



Citation: Mathurin v. Aviva General Insurance, 2023 ONLAT 21-005498/AABS

Licence Appeal Tribunal File Number: 21-005498/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:

Clesha Mathurin

Applicant

and

Aviva General Insurance

Respondent

DECISION

VICE-CHAIR:

Ian Maedel

APPEARANCES:

For the Applicant:

Yanira E. Monterroza, Paralegal

For the Respondent:

Peter A. B. Durant, Counsel

HEARD:

By way of written submissions

OVERVIEW

[1] Clesha Mathurin, the applicant, was involved in an automobile accident on July 13, 2019 and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “*Schedule*”). The applicant was denied benefits by the respondent, Aviva General Insurance, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.

ISSUES

- [2] The issues in dispute are:
- i. Is the applicant entitled to an attendant care benefit (“ACB”) in the amount of \$2,481.11 per month from October 17, 2019 to date and ongoing?
 - ii. Is the applicant entitled to interest on any overdue payment of benefits?

RESULT

[3] The applicant is not entitled to an ACB in the amount of \$2,481.11 per month from October 17, 2019 to date and ongoing, nor interest.

ANALYSIS

The period of ACB in dispute

- [4] In her written submissions, and contrary to the Order for this hearing, the applicant claims ACB for the period of August 25, 2019, or the date of the initial Form-1, to date and ongoing.
- [5] The respondent objects, indicating that the Form-1 was dated August 25, 2019, but was not submitted to the respondent until October 17, 2019. The respondent submits it is not required to pay any benefits incurred prior to the submission of the Form-1 pursuant to s. 42(5) of the *Schedule*. However, the applicant does not dispute the submitted date of October 17, 2019.
- [6] Thus, I am satisfied that the period of ACB in dispute is from October 17, 2019 to date and ongoing.

The Applicant is not entitled to an ACB

- [7] The applicant is not entitled to an ACB in the amount of \$2,481.11 per month from December 12, 2019 to date and ongoing. The applicant has failed to establish these services were incurred pursuant to s. 3(7)(e)(iii)(A) of the *Schedule*.
- [8] Section 19 of the *Schedule* provides that an ACB shall pay for all reasonable and necessary expenses incurred by an insured person for the services of an attendant or aide.
- [9] 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.
- [10] The definition of “incurred” in s. 3(7)(e) sets out two categories of attendant care providers: professional service providers who provide services in the course of employment, occupation, or profession they would ordinarily be engaged but for the accident; and, non-professional service providers.
- [11] Section 42(1) of the *Schedule* provides that an application for ACB must be in the form of, and contain the information required to be provided in, the version of the document entitled Assessment of Attendant Care Needs (“Form-1”).
- [12] Section 20(1) of the *Schedule* also sets out 260 months as the maximum period of eligibility for ACB.
- [13] The applicant relies on the Form-1 and the In-Home Assessment conducted by occupational therapist Pravin Kedar, both dated August 25, 2019. The Form-1 states the applicant requires \$2,481.11 in monthly attendant care benefits.
- [14] Conversely, the respondent relies on the Form-1 and the In-Home Assessment conducted by occupational therapist Dilini Mohan, both dated October 17, 2019. The Form-1 states the applicant is entitled to attendant care in the amount of \$1,745.46 per month.
- [15] I find that the applicant has failed to establish the attendant care services were incurred pursuant to s. 3(7)(e)(iii)(A) of the *Schedule*. The applicant submits she received attendant care services from her mother, a personal support worker (“PSW”) employed with Lumacare. This care was particularized in invoices for attendant care services and housekeeping for the period between July 14, 2019 to October 31, 2021.

- [16] However, the wording of s. 3(7)(e)(iii)(A) is operative. Specifically, whether the applicant's mother did so in the course of the employment, occupation or profession in which she would ordinarily have been engaged, but for the accident.
- [17] While the evidence tendered does indicate the applicant's mother was employed as a PSW since January 21, 2019, the employment file also indicates she was injured in a workplace incident on August 22, 2019. She was last employed as a PSW on October 11, 2019, prior to the submission of Ms. Kedar's Form-1. The applicant's mother filed a Workplace Safety and Insurance Board ("WSIB") claim for these injuries sustained to her upper back, lower back, and right knee. WSIB denied that claim on December 2, 2019. The applicant's mother never returned to work as a PSW and submitted her formal letter of resignation to Lumacare dated February 15, 2020.
- [18] Thus, I cannot conclude that her mother was ordinarily engaged as a PSW pursuant to s. 3(7)(e)(iii)(A) in the period following October 17, 2019 when Ms. Kedar's Form-1 was submitted. While the applicant submits her mother was able to provide modified or light services as a PSW following her workplace injury and subsequent resignation, she has tendered no evidence that she was ordinarily engaged in work as a PSW during this period.
- [19] When I consider the totality of the evidence, I find the applicant has not met her onus to establish the attendant care services were incurred. Even if I determined the applicant was entitled to ACB, she would be unable to recoup any ACB expenses that were not incurred. Having not incurred any expense, the applicant is therefore not entitled to any payment for attendant care services.
- [20] I also considered whether the applicant is entitled to an ACB relative to her mother's economic loss as a result of providing attendant care services. However, the applicant has failed to tender any evidence regarding a potential economic loss sustained pursuant to s. 3(7)(e)(iii)(B). Thus, no attendant care benefits are payable pursuant to this section of the *Schedule*.

The applicant is not entitled to interest

- [21] Given there are no overdue payment of benefits, the applicant is not entitled to interest pursuant to s. 51 of the *Schedule*.

ORDER

- [22] The application is dismissed, and I find:

- i. The applicant is not entitled to attendant care benefits of \$2,481.11 per month from October 17, 2019 to date and ongoing, nor applicable interest.

Released: July 31, 2023



**Ian Maedel
Vice-Chair**