Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Neutral Citation: 2016 ONFSCDRS 107

FSCO A15-001653

BETWEEN:

GIUSEPPE TERRANOVA

Applicant

and

ECONOMICAL MUTUAL INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Arbitrator Marcel D. Mongeon

Heard: In person at ADR Chambers on March 3, 2016

Appearances: Mr. Giuseppe Terranova participated
Mr. Joseph Campisi and Mr. Ryan Breedon for Mr. Giuseppe Terranova
Mr. Neil Colville-Reeves for Economical Mutual Insurance Company

Issues:

The Applicant, Mr. Giuseppe Terranova, was injured in a motor vehicle accident on February 4, 2014, and sought accident benefits from Economical Mutual Insurance Company ("Economical"), payable under the *Schedule*.[1] The parties were unable to resolve their disputes through mediation, and the Applicant, through his representative, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

[1] *The Statutory Accident Benefits Schedule - Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

The issue in this Hearing is:[2]

1. Is Mr. Terranova entitled to attendant care benefits to be paid to his daughter for services rendered in the total amount of $75,461.75?

Result:

1. Mr. Terranova is not entitled to attendant care benefits to be paid to his daughter for services rendered.

EVIDENCE AND ANALYSIS:

Facts

I have the following facts through the testimony of the Applicant and the Applicant's daughter, Ms. Jennifer Terranova, and other documents filed in this Arbitration.

The Applicant was involved in a serious motor vehicle accident. As a result of the injuries that he sustained in the accident, the Applicant was determined to be catastrophically impaired by the Insurer on May 12, 2014.

On three occasions, the Applicant's need for attendant care has been assessed. Assessment of Attendant Care Needs Forms ("Form 1s"), dated April 8, 2014, February 24, 2015 and August 5, 2015, were available as Exhibits 1, 2 and 3, respectively. Each of the Form 1s indicate an assessed monthly attendant care benefit in excess of $6,000.

The Applicant's daughter, Ms. Jennifer Terranova, is a child and youth worker. She has taken additional courses and received training in a number of fields.

[2] Although listed as an issue in the Pre-Hearing letter, a claim for a special award was withdrawn by the Applicant at the outset of this Hearing.

Ms. Terranova provided evidence of a Police Vulnerable Sector Check,[3] Medication Administration Training,[4] SFR & CPR Recertification – Level C,[5] Nonviolent Crisis Intervention Training,[6] Accessibility Standards for Customer Service,[7] Worker Health and Safety Awareness in 4 Steps,[8] St. John Ambulance Standard First Aid x CPR Level C[9] and her community college diploma for the Three Year Child and Youth Worker Program.[10] She gave evidence that she is one of three family members who lives with the Applicant and provides various assistance. The other family members who assist are the wife and the son of the Applicant.

Ms. Terranova seeks to have herself considered as someone providing attendant care to her father and to be paid for those services. During a period of 25 months, she has submitted three types of accounting for her work as Exhibit 19. The accounting provides the following information:

i) *For the period from February 4, 2014 to June 1, 2014* – Expenses Claim Form (OCF-6) indicating for each month that a claim is made: "Attendant care provided by Jennifer Terranova as per Form 1" with no further explanation of hours or days worked.

ii) *For the period from June 2, 2014 to October 3, 2014* – A weekly form with columns indicating the 7 days in one week and the rows indicating different types of activities with an amount of time indicated for a particular day and activity. All of these forms indicate a total number of hours.

iii) *For the period from October 1,*[11] *2014 to January 31, 2016* – A weekly form with columns indicating the 7 days in one week and the rows indicating different types

[3] Exhibit 21.
[4] Exhibit 16.
[5] Exhibit 10.
[6] Exhibit 9.
[7] Exhibit 8.
[8] Exhibit 7.
[9] Exhibit 6.
[10] Exhibit 5.
[11] I note that although the previous group time period ends on October 3, this time period is correctly stated as beginning October 1. I do not believe anything turns on this minor discrepancy in dates.

of activities with only a check mark indicated for a particular day and activity. These forms do not indicate a total number of hours.

The latter two types of forms indicate that the claim is being made for work at $25 per hour.

Exhibit D shows that a total of $75,461.75 is sought by Ms. Terranova for providing attendant care between February 2014, and January 2016. She received payment for the first four of these months for $3,000 per month prior to the formal denial of benefits[12] for a total of $12,000.

For the same period that Ms. Terranova is seeking attendant care expenses, she also worked on a part-time and full-time basis in Barrie for a facility providing care for youth and young adults. She continues to work in this facility full-time. Her work in her employment includes positions entitled:[13] "Residential Counsellor-Part-time Worker"; "Housemother"; and "Residential Counsellor-Primary Worker".

Exhibit 24 was Ms. Terranova's time sheets for her work from August 26, 2013 until December 27, 2015. At the beginning of this period, these time sheets show work for her employer of 11 hours over two weeks. In January 2014, the work time sheets show about 40 hours every two weeks, and then by April she is working in excess of 80 hours every two weeks, which is the pace of work continued through 2014. Clearly, since shortly after her father's accident, she is engaged in a full-time position with her employer.

Basis of the Claim for Attendant Care Benefits

The Applicant seeks to pay attendant care benefits to Ms. Terranova pursuant to the provisions of section 3(7)(e)(iii)(A) of the *Schedule*; that is, that she was someone who provided the services "in the course of the employment, occupation or profession in which he or she would ordinarily have been engaged, but for the accident". The Applicant's representative submits that since Ms.

[12] The delay, in part, related to a loss transfer which took place from another Insurer to the current Insurer. Nothing more turns on the loss transfer.

[13] Exhibit 14.

Terranova works in a field analogous to attendant care providers, she should be paid for her work with her father at home.

Ms. Terranova's evidence is clear that all of the services that she provides could also be provided by her mother or her brother; there is no service that she provides to the Applicant which can only be provided by her. There are some services, such as bathing of the Applicant, which the mother provides although Ms. Terranova assists by cleaning up the washroom after the completion of the bathing.

For completeness, there is no evidence that any assistance or care that Ms. Terranova provides to the Applicant entails an economic loss for her. Economic loss means that Ms. Terranova had lost wages or incurred out-of-pocket expenses in providing attendant care to the Applicant.

The Insurer has denied payment of the attendant care expense. The Insurer has submitted that as a family member, Ms. Terranova would have to show an economic loss in order to qualify to be paid attendant care services. The Insurer also denies that her employment is analogous to that provided in attendant care, and finally submits that the billing for attendant care service is really only a strategy to be paid such amounts with no legal entitlement being allowed under the arrangement or the *Schedule*.

Analysis

The relevant provisions of the *Schedule* provide:

3 (7) For the purposes of this Regulation,

…

(c) an aide or attendant for a person includes a family member or friend who acts as the person's aide or attendant, even if the family member or friend does not possess any special qualifications;

…

(e) subject to subsection (8), an expense in respect of goods or services referred to in this Regulation is not incurred by an insured person unless,

(i) the insured person has received the goods or services to which the expense relates,

(ii) the insured person has paid the expense, has promised to pay the expense or is otherwise legally obligated to pay the expense, and

(iii) the person who provided the goods or services,

(A) did so in the course of the employment, occupation or profession in which he or she would ordinarily have been engaged, but for the accident, or

(B) sustained an economic loss as a result of providing the goods or services to the insured person;

…

19 (1) Attendant care benefits shall pay for all reasonable and necessary expenses,

(a) that are incurred by or on behalf of the insured person as a result of the accident for services provided by an aide or attendant…;

…

(3) The amount of the attendant care benefit payable in respect of an insured person shall not exceed the amount determined under the following rules: … the amount of the attendant care benefit payable in respect of the insured person shall not exceed … $6,000 per month, if the insured person sustained a catastrophic impairment as a result of the accident. … if a person who provided attendant care services (the "attendant care provider") to or for the insured person did not do so in the course of the employment, occupation or profession in which the attendant care provider would ordinarily have been engaged for remuneration, but for the accident, the amount of the attendant care benefit payable in respect of that attendant care shall not exceed the amount of the economic loss sustained by the attendant care provider during the period while, and as a direct result of, providing the attendant care.

I find that there are four reasons that the Applicant is not entitled to claim attendant care benefits for services provided by Ms. Terranova. These reasons are:

1) the authorities indicate that in order to claim for attendant care, a family member must have an economic loss. No evidence was submitted that Ms. Terranova sustained an economic loss;
2) the facts in this case do not show that providing attendant care to her father was in the course of the employment, occupation or profession that Ms. Terranova was ordinarily engaged in;
3) the facts do not show that the Applicant was legally obligated to pay Ms. Terranova for her services; and
4) it is neither reasonable nor necessary that Ms. Terranova should provide compensated attendant care services.

I will fully explain each of these in turn.

The Authorities – A family member must have an economic loss

The parties have cited a number of authorities. The first of these is the decision of the Court of Appeal in *Henry v. Gore Mutual Insurance Company*, 2013 ONCA 480. *Henry* is a well-known decision which provides insight into the background of the current version of the *Schedule* relating to the payment of attendant care to family members who also reside with an Applicant.

Although *Henry* does not directly consider the issue of clause 3(7)(e)(iii)(A), it does provide guidance on the issue of paying family members for attendant care.

Paragraph 36 of *Henry* provides:

> Attendant care benefits are only payable in respect of the provision by a family member of care detailed in the Form 1 assessment of the insured's attendant care needs if the family member sustains an economic loss as a result of providing such care to the insured. If an economic loss is sustained, attendant care benefits are payable with respect to all care

> detailed in the Form 1 provided by the family member, subject to the maximums in s. 19(3) and various other safeguards, including ss. 42 and 33 of SABS-2010. ***If no such loss is sustained, no attendant care benefits are payable in respect of care provided by the family member, even if the family member provides care that would otherwise be provided by someone in the course of their employment, occupation or profession and would necessitate the payment of attendant care benefits by the insured.*** And to the extent that the economic loss sustained by the family member as a result of providing such care to an insured exceeds the maximum attendant care benefits stipulated in SABS-2010, the family member is not indemnified. (my emphasis)

As I said, *Henry* does not specifically refer to clause 3(7)(e)(iii)(A). It did not concern a family member who was otherwise employed in a field analogous to attendant care.

A case which did consider the clause and was decided after *Henry* is that of *Josey and Primmum Insurance Company*[14] In this decision, we find an analysis of the clause as follows:

> I find that the wording of s. 3(7)(e)(iii)(A) is clear and the intention was that the attendant care services be provided by a professional in the health care industry. While this would usually involve employing an arm's length service provider, ***if a family member is trained and/or working in that field, the benefit will be payable for any work they did for the insured person, "in the course of the employment, occupation or profession in which he or she would ordinarily have been engaged, but for the accident."*** (my emphasis)

And further on:

> I agree with the insurer that consistent with this reasoning, the amendments did not contemplate that a stay-at-home parent would be considered someone providing attendant care services in the course of their employment, occupation or profession. ***Section 3(7)(e)(iii)(A) was intended to address the arm's length professional attendant care***

[14] FSCO A13-005768, Arbitrator Fadel, October 31, 2014.

> ***service provider, not family and friends.*** I do not accept that an unpaid stay-at-home parent providing care to their children, meets this definition. While I acknowledge that a stay-at-home parent is providing important care to their children, a working parent as well is providing care to their children for a significant part of their day and would qualify under s. 3(7)(e)(iii)(A) if I found that the care provided qualifies as "occupation." This was not the intent of the Legislature, especially given the existence of s. 3(7)(e)(iii)(B) which provides that a family member must prove an economic loss. (my emphasis)

Finally, the case of *Shawnoo v. Certas Direct Insurance Company*, 2014 ONSC 7014 postdates both *Henry* and *Josey*. It is also a decision of the Superior Court.

Shawnoo considers clause 3(7)(e)(iii)(A) and specifically attendant care services that are provided by a friend and roommate who, like Ms. Terranova in this case, is a child and youth worker. However, in *Shawnoo*, the friend was "neither trained in the field of healthcare nor [had] any prior work history or experience in the field" and was denied payment of accident benefits.

Shawnoo also dealt with a mother who had trained as a healthcare aide and had been employed as such in the past. However, as she was not employed as such at the time attendant care services were required, the decision notes:

> [61] On the facts before me, [the mother] was not working outside the home as a healthcare aide or PSW for remuneration. I agree with Arbitrator Fadel that she must be excluded from receiving SABS benefits without showing an economic loss.
> [62] Although I am sympathetic to the plight of those healthcare professionals who may be recently unemployed due to work shortages or injury, ***I am left to conclude that section 3(7)(e)(iii)(A) requires that family members must prove that they have sustained an economic loss in order to be reimbursed for attendant care services from the accident benefit insurer.*** (my emphasis)

The passages that I have highlighted in the discussion of the cases suggest that clause 3(7)(e)(iii)(A) was not designed to have family members paid for attendant care services. This

clause was reserved for those who were in the business of providing such services, which I consider more fully in the next section. However, it is clear to me that the intention of the *Schedule* as explained in the foregoing decisions is that a family member must be able to show an economic loss. As there is no such loss in this case, there can be no benefit paid.

Was Ms. Terranova providing services in the course of employment, occupation or profession?

The provision of attendant care services is not regulated. The professions that we refer to as personal support worker and child and youth worker are not regulated in the same fashion as, for example, lawyers or nurses. Anyone can provide these services. It is up to an employer to decide what certifications they require someone to have.

In this case, Ms. Terranova submits that she should be considered as having provided such services in the course of her normal employment. Was she providing services to her father in the same manner as she was providing in her normal employment to youth and young adults?

It was clear during the course of her testimony that Ms. Terranova is engaged in a caring profession and is a very caring person. In her regular employment, she cares for youth and young adults. However, no evidence was provided to show me that working as a Housemother for a number of youth and young adults is the same employment, occupation or profession as providing convalescent care to a middle age man recovering from a serious car accident.

I have no doubt that Ms. Terranova has generic skills respecting life safety, fire skills, medication dispensing and the like which are applicable to both situations. She was also examined on the functions listed on the Form 1s and indicated abilities to perform those tasks. However, just because she can perform the tasks does not suggest to me that they are the same function.

Could the Applicant convalesce at the youth facility of Ms. Terranova's employment? Clearly this would be inappropriate. How then can it be said that her employment with that facility is the same as the attendant care that he needs?

In my view, it is not reasonable on the facts of this case to conclude that Ms. Terranova's full-time employment, profession or occupation is the same as caring for her father.

Is there a legal obligation?

Section 3(7)(e)(ii) makes it clear that to be payable, there must be a legal obligation between the Applicant and Ms. Terranova to pay her the $25 per hour that she is billing. In this regard I note that legal obligation typically pre-supposes some type of contract.

Contracts imply significant record-keeping and reporting obligations, as well as the collection of appropriate taxes and other levies such as Employment Insurance, WSIB, and Canada Pension Plan deductions in an employment situation.

All that has been entered into evidence are forms completed by Ms. Terranova. All of the forms started with "The Insured hereby agrees to pay the service provider the total amount set out herein on receipt of such monies from the Insurer." As I have previously mentioned, of the three different types of forms, only one contained any breakdown of actual time spent and on which day.

No evidence was presented that the $25 per hour being sought represents a reasonable rate for the type of work provided. I note that Exhibit 23 was Ms. Terranova's full-time employment agreement with her employer in which she is paid less than $16 per hour. It is difficult to reconcile these two rates other than to come to the same conclusion that the Insurer's representative has urged upon me: there is no real contract here; it is merely a strategy to be paid the attendant care benefits.

I find that there was no legal obligation governing Ms. Terranova's work based on the foregoing indicia and, therefore, the attendant care benefit is not payable.

Is the attendant care expense reasonable and necessary?

Among the Applicant's family members, only Ms. Terranova has made a claim for the attendant care expenses. What services does she provide that no one else can provide?

There are no such services. Ms. Terranova noted that in addition to herself, her mother, brother and even her grandparents have provided assistance to the Applicant. There was no evidence that she was required to cover time periods when no one else was available; in fact, because of her busy schedule, she was the one who was likely least available compared to her mother who works part-time and her brother who was unemployed.

In circumstances where a number of family members are available, can it be said to be reasonable or necessary that Ms. Terranova should provide attendant care services because she can charge for them rather than another family member providing such services? Section 19(1) of the *Schedule* requires that all expenses sought for attendant care should be "reasonable and necessary".

In this case, it is clear to me that the payment of the attendant care expense would neither be reasonable nor necessary.

Conclusion

I have determined four separate reasons why the claim for attendant care expenses must fail. Any one of them alone would be sufficient to defeat the claim; all of them combined provide overwhelming reason why the claim cannot succeed.

As in the *Shawnoo* case, I want to reiterate the following from that case:

> [63] I do not see this conclusion as a non-payment windfall to the insurer. Rather, it is a recognition of the concerted effort of the drafters of SABS-2010 to exclude family members and friends from eligibility for payment for attendant care services unless they suffer an economic loss.

[64] The love and affection of a family member is critical in the recovery of an accident victim. I do not intend any of my conclusions in this regard to in any way discourage the involvement and support of family and friends in helping accident victims recover from injuries.

EXPENSES:

As discussed with the parties at the Hearing, if the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Marcel D. Mongeon Arbitrator	April 1, 2016 Date

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Neutral Citation: 2016 ONFSCDRS 107

FSCO A15-001653

BETWEEN:

GIUSEPPE TERRANOVA

Applicant

and

ECONOMICAL MUTUAL INSURANCE COMPANY

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended, it is ordered that:

1. Mr. Terranova is not entitled to attendant care benefits to be paid to his daughter for services rendered.

April 1, 2016

Marcel D. Mongeon
Arbitrator

Date