasonably withheld or delayed the payment of benefits?
 - iii. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

- [4] The applicant has not met her onus in establishing entitlement to the attendant care benefit she seeks. She has not proven on a balance of probabilities that her care provider sustained an economic loss while providing attendant care. Since no benefits are owing, no interest is payable. There is no basis for an award.

ANALYSIS

Attendant care benefits

- [5] Section 19 of the *Schedule* provides that attendant care benefits shall pay for all reasonable and necessary expenses incurred by an insured person for the services of an attendant or aide. Section 3(7)(e) provides that a person has “incurred” an expense if they have received the goods or services to which the expense relates; paid the expense; promised to pay the expense; or are otherwise legally obligated to pay the expense.

¹ O. Reg. 34/10.

- [6] The definition of “incurred” in s. 3(7)(e) sets out two categories of attendant care providers:
- a. professional service providers, who provide services in the course of the employment, occupation, or profession in which they would ordinarily be engaged but for the accident; and
 - b. non-professional service providers.
- [7] For the services of a non-professional care provider to be compensable under the *Schedule*, s. 3(7)(e)(iii)(B) stipulates that the care provider must have sustained an economic loss as a result of providing the goods and services. In addition, under s. 19(3)4 of the *Schedule*, the amount of attendant care benefits payable is limited to the economic loss sustained by a non-professional care provider while, and as a result of, providing the attendant care.
- [8] For insured persons who not sustain a non-catastrophic impairment as a result of an accident, s. 19(3)1.i. of the *Schedule* limits the amount of attendant care benefits payable to \$3,000.00 per month.
- [9] Under s. 42(5) of the *Schedule*, an insurer may, but is not required to, pay an expense before an insured person submits an Assessment of Attendant Care Needs (Form 1).
- [10] The insured person bears the onus of establishing entitlement to these benefits on a balance of probabilities: see *Scarlett v Belair Insurance*, 2015 ONSC 3635.

No dispute as to the applicant’s accident-related injuries or attendant care needs

- [11] At issue in this hearing is not whether the applicant sustained impairments requiring the services of an attendant or aide, but whether
- a. she has proven that she incurred expenses for attendant care; and
 - b. the service provider sustained an economic loss due to providing attendant care services.
- [12] The applicant relies on a Form 1 dated March 11, 2020 to establish her need for 12 to 14 hours of attendant care per week as a result of the accident. She submits that her partner, Ms. Teresa Bagtas, provided over 40 hours of weekly attendant care to her from March 2, 2020 onwards. She has tendered a series of OCF-6 expense claim forms and detailed time sheets to support the services she says she incurred.

[13] The applicant submits that her partner sustained an economic loss of \$778.00 monthly since March 2, 2020 while she has been providing the applicant with attendant care. The applicant submits that the care Ms. Bagtas has provided has largely fallen outside her employment hours, but that she has reduced her work schedule by one eight-hour shift per week to accommodate the applicant's care needs. The applicant relies on an Economic Loss Calculation Report, dated October 22, 2020, to establish her economic loss.

The record does not establish the economic loss claimed

[14] I have carefully reviewed the Economic Loss Calculation Report tendered by the applicant and find that, while it is detailed, it does not establish Ms. Bagtas sustained an economic loss of \$778.00 per month from March 2, 2020 onwards. The report estimates that but for the accident, Ms. Bagtas' annualized earnings for 2020 would have been \$59,928.00. This is based on estimated average biweekly earnings of \$2,178.00, multiplied by 26 pay periods. The report assesses Ms. Bagtas' economic loss by subtracting her actual gross income per pay period from her estimated average biweekly earnings.

[15] I do not accept that \$2,178.00 is a reasonable assessment of Ms. Bagtas' biweekly earnings but for the accident. Ms. Bagtas' estimated average biweekly earnings are calculated based on her pay stubs from December 8, 2019 to February 29, 2020. Firstly, there is considerable variation in Ms. Bagtas' gross earnings from one pay period to the next. Secondly, the pay periods used to calculate Ms. Bagtas' estimated biweekly earnings include the pay period from December 22, 2019 to January 4, 2020 in which Ms. Bagtas worked 87.75 holiday hours and was compensated for 25 hours of sick time in addition to 50 regular hours of work. Ms. Bagtas' gross earnings were \$2763.45 in that period. By contrast, in the first four pay periods in 2020, which occurred immediately before the accident, Ms. Bagtas' hours of work and gross biweekly earnings were as follows:

Pay period	Hours	Gross earnings
01/05/20-01/18/20	24 regular hours 16 hours of sick time 40 total hours	\$1,996.68
01/19/20-02/01/20	66 regular hours 16 hours of sick time 82 total hours	\$2073.20
02/02/20-02/15/20	45.25 regular hours 42.5 total hours	\$2128.46

02/16/20-02/29/20	51.75 regular hours 16 hours of sick time 67.75 total hours	\$1715.53
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- [16] The gross pay for these periods averages at \$1,978.46.
- [17] Even if I accept the report's estimate of Ms. Bagtas' biweekly earnings for 2020 but for the accident, the report does not show a monthly economic loss of \$778.00. It only shows a \$778.00 loss for the five-day period of March 10 to March 14, 2020. After that, the quantum of the loss fluctuates, and in some periods, Ms. Bagtas' gross earnings exceed her estimated biweekly earnings.
- [18] Ms. Bagtas' pay stubs show that during the pay period of March 1 to 14, 2020, (when the March 2, 2020 accident occurred), the applicant saw her gross earnings decrease to \$301.20 for 12 regular hours worked. In the next pay period, March 15 to March 28, 2020, she resumed 46.5 regular hours and 6 training hours, earning a gross amount of \$1,345.31. The report counts this as a loss of \$769.00. In the next pay period, March 29 to April 11, 2020, Ms. Bagtas earned \$2,192.10 gross for 61.6 regular hours and 19 holiday hours. The report counts this a loss of nil.
- [19] The applicant submits that Ms. Bagtas reduced her work schedule from five eight-hour shifts to four while providing the applicant with attendant care, for a total of approximately 60 hours worked biweekly, down from 80. She submits that her pay stubs demonstrate this reduction in employment hours. However, in the four pay periods before the accident, Ms. Bagtas was only compensated for close to 80 hours once, from January 19, 2019 to February 1, 2020 (16 of those hours were sick time). Except for the periods in which the accident occurred and the one immediately after, Ms. Bagtas' regular hours reflect a similar pattern after the accident as before. Her regular hours of work only fall below 60 in periods where she was also being heavily compensated for hours noted as "NON-OPERA" in the pay stubs. As a screening officer at an international airport during the first wave of the COVID-19 pandemic, I infer from these notations that Ms. Bagtas was receiving compensation for hours when her employer was not conducting operations. She was still being compensated for employment hours comparable to pre-accident levels.
- [20] In conclusion, I see no marked difference between Ms. Bagtas' pre- and post-accident hours of work and earnings. The Economic Loss Calculation Report, though detailed, does little to assist in establishing that she suffered an economic loss while, and as a result of, providing attendant care to the applicant.

[21] I am alive to the significant investment of time made by Ms. Bagtas in caring for the applicant after the accident. I am sensitive to the impact the accident has likely had on the applicant and her spouse. However, the *Schedule* reflects a clear intention on the part of the legislature to compensate non-professional attendant care providers only up to the amount of their economic loss. Section 37 does not appear to contemplate compensating family members for services that are unaccompanied by a corresponding loss of income. Arguably, this allows insurers to save on attendant care claims at the cost of injured persons who are aided by non-professionals. However, the *Schedule* is clear. The applicant bears the burden of establishing an economic loss on a balance of probabilities. Because the applicant has failed to establish a monthly economic loss, she has not met her onus in proving that she incurred this amount for attendant care, and I cannot grant the order she seeks.

Award

[22] The applicant claims an award under Regulation 664 for unreasonably withheld or delayed benefits. The well-established standard for awards under Regulation 664 set out in the Financial Services Commission of Ontario case of *Plowright v. Wellington Insurance Co.*² is conduct that is excessive, imprudent, stubborn, inflexible, unyielding or immoderate.

[23] The applicant makes only brief submissions in support of her claim for an award. She submits that the respondent systematically failed to reimburse her for attendant care expenses, knowingly, willingly, and intentionally submitting her and her spouse to undue financial hardship, emotional stress and anxiety. She submits that the respondent acted unreasonably by deciding to “entertain this appeal”, resulting in a waste of Tribunal resources and taxpayer dollars.

[24] In my view, this does not amount to unreasonable conduct on the part of the respondent that would warrant an award. As I have found, the applicant has not demonstrated that her spouse sustained an economic loss as a result of the attendant care she provided to the applicant. This is the very basis of the respondent’s denial of attendant care benefits. It is not clear that the respondent caused financial hardship by denying the benefits claimed, considering that the applicant’s spouse continued to earn income at a rate comparable to her pre-accident earnings. Finally, I fail to see how entertaining this appeal could be construed as unreasonable conduct deserving of an award. The insurer is the respondent in an application for dispute resolution brought by the applicant to this Tribunal. The applicant has not set out particulars to show how its conduct in this

² 1993 OIC File No.: A-003985 (FSCO).

proceeding has amounted to excessive, imprudent, stubborn, inflexible, unyielding or immoderate behaviour deserving of an award. I accordingly deny the request for one.

CONCLUSION

[25] The applicant has not met her onus with respect to the attendant care benefit in dispute. No benefits are owing, and no interest is payable. There is no award. The application is dismissed.

Released: October 15, 2021



Theresa McGee
Vice-Chair