**CITATION:** Vaitheeswaran v. State Farm Mutual Automobile Insurance Company, 2022 ONSC 6346
**DIVISIONAL COURT FILE NOS.:** 065/21 and 072/21
**DATE:** 20221125

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**DIVISIONAL COURT**

**ACJSC McWatt, Stewart and Mew JJ.**

| | |
|---|---|
| **BETWEEN:** | |
| SRISELVARANY VAITHEESWARAN<br>Appellant | *David S. Wilson*, for the Appellant |
| **– and –** | |
| STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY<br>Respondent | *Jonathan Schrieder*, for the Respondent |
| **AND** | |
| SRISELVARANY VAITHEESWARAN<br>Appellant | *David S. Wilson*, for the Appellant |
| **– and –** | |
| STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY<br>Respondent | *Jonathan Schrieder*, for the Respondent |
| | **HEARD at Toronto (by videoconference):** April 21, 2022 |

**REASONS FOR DECISION**

**Stewart J.**

**Nature of the Appeals**

[1] There are two appeals before the Court that were heard together on agreement of the parties.

[2] In each appeal Sriselvarany Vaitheeswaran is Appellant and State Farm Mutual Automobile Insurance Company is Respondent. Each appeal deals with claims by the Appellant for no-fault automobile accident benefits under the Statutory Accident Benefits Schedule, O. Reg. 34/10 ("*SABS*") pursuant to the *Insurance Act*, R.S.O. 1990, c. I.8.

[3] The First Appeal is from the Decision of Adjudicator Parish of the Licence Appeal Tribunal (the "Tribunal") dated February 18, 2020, and the subsequent Reconsideration Decision by the same Adjudicator dated June 15, 2020, which determined claims made by the Appellant for attendant care benefits.

[4] The Second Appeal is from the Decision of Arbitrator Lee of the Financial Services Commission of Ontario dated Lee dated June 17, 2020, which found that the Financial Services Commission of Ontario was *functus officio* and without jurisdiction to adjudicate upon the Appellant's claims for housekeeping and home maintenance benefits.

**Jurisdiction**

[5] An appeal to the Divisional Court may be brought from these decisions only on questions of law, pursuant to ss. 11 and (6) of the *Licence Appeal Tribunal Act*, 1999, S.O. 1999, c. 12, Sched. G (the "*Act*").

**Standard of Review**

[6] On a question of law, the standard of review is correctness (see: *Housen v. Nikolaisen*, 2022 SCC 33).

[7] Where a question of procedural fairness is raised, there is no specific standard of review. The determination of the question will depend on the nature of the alleged breach of fairness and the overall circumstances and context within which it occurred.

**The First Appeal**

[8] The Appellant was injured in an automobile accident on October 19, 2007, following which she experienced ongoing pain, psychological/emotional issues, and challenges with daily activities. On February 18, 2020, the Appellant was found by Adjudicator Parish to have sustained a Catastrophic Impairment as defined by the *SABS* following a hearing in which the Appellant sought an attendant care benefit of $1,762.52 per month from October 19, 2009, plus interest from that same date.

[9] The issues raised on the First Appeal relate to the availability and amounts of the attendant care benefits claimed by the Appellant and the date from which interest is to be calculated on those to which she was found to be entitled.

[10] Pursuant to the *SABS*, claims for attendant care must be accompanied by a Form 1 and provided to the insurer. Form 1 is to be completed so as to stipulate precisely the nature of the care or services for which entitlement to payment is being sought, organized into Levels 1, 2 and 3. The Appellant claimed retroactive payments for bathroom cleaning as well as basic supervisory care required where the claimant "lacks the ability to respond to an emergency or needs custodial care

due to changes in behaviour". The Appellant included these claims in Level 2 of the Form submitted by her in February 2017.

[11] At the lengthy hearing before the Tribunal to determine her claim for a Catastrophic Impairment designation and retroactive attendant care benefits, the Appellant tendered expert evidence from an occupational therapist who expressed the opinion that the Appellant required, among other things, attendant care with her personal hygiene. This care included bathroom cleaning, recommended by the occupational therapist because the Appellant's impairment negatively affected her ability to complete these "hygiene" activities. With respect to basic supervisory care, the occupational therapist also recommended elevated attendant care to provide the Appellant with emotional support to assist her in coping with her post-collision functional changes and symptoms.

[12] The Adjudicator determined that the Appellant had sustained a Class 4 Marked Impairment in the domain of "Activities of Daily Living" and was therefore entitled to an attendant care benefit in the amount of $507.03 per month for feeding assistance.

[13] No attendant care was ordered to be payable for bathroom cleaning, as the Adjudicator found that the services requested for her did not relate directly to the Appellant's personal hygiene care and were more properly in the nature of benefits for housekeeping and home maintenance, a separate category.

[14] Similarly, no attendant care was ruled payable for basic supervisory care which was, on the evidence, principally for emotional support. Relying on the wording of Form 1 that requires that the applicant "must lack the ability to respond to an emergency or needs custodial care due to changes in behaviour" in order to qualify for such payment assistance, the Adjudicator noted the Appellant's own evidence that she had not experienced any emergency that she had been unable to respond to since the accident. She knew what to do, and could do it, in case of an emergency and did not need custodial care for that purpose. Generally speaking, a custodial care benefit does not include the cost of provision of emotional support (see: *TN v. TD Insurance Company*, 2020 ONLAT 19-005638/AABS).

[15] The Adjudicator further determined that interest was to accrue on the retroactive attendant care benefits found to be payable, but only from the date in February 2017 when the Respondent received the Appellant's Form 1 claiming them.

[16] The Appellant submitted a request for reconsideration of the Decision. On June 15, 2020, the Adjudicator, in her Reconsideration Decision, determined that she had erred in calculating the amount of the attendant care benefit payable to the Appellant regarding assistance required for feeding and, as a result, corrected the amount to $845.06 per month.

[17] The Adjudicator dismissed the balance of the reconsideration request with respect to the issues of bathroom cleaning, basic supervisory care, and interest. In so doing, she noted that the Appellant had raised some new arguments on some of these issues for the first time on reconsideration which she was of the opinion ought to have been advanced at the initial hearing.

[18] The Appellant claims that the Adjudicator erred in law in denying the above-noted parts of her claim for attendant care benefits. She further submits that she was denied natural justice in the reconsideration proceedings.

**Discussion**

[19] As stated above, an appeal from a decision of an Adjudicator pursuant to the *Act* may be brought on a question of law only.

[20] In my view, the Adjudicator's assessment of the evidence and determination of the Appellant's condition that might entitle her to additional or increased attendant care are questions of fact and therefore not the proper subject of an appeal permitted under the *Act*.

[21] Further, there was ample evidence in the record before the Adjudicator, including that of the Appellant, to support the factual conclusions arrived at by her. This observation applies to the Appellant's claims for payment for cleaning her bathroom as well as for emotional support.

[22] With respect to the Appellant's assertion that she was denied procedural fairness, principally by the limit placed by the Adjudicator upon the length of submissions and the refusal to entertain new arguments on reconsideration that had not been raised at the hearing, I see no breach of procedural fairness that would warrant interference with her decision. The Adjudicator's management of the process was well within her discretion and was clearly designed to require focussed submissions in the context of a complex Catastrophic Impairment claim. A limit on new claims and arguments in such circumstances was designed to prevent unfairness in the process and to manage the Tribunal's resources, considerations that are well within the discretion of the Adjudicator's discretion to achieve by the controls imposed by her (see: *Iqbal v. Gore Mutual Insurance Company*, 2021 ONLAT 20-005901/AABS).

[23] The Appellant did not pursue any oral argument at the hearing of this appeal of any lack of fairness in the Tribunal's practice of reconsideration being conducted by the same Adjudicator, a common practice of this Tribunal which is permitted by s. 21.2(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 and Rule 18.1 of the Tribunal's Rules. I do not view adopting such practice as problematic in this case. Rather, the record demonstrates that the Appellant was given a fair hearing of the issues raised in the initial hearing and upon reconsideration of the Decision.

[24] With respect to the date upon which interest begins to run, I can see no error of law in the Adjudicator's approach to this issue.

[25] The Adjudicator accepted, but distinguished on these facts, the approach and test set out in *Mulhall v. Wawanesa*, 2015 ONSC 7495. The Appellant takes issue with the Adjudicator's distinguishing of the facts in *Mulhall* and her finding that the Respondent only became apprised of what the level of the Appellant's alleged attendant care needs were when the Form 1was received in February 2017.

[26] The Appellant refers generally to the medical evidence in support of her impairments to disagree with the Adjudicator's findings in this regard. However, those impairments did not arise from more objective injuries such as a brain injury or broken leg, but from subjective injuries such

as psychological issues and back pain. This medical evidence was before the Adjudicator at the hearing.

[27] Impairments arising from such subjective injuries can be more difficult to immediately ascertain and confirm and on this basis the Adjudication distinguished *Mulhall*. Where the Appellant's alleged degree of impairment was unknown given the nature of these conditions, the Adjudicator accepted and concluded that the Respondent was not made aware of any need for attendant care with respect to such impairments until it had received the Appellant's Form 1 for payment of benefits in February 2017. It was open to the Adjudicator to make that finding.

[28] In any event, I view the considerations outlined above that enter into determining the date upon which interest accrues in a case such as this are questions of fact or, at its highest, of mixed fact and law from which no extricable question of law has been demonstrated. Accordingly, this issue is not one which may be made the proper subject of an appeal under the *Act*.

[29] I therefore would not interfere in the conclusions of the Adjudicator in either her Decision or her Reconsideration Decision with respect to any of the issues raised by the Appellant on the First Appeal.

**The Second Appeal**

[30] Although the Appellant received some statutory accident benefits following her accident of October 19, 2007, disputes arose between the parties concerning some of these benefits. The Appellant therefore sought arbitration of the disputed issues, a process available to her under the statutory scheme and accordingly delivered an Application for Arbitration.

[31] Prior to the arbitration hearing, the parties reached a mutually acceptable agreement on the various disputed issues. Minutes of Settlement and a Consent were executed and filed with the Financial Services Commission of Ontario. On October 14, 2011, Arbitrator Richards incorporated the provisions of their executed Minutes of Settlement into a Consent Order.

[32] On July 13, 2016, the Appellant submitted an Application for Determination of Catastrophic Impairment. Almost five years after the making of the Consent Order, on August 24, 2016, counsel for the Appellant contacted the Financial Services Commission of Ontario to advise that the Application for Arbitration stated that the claim for housekeeping and home maintenance benefits was to be for the period commencing June 2, 2008 to "ongoing". He further advised that the letter of December 23, 2009, delivered before the settlement of the dispute, which limited the benefits in dispute to the period from June 2, 2008 to October 19, 2009, was in error.

[33] On September 28, 2016, Arbitrator Robinson addressed the issue of jurisdiction and found that the Commission was *functus officio* and therefore lacked the jurisdiction to deal with the claim. On August 23, 2018, Arbitrator Robinson's decision was vacated on procedural grounds and a further hearing was ordered before Arbitrator Lee.

[34] On June 17, 2020, Arbitrator Lee of the Financial Services Commission of Ontario ultimately took the same view as Arbitrator Robinson that the Commission was *functus officio* and accordingly had no jurisdiction to adjudicate the housekeeping and home maintenance benefits claim.

[35] The Appellant now appeals from the decision of Arbitrator Lee. The Appellant argues that the Arbitrator erred in law and seeks an order setting aside his decision and a direction permitting the Appellant to commence a new proceeding to pursue these benefits before the Licence Appeal Tribunal.

**Discussion**

[36] The Arbitrator noted that Arbitrator Richards had issued a final Consent Order on the Appellant's claim for housekeeping and home maintenance benefits on October 14, 2011. That Consent Order determined all issues in dispute at the arbitration and incorporated the Minutes of Settlement agreed to by the parties that included a specific provision that the Respondent would pay to the Appellant $7,200.00 with respect to her claims for housekeeping and home maintenance benefits for the period from June 2, 2008, to October 19, 2009, in satisfaction for all claims for that period. The characterization of the claim as relating to that time frame is supported by several pre-hearing communications.

[37] The Arbitrator found that Rule 33 of the Financial Services Commission of Ontario's *Dispute Resolution Practice Code* limited the claim for housekeeping benefits to a later date. The Arbitrator also found no justification under r. 81.1(b) to waive Rule 70, which provides for the withdrawal of a dispute, in these circumstances.

[38] Counsel for the Appellant made a tactical choice in coming to an agreement with the Respondent in 2011 with respect to these benefits, despite his assertions as to his intention at the time to pursue more benefits later. The parties clearly agreed in writing that the Appellant's housekeeping benefits claim would be limited to the period noted and a Consent Order to that effect was made. The consumer protection objective of the *SABS* does not create rights not found within it. To allow the Appellant to re-start and pursue her claim for further housekeeping benefits and home maintenance benefits would effectively be allowing her to make a second claim for benefits. Such multiple applications for weekly benefits are not permitted under the *SABS*.

[39] Having said that, the Arbitrator's primary finding was that the housekeeping and home maintenance benefit was resolved for the purposes of the arbitration, wherein the jurisdiction of the Financial Services Commission of Ontario was exhausted. Characterization of the Appellant's conduct as a proceeding seeking to rescind a settlement or otherwise vary the Consent Order does not change the Arbitrator's finding that the Commission lacked jurisdiction to re-open the arbitration.

[40] Moreover, to permit a rescission of this aspect of the settlement and a possible variation of the Consent Order would jeopardize the entire scope of the settlement and thereby risk a re-opening of a variety of disputed issues that were settled by the parties and their counsel in 2011. The Arbitrator and the Financial Services Commission of Ontario lacked the jurisdiction to do so, and, in any event, such a result would not be just.

[41] I therefore view the decision of the Arbitrator to be correct and his reasoning for it to be unassailable.

[42] As a result, I would not give effect to any of the grounds advanced by the Appellant in support of her Second Appeal.

**Conclusion**

[43] For these reasons, the First Appeal and the Second Appeal are dismissed.

**Costs**

[44] In accordance with the agreement of the parties' costs of the two appeals, fixed at $7,000.00 plus HST, are to be awarded to the successful party. Accordingly, costs in that amount shall be paid to the Respondent by the Appellant within 60 days.

I agree

**ACJSC McWatt J.**

**Stewart J.**

I agree

**Mew J.**

**Released:** November 25, 2022

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**REASONS FOR DECISION**

**Stewart J.**

**Released:** November 25, 2022