Citation: [G] v. Allstate Insurance, 2023 ONLAT 19-008034/AABS - A

Licence Appeal Tribunal File Number: 19-008034/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:

[D. G.]

Applicant

and

Allstate Insurance

Respondent

AMENDED DECISION

ADJUDICATOR: **Harry Adamidis**

APPEARANCES:

For the Applicant:	[D. G.], Applicant Ashu Ismail, Counsel Joseph Campisi, Counsel Sara Crittenden, Counsel
For the Respondent:	Ryan Kirshenblatt, Counsel Radana Singh, Counsel Athina Ionita, Counsel
Third Party:	Jared ~~Swartz~~ **Schwartz,** Counsel
Court Reporter:	Martyna Majewska

HEARD By Videoconference: January 9-12, 2023

OVERVIEW

[1] [D. G.], the applicant, was involved in an automobile accident on September 18, 2015, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010Effective September 1, 2010* (the "*Schedule*"). The applicant was denied benefits by the respondent, Insurer, and applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

PRELIMINARY ISSUES

[2] Viewpoint, a medical assessment company, is a third party in this proceeding. It filed a motion to quash the summons issued to Dalal Sima. The second item of relief in this motion is to quash part of the summons issued to Chantal Sands. Ms. Sima and Ms. Sands are employees of Viewpoint.

[3] On consent, the parties agreed that the testimony of Ms. Sima was not required. Consequently, I order that this summons is no longer in effect.

[4] The core issue in the second item of relief is whether Viewpoint provided its complete file to the applicant. Viewpoint submits that this has already been done and that the witness should not be required to do a broad sweep of their records. The applicant disagrees.

[5] On consent, the parties agreed that the summons issued to Ms. Sands will remain in effect. Consequently, I dismiss the second item of relief.

Motion of the Applicant

[6] The parties presented their closing arguments by way of written submissions. In the applicant's written submissions, he makes a motion to the Tribunal to state a case to the Divisional Court for contempt under section 13 of the *Statutory Powers Procedure Act, 1990* (*SPPA*). Specifically, to punish and deter Aide Sortino, adjuster, for subjecting the applicant to repeated surveillance. The applicant submits that this amounts to criminal harassment, an offense under section 264 of the *Criminal Code of Canada, 1985 (CCC)*. In his view, this constitutes a prima *facie case* for contempt.

[7] The respondent submits that Ms. Sortino has not behaved in a manner that constitutes contempt under the *SPPA*. There is no basis to grant this motion.

[8] I find that s. 13 of the *SPPA* is not engaged. Therefore, I cannot state a case to Divisional Court.

[9] In s. 13 of the *SPPA*, contempt involves the conduct of a witness in relation to proceedings before a Tribunal. The applicant made no submissions that touch on Ms. Sortino's conduct during the proceedings. His submissions relate entirely to criminal harassment under s.264 of the *CCC*. I have no authority to state a case to Divisional Court based on an alleged violation s.264 of the *CCC*. I cannot exercise authority I do not have. This motion is dismissed.

ISSUES

[10] The issues in dispute are:

i. Is the applicant entitled to attendant care benefits of $4,776.10 per month from July 3, 2019 and ongoing?

ii. Is the applicant entitled to housekeeping and home maintenance benefits of $100.00 per week from September 18, 2015 and ongoing?

iii. Is the applicant entitled to the cost of an attendant care assessment in the amount of $2,200.00 recommended by Personal Injury Occupational Therapy Inc.?

iv. Is the applicant entitled to the cost of an attendant care assessment in the amount of $1,659.99 recommended by Caring Rehabilitation?

v. Is the applicant entitled to the cost of an attendant care assessment in the amount of $2,200.00 recommended by Caring Rehabilitation?

vi. Is the applicant entitled to interest on any overdue payment of benefits?

vii. Is the applicant entitled to an award under Ontario Regulation 664 because the respondent unreasonably withheld or delayed the payment of benefits?

viii. Is the applicant entitled to costs?

RESULT

[11] The applicant is entitled to attendant care benefits.

[12] The applicant is entitled to housekeeping and home maintenance benefits.

[13] The applicant is not entitled to the three attendant care assessments in dispute.

[14] The applicant is entitled to interest.

[15] The respondent is not liable to pay an award.

[16] The applicant is not entitled to costs.

ANALYSIS

Attendant care benefit (*ACBs*)

[17] I find that the applicant is entitled to an ACB.

[18] Section 19 of the *Schedule* states that an insurer shall pay for all reasonable and necessary expenses incurred by or on behalf of an insured person as a result of an accident for attendant care services provided by an aide or attendant.

[19] Section 42(1) of the *Schedule* provides that an application for ACBs 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").

[20] The applicant submits that he is entitled to attendant care benefits in the amount of $4,776.10 per month from July 3, 2019 and ongoing. This calculation is based on the Form 1 of Daniela Laski, occupational therapist, dated June 26, 2019. The applicant also relies on the Form 1 of Andrea Li, occupational therapist, dated May 31, 2021 that seeks $4,901.14 per month in ACB. According to the applicant, his functional abilities changed over time and the Form 1 of Ms. Li reflects his current attendant care needs.

[21] The respondent submits that the applicant may be entitled to the attendant care recommended in the Form 1 of Ron Findlay, occupational therapist, dated October 6, 2021.

[22] I find that the applicant is entitled to attendant care as follows:

Level 1 Routine Personal Care

[23] The applicant is not entitled to attendant care for dressing and undressing.

[24] The report of Ms. Laski documents that the applicant can complete the tasks of dressing and undressing using adaptive techniques, but he does not change his clothes everyday due to decreased motivation and varying levels of pain. Ms. Laski recommended attendant care for dressing, in particular, for cueing.

[25] The applicant testified that he received assistance with dressing and undressing while he lived with his ex-partner. His ex-partner confirmed in her testimony that the applicant received assistance with dressing while they lived together. Since

he moved out in June 2022, the applicant testified that he is independent with dressing.

[26] Ms. Li's and Mr. Findlay's reports do not recommend attendant care for dressing.

[27] The applicant did not make any submissions on whether attendant care for dressing and undressing is reasonable and necessary. The respondent submits that the recommendation of Ms. Laski should be disregarded because it is inconsistent with that of Ms. Li, who did not recommend attendant care for dressing and undressing.

[28] I find that the applicant is not entitled to attendant care for dressing and undressing. The applicant has the functional ability to dress and undress. He reported this to Ms. Laski and also confirmed this in testimony. Ms. Laski recommended attendant care for cueing as the applicant did not change his clothes everyday. The applicant provided no testimony on how often he changes his clothing. As such, the frequency of his clothing changes is unknown.

[29] The applicant made no submissions on this item of attendant care and it is not possible to determine the frequency of the applicant's clothing changes. Given these circumstances, I find that there is an insufficient basis to justify attendant care for dressing and undressing.

[30] The applicant is not entitled to 30 minutes per week for shaving from July 3, 2019 and ongoing.

[31] The applicant submits that he cannot shave because doing so requires him to bend his neck and to hold his neck in a contorted position, and this causes him pain.

[32] The respondent disputes that attendant care for shaving is reasonable and necessary because the range of motion testing completed by Mr. Findlay establishes the applicant likely has the functional ability to perform the task of shaving. The respondent also references surveillance footage which shows the applicant raising his neck to drink an alcoholic beverage as proof that he can perform movements akin to shaving.

[33] Pre-motor vehicle accident (MVA) the applicant received shaves from the barber. Since the accident, the applicant testified that it is too painful for him to stretch his neck in a manner that allows for a barber to shave him. Instead, his brother shaves him. His brother is more accommodating than barbers in regard to ensuring that he does not have to stretch his neck and experience pain.

[34] The applicant's brother is able to shave the applicant without requiring him to bend or stretch his neck. In my view, the range of motion testing done by Mr. Findlay shows that the applicant can use similar adaptive techniques to shave himself without bending or stretching his neck. Consequently, I find that the applicant is not entitled to attendant care for shaving.

[35] Ms. Laski recommended attendant care for shampooing and cutting toenails. The applicant makes no submissions on shampooing. The applicant's submissions mention that his daughter helps to cut the applicant's toenails, but no submissions were made on whether attendant care for cutting toenails is reasonable and necessary.

[36] The burden of proof for establishing that attendant care is reasonable and necessary rests with the applicant. Under these circumstances, there is an insufficient basis to find, on a balance of probabilities, that the applicant is entitled to these two items of attendant care.

[37] The applicant is entitled to 420 minutes per week for feeding.

[38] The applicant submits that he is entitled to attendant care for feeding, in particular, for food preparation and to ensure that he does not leave the stove on. The applicant can prepare simple meals. However, he also orders in and relies on others to batch cook meals for the entire week. The applicant, his ex-partner, and his personal support worker (PSW) testified as to the limited amount of time that he is able to engage in food preparation, which ranges from zero to 20 minutes. As such, attendant care for meal preparation is reasonable and necessary.

[39] The respondent submits that the applicant can prepare his meals. The evidence shows that he can prepare not only simple meals, but also more complex meals in a slow cooker and on the barbeque. Mr. Findlay recommended some attendant care to ensure that the stove is turned off. However, this too may not be necessary because there are no reported incidents where the applicant forgot to turn off the stove.

[40] I agree that the applicant can prepare simple food like rice, pasta, smoothies, and eggs. He can also cook stews in the slow cooker. However, the use of the slow cooker is dependant on the preparation of food to be placed in the slow cooker. As noted above, there is consistent testimony from three witnesses that the applicant has a limited ability to prepare food.

[41] Likewise, surveillance shows the applicant barbequing, but does not show who prepared the food for the barbecue.

[42] In my view, the applicant has the ability to do some meal preparation and cooking, but this does not establish that he is independent with meal preparation. The testimony of the applicant, his ex-partner, and the PSW establish, on a balance of probabilities, that he has ongoing limitations in the amount of meal preparation he can engage in and that he requires assistance in the kitchen.

[43] The amount of time recommended by Ms. Lasky and Ms. Li, 60 minutes per day, is reasonable. This would include time for meal preparation and for ensuring that the stove is turned off. For these reasons, I find that the applicant is entitled to 60 minutes per day for feeding.

[44] The applicant is not entitled to attendant care for mobility.

[45] The applicant submits that Ms. Li recommends attendant care for mobility to provide the applicant with assistance if a pain episode occurs while he is on a leisure walk, but he does not require assistance for the leisure walk itself. The applicant also submits that an attendant would ensure that the applicant walks further.

[46] The respondent submits that attendant care for mobility is limited to location changes. The applicant is able to independently go on leisure walks, and as such, no assistance is needed for location changes.

[47] I am not persuaded that attendant care is needed for the applicant's leisure walks. Ms. Li testified that the applicant's chronic pain makes it more likely that he will fall. However, the applicant utilizes coping strategies when he goes on leisure walks. He uses a TENS machine to decrease pain. He also uses a cane to stabilize his walking and minimize the risk of falling. It is also noteworthy that in Mr. Findlay's Occupational Therapy assessment, dated October 19, 2021, under the section titled "Balance," the applicant is found to have sufficient functional standing capabilities. In light of this evidence, I find that the risk of falling is not significant enough to justify attendant care.

[48] In regard to walking further, Ms. Li testified that the applicant has low walking tolerance due to pain. No explanation was provided on how an attendant would manage this pain in a way that would allow him to walk further.

[49] Ms. Li also opined in her testimony that the applicant can become immobilized by pain and that an attendant can be with him to ensure his safety when this happens. The only safety issue she described is the inability to return home.

[50] Being unable to return home is difficult, but it is not a safety issue. If there is a safety issue, then this needs to be explained to understand what that issue is. This was not done. For all these reasons, I find that the applicant has not established that attendant care is reasonable and necessary for mobility.

Level 2 – Basic Supervisory Functions

[51] Ms. Li recommends 60 minutes for sorting laundry and linen changes. The applicant made no submissions in regard to this item of attendant care.

[52] The respondent submits that this item of attendant care is, in fact, housekeeping. The applicant is not entitled to this item of attendant care as housekeeping is already being provided to him.

[53] As noted above, the burden of proof for establishing that attendant care is reasonable and necessary rests with the applicant. The applicant made no submissions on this item of attendant care. As such, I find that there is an insufficient basis to find that he is entitled to this item of attendant care.

[54] The applicant is not entitled to attendant care for ensuring comfort in the bedroom.

[55] The applicant submits that he is entitled to this item of attendant care.

[56] The respondent submits that the applicant is not entitled to this item of attendant care. Ms. Li testified that the applicant is unable to make himself comfortable at night. However, this testimony is not supported by her clinical notes. She documents the applicant getting out of bed at night to stop a draft by closing a window. Her notes also document that if he awakes at night, then he is able to fall asleep again on his own. As well, no psychologist or psychiatrist has recommended emotional support in the bedroom. The respondent also sites *Applicant v Certas*, 2017 CanLII 99139 (ON LAT), at paragraph 75 where the Tribunal found that this type of attendant care is only applicable to persons who are hospitalized. The applicant is not hospitalized. Therefore, this item of attendant care is not available to him.

[57] I find that the applicant does not require attendant care for ensuring comfort in the bedroom. Ms. Li testified that the applicant's psychological disorders and pain impact his ability to be comfortable in his bedroom. He would benefit from an

attendant providing emotional support and ensuring that he is comfortable enough to sleep. I agree that the applicant's impairments impact his comfort and his ability to sleep, however, these impairments do not prevent him from ensuring his comfort in the bedroom. The applicant falls asleep on his own without an attendant. The applicant also makes himself comfortable in his bedroom. As noted in Ms. Li's report, dated May 10, 2021, the applicant sleeps with a memory foam pillow and uses a pillow under his knees. He also uses a body pillow to improve his posture. If he is uncomfortable, also noted in Ms. Li's clinical notes, he is able to take action, like closing a window to stop a draft in his bedroom, to ensure his comfort. In light of this evidence, I find that this item of attendant care is not reasonable and necessary.

Level 3: Complex Health/Care and Hygiene

[58] The applicant is not entitled to basic supervisory care.

[59] The applicant submits that he is entitled to 10 hours per day of basic supervisory care to ensure that he can leave his home in an emergency. After long periods of laying down, he is immobilized due to stiffness and pain and this prevents him from leaving his home in a timely manner.

[60] The respondent submits that there is no objective evidence of the applicant becoming stiff from sleep. Ms. Li never observed this condition. The other witnesses, including the applicant himself, did not provide corroborating testimony on this condition. The only record of this condition is the applicant's self report that is found in Ms. Li's assessment dated May 10, 2021.

[61] The respondent also notes that in 2021 the applicant's ex-partner left her children in the care of the applicant while she worked overnight shifts. As such, it was the applicant who provided supervisory care to the children at night.

[62] I agree with the respondent. There is no medical evidence or corroborating testimony to establish that the applicant is unable to vacate his home at night because of stiffness and pain caused by lying down while sleeping.

[63] Additionally, under section 19(1)(a) of the *Schedule*, entitlement to attendant care must be as a result of the accident. The absence of medical evidence documenting stiffness and pain caused by lying down for lengthy periods of time does not permit a causal link to be established between this condition, if it exists, and the accident. For these reasons, I find that the applicant is not entitled to basic supervisory care.

[64] The applicant is not entitled to co-ordination of attendant care.

[65] The applicant made no submissions on this item of attendant care.

[66] The respondent submits that there have been a number of attendant care assessments by occupational therapist. Only Ms. Li has recommended this item of attendant care. Consequently, this recommendation should be rejected.

[67] The burden of proof for establishing that co-ordination of attendant care is reasonable and necessary rests with the applicant. He has provided no justification on why the co-ordination of attendant care is reasonable and necessary. As such, there is an insufficient basis to find, on a balance of probabilities, that the applicant is entitled to this item of attendant care.

[68] The applicant is not entitled to attendant care for monitoring medication.

[69] The applicant submits that weight should be given to the testimony of Michele Himelstein, the applicant's case manager. She testified that the respondent currently pays for Invisible Care, a service that sends text reminders to the applicant to take his medication. In her view, the applicant's impairments need human interaction for cues and prompts which are far more effective than texts.

[70] The difficulty with this submission is that Invisible Care works. The applicant receives the texts and takes his medication. Under these circumstances, attendant care duplicates a service already being provided to the applicant. Therefore, I find that attendant care for medical monitoring is not reasonable and necessary.

[71] The applicant's entitlement to an ACB is calculated as follows:

Level 1: 420 minutes/ 60 = 7 hrs x 4.3 = 30.10 hrs/month x $14.90 rate = $448.49 /month

[72] Consequently, the applicant is entitled to $448.49 per month of the ACB from July 3, 2019 and ongoing.

[73] The applicant submits that his attendant care has been incurred. The previous version of the *Schedule* that was in place when the accident took place did not require attendants to be professionals or to be persons who suffered an economic loss to provide attendant care. Moreover, the applicant received attendant care from various family members who have cared for him since the accident took place. As such, attendant care has been incurred and the respondent should be ordered to pay for this incurred attendant care.

[74] It is not clear to me that the previous regulation applies. However, if it does apply, then I still cannot order the respondent to pay for incurred attendant care. The applicant has not provided an accounting of the hours of attendant care he received for feeding. Without this information it is not possible to calculate the amount of incurred attendant care to be paid by the respondent.

[75] The applicant further submits that attendant care should be deemed incurred because the respondent improperly adjusted the file. In particular, the respondent did not reassess his entitlement to attendant care after his catastrophic impairment designation and never advised him how to incur attendant care. Instead, it preferred to subject the applicant to numerous rounds of surveillance. This conduct was unreasonable and justifies deeming the ACB to have been incurred.

[76] Respondent submits that the 2019 denial of the ACB was justified given the caselaw that existed at the time. The respondent adjusted their position on the ACB after the caselaw changed. As such, it's conduct was reasonable. The respondent also submits that it did advise the applicant on how to incur attendant care and he was represented by counsel throughout his accident benefits claim.

[77] In my view, there is an insufficient basis to find that attendant care should be deemed incurred.

[78] Under 3(8) of the *Schedule*, an expense that was not incurred because the insurer unreasonably withheld or delayed the payment of a benefit can be deemed to have been incurred by the Tribunal.

[79] The insurer denied the attendant care from July 3, 2019. The caselaw, at that time, supported the position that the Insurance Act and the *Schedule* required disputes over benefits to be brought within two years of the insurer's denial. The respondent previously denied attendant care in 2016 and this decision was not appealed.

[80] The caselaw changed in November, 2019 when the Court of Appeal determined, in *Tomec v. Economical*, 2019 ONCA 882, that it is absurd to bar an insured person from claiming enhanced benefits before the person is eligible for such benefits based on a previous denial. The Supreme Court denied leave of this decision in June of 2020. The respondent subsequently withdrew this defence and made arrangements for an insurer's examination to take place in January 2021.

[81] I agree that the post-CAT determination process for assessing attendant care was lengthy. However, the respondent's explanation for why this process took as long as it did, because of a change in caselaw, is reasonable.

[82] The applicant also submits that section 32(2) of the *Schedule* requires the respondent to provide forms and information to the applicant once it receives notification that the applicant intends to apply for benefits. However, the respondent did not advise the applicant on how to incur attendant care. Consequently, the applicant argues, the respondent conducted themselves in an unreasonable manner that disadvantaged the applicant. Attendant care should be deemed incurred for this reason as well.

[83] The applicant relies on the testimony of Aide Sortino, adjuster, who agreed that the applicant likely did not understand the small print and legal language in the documents provided to him by the respondent. Ms. Sortino also confirmed that she never spoke directly to the applicant. Instead, she spoke to the applicant's case manager and also communicated with his legal counsel.

[84] In my view, 32(2) refers to the process of applying for benefits. This includes providing the correct forms and information to assist an insured person in applying. It does not require the insurer to provide detailed information on the numerous facets of the *Schedule*. The only exception to this is 32(2)(d) which does require insurers to provide specific information on the election of the income replacement, non-earner, and caregiving benefits. This exception does not apply to attendant care benefits. For this reason, I find that the respondent did not violate 32(2) of the *Schedule* by not explaining how ACBs are "incurred" pursuant to the *Schedule*.

[85] As such, I find that the applicant has not established, on a balance of probabilities, that the respondent acted in an unreasonable manner. Consequently, I further find that attendant care cannot be deemed incurred.

[86] The applicant submits that the incurred Invisible Care services be deemed attendant care because this service is, in fact, attendant care.

[87] The respondent submits that this applicant never incurred Invisible Care, and therefore, cannot be found to be an incurred benefit.

[88] I agree with the respondent. Invisible Care has not been incurred by the applicant. Section 3(8) of the Schedule requires an insured person to pay, promise to pay, or be legally obligated to pay for a service. None of these apply. The applicant applied for the Invisible Care service as a medical benefit and this

was approved and paid for by the respondent. Thus, there is no “incurred” Invisible Care services to be deemed attendant care.

[89] As such, I find that Invisible Care cannot deemed to be incurred attendant care.

Housekeeping and home maintenance benefits

[90] The *Schedule* requires the respondent to pay for reasonable and necessary expenses incurred by an insured person as a result of an accident for housekeeping if the person sustains a catastrophic impairment that results in a substantial inability to perform the housekeeping performed before the accident.

[91] The respondent approved housekeeping in an Explanation of Benefits form dated December 29, 2021. The respondent has been paying this benefit since September 2022.

[92] The applicant submits that he received housekeeping services from family members before the respondent approved this benefit. He also submits that had he known how incur housekeeping, then he would have done so. In terms of the relief being sought, the applicant asks the Tribunal to find entitlement to $100 in weekly housekeeping benefits from September 18, 2015 and ongoing.

[93] The respondent submits that there is no evidence of housekeeping being incurred by the applicant prior to the approval of this benefit. Consequently, housekeeping is not payable.

[94] As I understand it, the respondent agrees that the applicant is entitled to housekeeping from September 18, 2015 and ongoing. If this is not correct, then I find that he is entitled to housekeeping from September 18, 2015 and ongoing because the applicant is catastrophically impaired and has functional limitations that justify this benefit.

[95] However, I cannot order the respondent to pay this benefit prior to September 2022 because the applicant has not provided an accounting of the housekeeping services that have been incurred. Under these circumstances, it is not possible to calculate the amount of incurred housekeeping.

[96] The explanation provided by the applicant, that he was unaware of how to incur housekeeping, is not persuasive for the same reasons noted above in paragraph 83.

Attendant Care Assessments

[97] To receive payment for a treatment and assessment plan under s. 15 and 16 of the *Schedule*, the applicant bears the burden of demonstrating on a balance of probabilities that the benefit is reasonable and necessary as a result of the accident.

[98] The applicant submits that the respondent improperly denied three treatment plans for attendant care assessments. In particular, the plan dated August 2, 2018 should have been approved given his catastrophic impairment finding. The applicant relies on the testimony of Ms. Sortino who explained that in hindsight she would re-evaluate the applicant's eligibility to claim these treatment plans.

[99] The respondent submits that the applicant has not relied on any of the three attendant care assessments. In fact, he withdrew one of them after it was already sent to the respondent. As such, these plans are not reasonable and necessary.

[100] I find that these attendant care assessments are not reasonable and necessary. The applicant has two attendant care assessments in evidence. No explanation has been provided for why three more are necessary. Consequently, the applicant has not established, on a balance of probabilities, that he is entitled to these treatment plans.

Interest

[101] Interest applies on the payment of any overdue benefits pursuant to s. 51 of the Schedule.

[102] I have determined that the applicant is entitled to $448.49 per month of the ACB from July 3, 2019 and ongoing. The applicant is entitled to interest for any overdue payment of these benefits pursuant to s. 51 of the Schedule.

Award

[103] Section 10 of *Regulation 664* provides that, if the Tribunal finds that an insurer has unreasonably withheld or delayed payment of benefits, the Tribunal may award a lump sum of up to 50 per cent of the amount in which the person was entitled.

[104] The applicant submits that he is entitled to an award due to the respondent's purposeless surveillance and allowing Viewpoint, the section 44 vendor, to alter reports.

[105] The respondent submits that when considered in context the eight rounds of surveillance over four and a half years is not excessive and there is no evidence showing that Viewpoint tampered with reports.

[106] I find that the respondent is not liable to pay an award.

[107] The assessment of an award is limited to unreasonably withheld or delayed payments of benefits. In this case, I have determined that the applicant is entitled to a greater amount of attendant care than was previously approved by the respondent. As such, this analysis begins with an examination of whether this greater amount of attendant care was unreasonably withheld.

[108] The respondent approved attendant care for the applicant based on the section 44 insurer's examination (IE) conducted by Mr. Findlay. The applicant has raised the concern that Viewpoint, the company that contracted Mr. Findlay to complete this IE, altered his report. Mr. Findlay testified at the hearing and the applicant had an opportunity to test his evidence. In my view, his testimony and report are consistent and there is no indication that his findings were altered.

[109] The applicant submits that Viewpoint made alterations to Mr. Findlay's report, but these alterations were not made clear because of the evasive testimony of Ms. Chantal Sands, a representative of Viewpoint. I disagree. Ms. Sands provided detailed information on the process of completing IE reports. In particular, she testified that assessors make changes to reports, not Viewpoint. She was unable to answer some questions. She explained that the applicant's file is 3000 pages and that she would have to check the file to provide the information being sought. In my view, this is not an indication being evasive. It is unreasonable to expect her to have complete recall of such a voluminous amount of information. In light of these factors, I find that she did not provide evasive testimony. I further find that there is an insufficient basis to conclude that there are hidden alterations in Mr. Findlay's report. Consequently, it was reasonable for the respondent to rely on Mr. Findlay's report.

[110] The issue of surveillance not relevant. The respondent determined the applicant's entitlement to attendant care based on the IE of Mr. Findlay.

[111] For these reasons, I find that the respondent did not unreasonably withhold the payment of benefits and is not liable to pay an award.

Costs

[112] The applicant asks for costs of this hearing because the respondent's surveillance of the applicant is vexatious.

[113] The respondent submits that the applicant did not raise the issue of costs until their submissions and this is procedurally unfair. Moreover, the respondent has not acted in bad faith and costs are not warranted.

[114] Under Rule 19 of the Licence Appeal Tribunal's (LAT) *Common Rules of Practice and Procedure* (the Rules), the applicant may request costs if he believes that the respondent acted unreasonably, frivolously, vexatiously, or in bad faith.

[115] I find that the respondent has not acted vexatiously. One element to be established by the applicant is that the respondent intentionally set out to vex or annoy him. Surveillance requires the person being observed to be completely unaware that they are being watched. It is not possible to vex someone who is oblivious to the offending behaviour. Consequently, I find that there is an insufficient basis for the applicant to be awarded costs.

ORDER

[116] I order the following:

i. The applicant is entitled to attendant care.

ii. The applicant is entitled to housekeeping and home maintenance benefits.

iii. The applicant is not entitled to three attendant care assessments.

iv. The applicant is entitled to interest.

v. The respondent is not liable to pay an award.

vi. The applicant is not entitled to costs.

Released: September 12, 2023

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Harry Adamidis
Adjudicator