



Appeal P15-00040

OFFICE OF THE DIRECTOR OF ARBITRATIONS

PARALOGANATHAN NADESU

Appellant

and

ZURICH INSURANCE COMPANY LTD. (COMMERCIAL BUSINESS)

Respondent

BEFORE: Richard Feldman

REPRESENTATIVES: David S. Wilson for the Appellant
William M. Sproull for the Respondent

HEARING DATE: September 8, 2016

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990 c. I.8 as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*, and Regulation 664, R.R.O. 1990, as amended, it is ordered that:

1. Paragraph 2 on page 2 (under the heading "Result") of the Order of May 27, 2015 in FSCO File No. A09-001538 is replaced with the following:
2. Zurich shall pay Mr. Nadesu monthly attendant care benefits as follows:
 - \$730.50 from April 4, 2006 through February 13, 2007;
 - \$730.50 from April 1, 2007 through May 4, 2007;
 - \$730.50 from May 17, 2007 through January 8, 2008;
 - \$730.50 from January 22, 2008 through October 30, 2009; and
 - \$796.45 from November 1, 2009 onwards.

Richard Feldman
Director's Delegate

October 7, 2016
Date

REASONS FOR DECISION

I. BACKGROUND

The Appellant, Mr. Paraloganathan Nadesu ("Mr. Nadesu" or "the Appellant"), was involved in a motor vehicle accident on September 7, 2003 ("the accident"). He was 34 years old at the time of the accident and worked full-time at one job and part-time at a second job. After the accident he returned to his full-time job until February 2004. He has not been employed since then. Initially, the Appellant's impairments appeared to be typical complaints of pain related to soft tissue injuries. Gradually, his health and function declined and, after a period of time, it became apparent that the Appellant's functional limitations were related primarily to mental health impairments.

The Appellant applied for and received statutory accident benefits from Zurich Insurance Company Ltd. (Commercial Business) ("Zurich", "the Insurer", or "the Respondent") payable under the *Schedule*.¹ Disputes arose regarding certain claims and Mr. Nadesu applied for arbitration of those disputes at the Financial Services Commission of Ontario ("FSCO") under the *Insurance Act*, R.S.O. 1990, as amended. Mr. Nadesu claimed the following:

1. A determination that he sustained a catastrophic impairment as a result of the accident;
2. Monthly attendant care benefits as follows:
 - a. \$850.37 from September 7, 2003 through February 12, 2007; and
 - b. \$5,210.40 from February 13, 2007 to the present and ongoing;
3. \$7,200.00 for the cost of a series of Botox injections recommended by Dr. M. Gaid in a plan dated November 15, 2007;
4. A special award related to the alleged unreasonable denial by Zurich of this treatment plan by Dr. Gaid;
5. Interest on payments found to be overdue; and
6. Expenses of the arbitration proceeding.

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

The arbitration hearing was first conducted in person over the course of sixteen days, between June 2010 and June 2012. When the arbitrator who had presided over the hearing became unavailable to conclude the hearing and render a decision, Arbitrator Jeffrey Rogers (“the Arbitrator”) was assigned by the Director of Arbitrations to complete the arbitration proceeding. The parties consented to have the Arbitrator decide the case based upon the record, including transcripts of the proceedings, and upon written submissions from the parties (completed on February 3, 2015).

The Arbitrator issued his decision on May 27, 2015. His findings can be summarized as follows:

1. The Appellant did sustain a catastrophic impairment as a result of the accident within the meaning of s. 2(1.1)(g) of the *Schedule* (i.e., as a result of marked psychological and behavioural impairments);
2. The Appellant was entitled to some, but not all, of the attendant care he was claiming;²
3. The Appellant was not entitled to the cost of the Botox injections claimed;
4. The Appellant was not entitled to a special award related to these Botox injections;
5. The Appellant was entitled to interest on overdue payment of attendant care benefits;
6. The issue of expenses was deferred.

II. NATURE OF THE APPEAL

Mr. Nadesu appeals the following components of the May 27, 2015 decision:

1. the dismissal of his claim for the cost of the Botox injections; and
2. the duration and amount of monthly attendant care benefits awarded to him.

Written submissions were delivered by both parties to this appeal and, on September 8, 2016, I heard oral arguments by counsel for each of the parties.

Pursuant to subsection 283(1) of the *Insurance Act*, a party may only appeal an order of an arbitrator to the Director of Arbitrations (or his delegate) on a question of law. Errors of law in the context of proceedings at FSCO include (but are not limited to): procedural errors that result

² Details of the amounts awarded are set out later in this decision.

in a denial of natural justice; erroneous interpretation or application of provisions of the *Insurance Act* or regulations thereunder; and, failing to provide reasons (or sufficient reasons) to explain the basis of an arbitrator's decision(s).

On the issue of sufficiency of reasons, the Supreme Court of Canada has said:

The simple underlying rule is that if, in the opinion of the appeal court, the deficiencies in the reasons prevent meaningful appellate review of the correctness of the decision, then an error of law has been committed.³

The question of whether reasons are sufficient to permit meaningful appellate review is a "contextual one having regard to their purpose and taking into consideration a number of factors including the nature of the issues, the evidence and record of the proceeding, the positions and representations of the parties, implicit findings, and the extent to which the reason for the judge's conclusion is patent on the record."⁴

The Appellant submits that the Arbitrator erred in his interpretation of the law and failed to provide sufficient reasons for his decision. On the latter point, I do not agree. I find that the reasons of the Arbitrator were sufficient in the context of this case and the entirety of the record. On the former point, I generally find that the issues raised by the Appellant amount to attacks on findings of fact by the Arbitrator, for which there was an evidentiary basis, and thus I have no jurisdiction to intervene. Nevertheless, I have found two errors in law on certain narrow issues and, where necessary, I have substituted my decision for that of the Arbitrator; this has resulted in the Appellant being awarded an increased level of monthly attendant care benefits, although not nearly the amount that he was seeking.

III. ANALYSIS

Botox Injections

In a treatment plan dated November 15, 2007, Dr. M. Gaid of Ajax Anesthesia Pain Clinic recommended a series of Botox injections (every three months over a 48-week period) for the chronic pain Mr. Nadesu was describing in his lower back, shoulders, neck and head. The total

³ *R. v. Sheppard*, [2002] 1 SCR 869, 2002 SCC 26 (CanLII).

⁴ *Crudo Creative Inc. v. Marin et al.*, 90 O.R. (3d) 213 (Div. Ct.), at para. 23.

cost of this proposed plan was \$7,200.00 (\$1,800.00/session x 4 sessions). The stated goal of this treatment was to “take the edge off the pain ... so he doesn’t continue to be pain-focused” as well as improving Mr. Nadesu’s strength and range of motion.

Dr. Gaid authored two consultation reports which were entered into evidence. The first, dated October 18, 2007, briefly describes Mr. Nadesu’s history from 2003 through 2007, based on the information available to Dr. Gaid. Dr. Gaid decided to try Botox injections in the hope that they might “make life easier” for Mr. Nadesu. Dr. Gaid states in this report that he does not believe that Mr. Nadesu “will be completely pain free at any time” and that “all we tried to do is just to see if we can take the edge off the pain.” In a follow-up report (dated March 9, 2009), Dr. Gaid states that he believes that there is some myofascial strain and pain and that Botox might help. Dr. Gaid also reports that the result of initial trials were “not as was expected” but that Mr. Nadesu did get “some relief” from the Botox injection. The treatment plan and these two consultation reports are contained in the record. Counsel made reference to the reports in closing arguments (a transcript of which was provided to the Arbitrator).

The Arbitrator rejected this claim on the basis that Mr. Nadesu had failed to prove that the treatment in question was reasonable and necessary.

The Arbitrator pointed out that Mr. Nadesu testified that Botox injections he had received had the effect of reducing his pain for two to three days and that other medication and pain-coping strategies Mr. Nadesu had tried in the past had had similar benefits. The Arbitrator also cited evidence from the medical records and the testimony of Dr. Miller (the Appellant’s treating psychologist) that suggested that previous Botox injections had either not helped Mr. Nadesu at all or had very limited benefits. Finally, the Arbitrator noted that there was no evidence that Botox injections actually had any beneficial effect on either Mr. Nadesu’s strength or range of motion (the other two stated goals given by Dr. Gaid as justifications for this treatment). For these reasons, the Arbitrator denied this claim.

The Appellant argues that the failure of the Arbitrator to specifically refer, in his reasons, to the two consultation reports of Dr. Gaid constitutes a reversible error in law.

The Respondent, however, correctly points out that failing to specifically cite a document does not mean that it was not considered by an arbitrator⁵ and that reasons “need not be perfect or lengthy ... and ... need not refer to all aspects of the evidence or every point raised in the case.”⁶ An arbitrator is presumed to have considered all of the evidence and submissions.

In this case, I am satisfied that the Arbitrator was alive to the issue before him and that he considered and weighed the relevant evidence. The Appellant is really raising a question of fact, not law. There was evidence before the Arbitrator that support his findings and he provided sufficient reasons to explain the basis for his decision. I find no error in law with respect to the denial of the Botox injections. This part of the appeal is dismissed.

Attendant Care

Overview

Section 16 of the *Schedule* requires an insurer to pay an attendant care benefit to an insured person who sustains an impairment as a result of an accident. This type of benefit includes payment for 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.

It is settled law that, for accidents prior to September 1, 2010, it is sufficient to prove that the attendant care services in question are reasonably required by the insured person as a result of the accident. The monthly amount payable shall be determined in accordance with Form 1 (Assessment of Attendant Care Needs). However, it is also well established (and the parties agree) that an arbitrator is not bound by the opinion of an assessor who completes a Form 1 and is free, after considering the relevant evidence and submissions, to make his or her own finding as to the amount of attendant care, if any, that is payable by an insurer for any given period of time.⁷

⁵*State Farm Mutual Automobile Insurance Co. v. Movahedi*, [2001] O.J. No. 5099.

⁶*Crudo Creative Inc. v. Marin et al.*, 90 O.R. (3d) 213 (Div. Ct.), at para. 22.

⁷so long as the calculations utilize the applicable hourly rates (set out in the Form 1) for the different levels of attendant care services that are found to be reasonably required by the insured person.

In this case, there were two occupational therapists who provided opinions concerning Mr. Nadesu's need for attendant care: **Sophie Bielawski** prepared two Form 1s on behalf of Mr. Nadesu; **Kim MacDonald**⁸ prepared four Form 1s at the request of Zurich. Although Mr. Nadesu had the benefit of legal representation from a very early stage, he did not claim attendant care benefits until more than six years after the 2003 accident. As a result of this delay in advancing a claim for attendant care benefits, no Form 1s were produced until 2010. Nevertheless, the Form 1s were made retroactive to earlier dates based upon the information available to the assessors and certain assumptions that they made.

These two assessors did agree, in principle, on a number of points. They agreed that Mr. Nadesu's need for attendant care services increased over time. They agreed that, while he was physically capable of many self-care tasks, as a result of worsening psychological impairments, he eventually required cuing (to remind him to wash, groom, change his clothes, eat, etc.). They agreed that several years after the accident, he began to require some assistance bathing. They agreed that he required some limited assistance with his financial affairs.

The main differences between these two assessors' recommendations can be summarized as follows:

1. Ms. MacDonald concluded that Mr. Nadesu did not require any attendant care services between September 7, 2003 (the date of accident) and April 3, 2006 – she concluded that Mr. Nadesu was independent and did not require any attendant care until April 2006.
2. Ms. MacDonald concluded that Mr. Nadesu did not require any assistance with activities classified under the headings “hygiene” or “dependent on others for meals, laundry, housekeeping” -- she felt these were better classified as housekeeping and home maintenance activities rather than as attendant care services. Ms. MacDonald also concluded that Mr. Nadesu was not entitled to claim such services (as attendant care) since his wife had provided these services to him prior to the accident and there was no evidence that, as a result of Mr. Nadesu's impairments, meal preparation, cleaning or laundry duties related to Mr. Nadesu took longer after the accident than they had before the accident.

⁸whose name changed to Kim Teggelove by the time of the hearing

3. According to Ms. Bielawski, as of early 2007, Mr. Nadesu required round-the-clock attendant care. In addition to other types of attendant care she was recommending, Ms. Bielawski added over 8,000 minutes per week (approximately \$4,000 per month) for *supervisory* care (i.e. for safety) in her final Form 1 (covering February 13, 2007 onwards). Ms. MacDonald, on the other hand, concluded that Mr. Nadesu did not require supervisory care.
4. Ms. MacDonald conceded that there were periods when Mr. Nadesu was receiving round-the-clock care during several hospitalizations. Since, however, there was no evidence that Mr. Nadesu required any care above and beyond that provided by the institutions at which he resided for short periods, she concluded that no attendant care benefits were payable during these relatively brief periods of institutionalization.⁹
5. Ms. Bielawski, in her final Form 1, concluded that Mr. Nadesu required assistance organizing and monitoring his medications. This added about \$65 to the monthly attendant care cost. Ms. MacDonald, on the other hand, did not recommend any amount under this heading.

The total amount of attendant care recommended by each of these occupational therapists can be summarized as follows:

- Ms. Bielawski recommended attendant care benefits of \$850.37 per month from September 7, 2003 through February 12, 2007 and \$5,280.40 per month from February 13, 2007 onwards. These are the amounts claimed by Mr. Nadesu in the arbitration proceeding.
- Ms. MacDonald, recommended:
 - no attendant care benefits up to April 3, 2006; and
 - with the exception of periods of institutionalization,
 - \$165.55 per month from April 4, 2006 through October 30, 2009; and
 - \$231.50 per month from November 1, 2009 onwards.

The Arbitrator generally preferred the opinion of Ms. MacDonald and, with one exception, adopted her recommendations. The exception was that he accepted Ms. Bielawski's opinion that

⁹February 13 - March 30, 2007; May 4 - 17, 2007; and January 8 - 22, 2008.

the weekly attendance of a nurse at Mr. Nadesu's home would not eliminate the need (from April 2006 onwards) for the daily monitoring and control of medication that Mr. Nadesu required. As a result, the Arbitrator increased by \$64.95 per month the amount of attendant care benefits that had been recommended by Ms. MacDonald and ordered Zurich to pay Mr. Nadesu attendant care benefits as follows:

- \$230.50 (\$165.55 + \$64.95) per month from:
 - April 4, 2006 to February 13, 2007;
 - April 1, 2007 to May 4, 2007;
 - May 17, 2007 to January 8, 2008;
 - January 22, 2008 to October 30, 2009; and
- \$296.45 (\$231.50 + \$64.95) per month from November 1, 2009 onwards.

The reasons given by the Arbitrator for generally preferring the opinion of Ms. MacDonald include:

- Ms. MacDonald's assessment reflects Mr. Nadesu's true need for attendant care assistance more accurately than the assessment by Ms. Bielawski and is more consistent with the documentary evidence and testimony at the hearing;
- Ms. Bielawski seemed unaware of important information such as the fact that Mr. Nadesu returned to full-time employment for many months following the accident;
- Ms. Bielawski accepted Mr. Nadesu's report of the onset of his symptoms that were inconsistent with the medical records;
- Ms. Bielawski ignored numerous self-reports by Mr. Nadesu, found in the medical records, that he was independent with regard to self-care;
- Ms. Bielawski ignored all previous assessments by medical professionals, including occupational therapists, who confirmed that Mr. Nadesu was independent in his personal care and did not require attendant care;
- Ms. Bielawski's recommendation for round-the-clock supervisory care due to psychological impairments was contradicted by Mr. Nadesu's treating psychologist, Dr. Miller (who testified at the hearing and upon whose reports and opinions Mr. Nadesu relied in this proceeding);
- Ms. Bielawski failed to consider whether or not Mr. Nadesu required attendant care services during his periods of hospitalization over and above what was being provided by the institution(s);

- Finally, the Arbitrator approved of Ms. MacDonald's approach in not assigning time for services that Mr. Nadesu did not perform for himself prior to the accident (such as meal preparation) or that could also be categorized as housekeeping.

Most issues raised in this appeal relate only to questions of fact

The Appellant is challenging the determination that he is not entitled to attendant care benefits prior to April 2006 and the amount of attendant care benefits awarded to him from that point on. The Respondent argues, however, that most of the issues raised in this appeal relate only to questions of fact. I agree with this submission by the Respondent.

With respect to most differences between the opinions of Ms. Bielawski and Ms. MacDonald, I find that there was ample evidence before the Arbitrator to support his finding that Ms. MacDonald's opinion ought to be given greater weight. I also find that the Arbitrator provided sufficient reasons to explain how he reached his conclusions.

The Appellant suggests that it was an error in law for the Arbitrator to not review each and every item listed in the Form 1s and explain in some detail how he determined the appropriate amount of attendant care awarded under *each* heading, for *each* period of time.

For instance, the Appellant argues that the Arbitrator erred in failing to accept Ms. Bielawski's opinion that Mr. Nadesu required 30 minutes per day in assistance in walking outside the home due to anxiety issues. Although the Arbitrator did not specifically refer to this particular type of attendant care in his decision, he is deemed to have been aware of and considered the evidence in the record that contradicted this recommendation, including the fact that:

- Ms. Bielawski obtained little useful information directly from Mr. Nadesu during her assessment of him (as he was, even in her opinion, an unreliable historian);
- Ms. Bielawski did not personally interview the Applicant's wife, Ms. Paraloganathan; and
- when Ms. Paraloganathan testified, she indicated that Mr. Nadesu *can* take short walks outside by himself.

I do not find this argument by the Appellant to be either practical or persuasive. An arbitrator is not required, whenever attendant care benefits are claimed, to review in his or her reasons each and every item listed in the Form 1s and explain in detail how he or she determined the appropriate amount of attendant care awarded under *each* heading, for *each* period of time.

By operation of s. 283(1) of the *Insurance Act*, appeals are restricted to questions of law.

An arbitrator's weighing of evidence is not properly the subject of an appeal especially where, as here, the arbitrator has provided cogent reasons, supported by evidence, for his decision to give generally more weight to one expert's opinion than another's.

With respect to the period of September 7, 2003 through April 3, 2006, the record is replete with references to Mr. Nadesu's self-reports of independence in personal care. Ms. Bielawski purported to review all the medical documents provided to her but her failure to make mention in her report of this important information and her failure, when testifying, to provide any explanation for this glaring omission was more than ample reason for the Arbitrator to question the objectivity and reliability of Ms. Bielawski's opinion and the weight that ought to be attached thereto. The Appellant's counsel, during his oral submissions before me, suggested that the Appellant may not have understood what was meant by "self-care" or "personal care" but this is mere conjecture on the part of the Appellant's counsel and is not supported by the evidence of Mr. Nadesu, his wife or any of the other witnesses who testified at the arbitration hearing.

From a relatively early stage, there was some evidence that Mr. Nadesu might require assistance with the heavier household tasks that he used to perform prior to the accident. Mr. Nadesu did claim housekeeping and home maintenance benefits. This claim was supported by Cecilia Chong, an occupational therapist who assessed Mr. Nadesu shortly after the accident on behalf of the Insurer. According to documents delivered to Zurich on behalf of Mr. Nadesu, he allegedly received housekeeping services from Akilanathan Loga and Seelan Kandasamy (from September 2003 through March 2006), as well as from his wife, Ms. Paraloganathan (from September 2005 onwards). The services provided by Ms. Loga and Ms. Kandasamy included: meal preparation;

cleaning; grocery shopping; washing dishes and all laundry service. Ultimately, Mr. Nadesu was paid housekeeping and home maintenance benefits by Zurich.¹⁰

Thus, although there is evidence that Mr. Nadesu suffered from some accident-related impairments in the first couple of years following the accident, there is also evidence in the record to support the Arbitrator's conclusion that from September 2003 through March 2006, Mr. Nadesu did not require *attendant care services*. The purpose of an appeal is not to allow a party to re-litigate unfavourable findings of fact (or mixed fact and law) that are supported by the evidence.

Similarly, with respect to the Appellant's claim to round-the-clock supervisory care, the Arbitrator carefully explained his reasons for preferring the opinion of Ms. MacDonald over that of Ms. Bielawski. Ms. Bielawski is the only medical professional who felt that Mr. Nadesu was unsafe to be left unattended and the only one to recommend any supervisory care.

The preponderance of the evidence suggested otherwise. Even the Appellant's treating psychologist, Dr. Miller, did not support Ms. Bielawski in this. No evidence was led by Mr. Nadesu that some lesser number of hours of *supervision* was reasonable and necessary. There was ample evidence upon which the Arbitrator could reach the conclusion he did (that the Applicant had not, on a balance of probabilities, proven a need for supervisory care) and no error of law has been demonstrated with respect to this issue.

With respect to the three periods of hospitalization, the Appellant is not contesting the Arbitrator's finding that, during these periods, no attendant care services were required (over and above what was provided by the institutions) and that no attendant care expenses were incurred (even in an expanded sense of that term).

It should be noted that the Arbitrator did not simply accept the lowest amount of attendant care proposed for each category of attendant care. There were instances where Ms. MacDonald recommended greater amounts of certain types of attendant care than did Ms. Bielawski and the

¹⁰There is evidence in the record that Mr. Nadesu was paid housekeeping and home maintenance benefits during the first two years post-accident and that his claim for ongoing housekeeping and home maintenance benefits was settled shortly before the arbitration hearing.

Arbitrator accepted these higher amounts as being reasonable based upon the evidence before him. Also, the Arbitrator did not simply accept all recommendations of Ms. MacDonald. Where he found that a recommendation by Ms. Bielawski was more consistent with the preponderance of the available evidence (e.g. with respect to the need of Mr. Nadesu for assistance in monitoring medication), the Arbitrator adopted the recommendation of Ms. Bielawski. This demonstrates a careful consideration and weighing of the evidence.

With two exceptions (see next section), the Appellant has therefore failed to raise any error of law with respect to the Arbitrator's analysis of Mr. Nadesu's claim for attendant care; rather, the Appellant is merely challenging the Arbitrator's findings of fact. In the absence of any clear error in law, I have no jurisdiction to interfere with the Arbitrator's findings of fact.

Error in Law

While I am upholding most of the order under appeal, I find that it does contain two errors of law. I find that Ms. MacDonald misdirected herself as to the law with respect to two particular types of attendant care services. This is in relation to: (1) "hygiene" (in particular, cuing for certain tasks) and (2) intermittent dependency on others (in particular, meal preparation.). The Arbitrator erred in law by adopting Ms. MacDonald's conclusions with respect to these two types of attendant care as her conclusions were based upon a misapprehension of the law.

a) Hygiene

Ms. MacDonald did not allow for attendant care services under the heading "hygiene" for the following reasons:

Mr. Nadesu is able to maintain a hygienic environment in his bathroom and bedroom. He is able to prepare his own apparel and sort his own laundry; he does not require assistance to ensure comfort/security in his own environment. Cleaning of the bathroom and bedroom should be considered under the housekeeping and home maintenance benefit.¹¹

Ms. MacDonald, however, also acknowledged that Mr. Nadesu suffers from chronic pain as well as depression and that he has difficulty with motivation and initiation and is unaware of his own

¹¹Report of Ms. MacDonald based on assessment of April 12, 2010, at page 13 of 34.

hygiene needs. As a result, she concluded that he requires reminders and cuing for eating and for hygiene. She recommended attendant care for cuing related to eating, dressing/undressing, and grooming (washing, shaving, bathing) but allowed no time for cuing related to hygiene (i.e., reminders to: rinse out the sink, tub, etc. after use; make the bed; change the bedding; choose clothing, and hang/sort clothing).

Ms. MacDonald seems to suggest that the tasks listed under “hygiene” are better claimed as housekeeping and home maintenance benefits. This is a misapprehension of the law. While there can be some similarity between certain types of housekeeping services and attendant care services, they are not necessarily interchangeable.¹² More importantly, if a person requires *reminders* (i.e., cuing) to do tasks listed under the heading “hygiene”, this ought to be reflected in the Form 1 under that heading. Ms. MacDonald fails to explain why she allows time for cuing for other tasks but does not allow for any time for cuing related to hygiene. Providing reminders to Mr. Nadesu to clean the sink/tub/toilet and to make/change the bed and choosing and laying out Mr. Nadesu’s clothes for him each day are not properly characterized as housekeeping and home maintenance activities. They are properly claimed as attendant care and, in this case, Ms. MacDonald conceded that Mr. Nadesu requires such reminders. Ms. MacDonald’s characterization of the services listed under “hygiene” as housekeeping was wrong and the Arbitrator erred in law by accepting this characterization.

Had these services properly been characterized by Ms. MacDonald as attendant care (i.e., *cuing* Mr. Nadesu to take care of his hygiene needs) rather than as housekeeping-type activities, this would have resulted in Mr. Nadesu’s entitlement to approximately an additional \$75 - \$90 per month in attendant care benefits.

¹²For example, there is a difference between quickly rinsing out the sink or bathtub after each use and doing a thorough cleaning of the bathroom, including scrubbing the sink and tub. The former is usually better characterized as attendant care and the latter is better characterized as housekeeping. Where a task is capable of being claimed as more than one type of accident benefit, the proper characterization will often depend upon the exact nature of the services being provided in a particular case and how the insured person has chosen to characterize that service.

b) Intermittent Care with Meals, Laundry, Housekeeping

Ms. MacDonald was asked to assess Mr. Nadesu's need for attendant care services as well as his need for assistance with the household chores in which he engaged prior to the accident. With respect to housekeeping and home maintenance, Ms. MacDonald concluded that Mr. Nadesu required assistance with heavier household chores, including: grocery shopping; laundry; bathroom cleaning; and garbage removal/recycling. She recommended that he receive 5 hours per week of assistance with housekeeping and home maintenance from April 2006 onwards. She did not recommend that similar services *also* be provided as attendant care since, presumably, that would have represented a duplication of the housekeeping and homemaking benefits she was recommending.

Ms. Bielawski was also asked to assess Mr. Nadesu's need for attendant care services as well as his need for assistance with housekeeping and home maintenance. With respect to housekeeping and home maintenance, Ms. Bielawski concluded that Mr. Nadesu required assistance with shopping, sweeping, vacuuming, washing floors, and taking out the garbage. She recommended 5.25 hours per week of assistance with housekeeping and home maintenance in addition to attendant care services she recommended (26.75 hours/week up to February 2007 and, from that point on, round-the-clock attendant care).

To the extent that Ms. Bielawski recommended 2 hours per week of assistance with **shopping** both as attendant care *and* as a housekeeping and home maintenance benefit, there may have been duplication and it was open to the Arbitrator to prefer the opinion of Ms. MacDonald (who recommended providing one hour per week of assistance with shopping but as a housekeeping and home maintenance benefit rather than as an attendant care benefit).

Both Ms. MacDonald and Ms. Bielawski recommended providing Mr. Nadesu with 2 hours per week of assistance with **laundry**. The difference is that Ms. Bielawski characterized this as intermittent attendant care and Ms. MacDonald characterized it as assistance with housekeeping.

The Arbitrator gave cogent reasons for giving greater weight to Ms. MacDonald's opinion and he explicitly adopted her conclusions, with one exception. It is therefore clear that, based upon

the evidence in this case, the Arbitrator agreed with Ms. MacDonald's characterization of Mr. Nadesu's need for assistance with shopping and laundry as claims for housekeeping and home maintenance benefits. There was evidence upon which the Arbitrator could make such a finding. For example, in addition to the opinion of Ms. MacDonald, many of the invoices for housekeeping services delivered to Zurich on behalf of Mr. Nadesu included time for grocery shopping and laundry service. I see no error in the Arbitrator's denial of attendant care benefits for assistance with shopping and laundry, which he concluded, on the facts of this case, were properly characterized as services related to housekeeping and home maintenance.

Ms. MacDonald's rationale for excluding attendant care services related to **meal preparation**, however, was founded upon a misapprehension of the law. Ms. MacDonald believed that if an insured person did not engage in a specific activity prior to an accident, that person cannot claim attendant care benefits when those services are provided to the person after the accident. The Arbitrator's acceptance of this interpretation of the law constitutes an error in law.

In this case, prior to the accident, meal preparation was mainly the responsibility of Mr. Nadesu's wife (Ms. Paraloganathan). Mr. Nadesu was capable but rarely assisted in meal preparation. After the accident, by about 2006, there was evidence that Mr. Nadesu was capable of simple tasks, like retrieving an item from the refrigerator, but that he was no longer capable of preparing meals due to: severe chronic pain, aggravated by prolonged standing; fatigue; cognitive impairments; and psychological/behavioural impairments.

Given her interpretation of the law, Ms. MacDonald concluded that since Mr. Nadesu's wife had prepared most meals before the accident and continued to do so after the accident, her time preparing meals for Mr. Nadesu did not increase as a result of the accident and Mr. Nadesu could not claim attendant care benefits for the time that his wife prepared meals for him after the accident. Ms. MacDonald only permitted 15 minutes per day for the wife to provide reminders to Mr. Nadesu to eat (under "feeding") and she recommended no attendant care benefits related to meal preparation since, in the opinion of Ms. MacDonald, the wife's time to prepare meals had not changed as a result of the accident.

In accepting and adopting this interpretation of s. 16(2) of the *Schedule*, the Arbitrator wrote:

I find this approach to be consistent with the language of s. 16(2) of the *Schedule* which requires payment for expenses “incurred ... as a result of the accident”. The expenses for services for activities Mr. Nadesu did not engage before the accident do not satisfy this requirement, unless his needs increased after the accident. I see no difference between claims for activities that the insured person voluntarily did not perform before the accident, and claims for activities that the insured person could not have performed before the accident, because of pre-existing limitations.

I find this interpretation of the s. 16(2) of the *Schedule* to be erroneous for the reasons that follow.

First and foremost, the interpretation adopted by the Arbitrator is inconsistent with the actual wording of section 16. Paragraph 16(2)(a) provides that an “attendant care benefit shall 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...” To be eligible for attendant care benefits (under O. Reg. 403/96), an insured person need only demonstrate that they have sustained an impairment as a result of the accident and that, as a result, they reasonably require specified types and amounts of attendant care. Unlike housekeeping and home maintenance benefits (s. 22) and caregiver benefits (s. 13), which are both restricted to the cost of replacing services that were performed by the insured person pre-accident, there is no reference in section 16 to what the insured person was doing prior to the accident.

The test for attendant care benefits is based upon the services the insured person reasonably *requires* as a result of the accident. While Mr. Nadesu may not have been doing much meal preparation prior to the accident, he was capable of doing so. He did not require assistance prior to the accident. After the accident (at least from April 2006 onwards), he was incapable of preparing meals. He then *required* assistance. The Arbitrator wrote that, “The expenses for services for activities Mr. Nadesu did not engage before the accident do not satisfy this requirement, *unless his needs increased after the accident*” (emphasis added). Mr. Nadesu's *need* for assistance did increase after the accident.

Ms. MacDonald did not properly assess the extent to which Mr. Nadesu required assistance with meal preparation post-accident because she incorrectly assumed that no such claim could be advanced by Mr. Nadesu since his wife was essentially performing the same services (in terms of

meal preparation) after the accident as before. Ms. MacDonald failed to consider that before the accident Mr. Nadesu was capable of meal preparation and after the accident he was dependent on others to do this for him.

In the case of a person who already requires attendant care prior to an accident, an insurer might well argue that it should not have to pay for services that the insured person already required prior to the accident and continued to require after the accident. The insurer could argue that such services (unless greater than before) were not being incurred as a result of the accident. In such a case, the applicant might respond that his or her impairment has somehow been worsened or prolonged as a result of the accident (i.e., that the accident has materially contributed to his/her level of impairment). This is not such a case, however, as there is no evidence that Mr. Nadesu suffered from any relevant pre-accident impairments that required him to obtain attendant care prior to the accident. I will therefore leave this debate to be resolved if and when such a case comes forward.

In the present case, Mr. Nadesu and his wife simply divided the household chores in a manner that left most of the meal preparation to her. He did not need her to prepare meals for him prior to the accident. He did need someone to prepare meals for him after the accident. Under section 16 of the *Schedule*, that is sufficient to qualify for attendant care benefits and it is was an error to hold otherwise.

The correct interpretation of section 16 gives meaning to the language of that section, especially when one puts it into the proper context and contrasts the language of section 16 with the language of sections 13 and 22. In addition, this also makes more sense in the realm of consumer protection, especially when one considers several common scenarios that arise in accident benefits cases.

For example, in the case of many minors, it will usually be a parent or guardian who will prepare their meals as a matter of course. If that minor is then involved in an accident, sustains serious permanent impairments and requires others to prepare his or her meals, the interpretation adopted by Ms. MacDonald would mean that that person would not be able to claim attendant care benefits to cover the cost of having others prepare meals, possibly for the rest of his or her life.

Without the funds to pay for such services, the insured person may be forced to be dependent on the goodwill of his or her relatives to provide unpaid services in perpetuity.

Or take a couple like Mr. Nadesu and his wife, where one partner does most of the meal preparation and housekeeping and the other works outside the home. If the partner who works outside the home is impaired as a result of a motor vehicle accident and now requires attendant care, should those services be denied simply because of their pre-accident division of labour? What if the partner who worked at home before the accident needs to now work outside the home to make up for some of the other partner's loss of income and is not available to provide attendant care? What if the partner who was primarily responsible for domestic chores prior to the accident leaves the insured person (i.e., there is a marital breakdown), becomes ill or dies? Should the insured person not be able to claim for attendant care services he or she requires as a result of the accident regardless of who did the cooking prior to the accident?

Ms. MacDonald's interpretation suggests that in each of these scenarios, the insured person would not be able to claim for attendant care benefits related to tasks that the insured person did not perform prior to the accident. There is no reason to read section 16 in such a way as to deprive the insured persons in any of the above scenarios of the attendant care services they reasonably require as a result of an accident. In my view, this is an incorrect interpretation of that section.

Because of this misapprehension as to the law, neither Ms. MacDonald nor the Arbitrator analyzed Mr. Nadesu's *need* for assistance with meal preparation. Ms. MacDonald also did not have an opportunity to interview Ms. Paraloganathan. Ms. Bielawski found that, in addition to the 15 minutes per day of cuing to remind Mr. Nadesu to eat, Mr. Nadesu required about 2 hours per day of assistance with meal preparation. The need for assistance with meal preparation appears to be supported by the preponderance of the evidence and there is no contrary opinion concerning the *amount* of assistance *required*. An additional two hours per day at \$7.00 per hour is equivalent to extra attendant care benefits of approximately \$421 per month.

Remedy for Errors in Law

Pursuant to subsection 283(5) of the *Insurance Act*, I have the authority to confirm, vary or rescind the order appealed from or substitute my order for that of the arbitrator. Since a Director's Delegate no longer has the authority to conduct a new hearing (i.e., hear *viva voce* evidence), where it is found that an order contains an error in law, typically, the matter is remitted back to arbitration for a re-hearing of some or all of the issues.

In this particular case, the Arbitrator did not hear *viva voce* evidence. He based his decision, with the consent of the parties, on the record (including transcripts of the testimony of witnesses and of the closing arguments of counsel). This was not a case that turned upon an assessment by the Arbitrator of the credibility of the Applicant or the witnesses.

Thus, in this case, I am in the unusual position of being in as good a position as the hearing Arbitrator. This case involves a 2003 motor vehicle accident. The original hearing took 16 days over two years. The arbitration proceeding has been dragging on for over six years. I am not inclined to order a re-hearing on the record (a record with which I am now intimately familiar). Nor am I inclined to order a new *viva voce* hearing when this case has been thoroughly considered and where the impact of the errors I have found can be readily quantified and remedied.

Mr. Wilson, on behalf of the Appellant, argued that if *any* of the reasons the Arbitrator gave for preferring the opinion of Ms. MacDonald turned out to be based upon an error in law, then the entire decision must fall and a new hearing (on the issue of attendant care) must be ordered. I do not agree. For the reasons set out in this decision, I find only two errors in law and the negative impact of those errors is easy to both determine and to rectify. I find that the most just, quickest and least expensive resolution of this appeal will be for me to vary the order under appeal and, to the extent necessary, substitute my order for that of the arbitrator.

Conclusion

Calculation of attendant care benefits, despite the requirement that it be done in accordance with the rates set out in the Form 1, is more of an art than a precise science. In this case, the two errors I have found resulted in denial of about \$496 to \$511 per month in attendant care benefits, from April 2006 onwards. To correct these errors (and for the sake of simplicity), I will amend the order under appeal by simply increasing by \$500.00 the monthly attendant care benefits originally granted (and for the same time periods during which attendant care benefits were granted). Of course, the Respondent will also have to pay any *additional* interest on overdue attendant care benefits resulting from this decision.¹³

IV. EXPENSES OF THE APPEAL

Given the mixed success of the parties, I would hope that the parties can resolve the issue of expenses on their own. If the parties are unable to agree about expenses of this appeal, however, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

Richard Feldman
Director's Delegate

October 7, 2016
Date

¹³a provision for the payment of interest on overdue attendant care benefits is already contained in the Order of May 27, 2015, so I see no need to include such a provision in this order.