Neutral Citation: 2017 ONFSCDRS 325

Appeal P16-00033

OFFICE OF THE DIRECTOR OF ARBITRATIONS

GIUSEPPE TERRANOVA

Appellant

and

ECONOMICAL MUTUAL INSURANCE COMPANY

Respondent

BEFORE:	David Evans
REPRESENTATIVES:	Joseph Campisi Jr. and Sylvia Guirguis for Mr. Giuseppe Terranova Neil Colville-Reeves for Economical Mutual Insurance Company
HEARING DATE:	April 11, 2017

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. The appeal is dismissed and the Arbitrator's order of April 1, 2016 is affirmed.

2. If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

December 5, 2017

David Evans
Director's Delegate

Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Mr. Terranova appeals the Arbitrator's order that he is not entitled to attendant care benefits under the *SABS–2010*[1] for services provided by his daughter, Jennifer Terranova.

However, the Arbitrator made a factual finding that a relevant criterion for awarding attendant care benefits was not met, namely that the services Ms. Terranova provided as part of her regular employment were not similar enough to the services she provided her father. This finding is not subject to review, and accordingly the appeal is dismissed.

II. BACKGROUND

Mr. Giuseppe Terranova was catastrophically impaired on February 4, 2014. He claimed entitlement to attendant care benefits (ACBs) to be paid to his daughter for services rendered in the total amount of $75,461.75. Various Assessment of Attendant Care Needs Forms ("Form 1s") indicated an assessed monthly attendant care benefit in excess of $6,000.

Ms. Jennifer Terranova, the daughter, is a child and youth worker. She had taken additional courses and received training in a number of fields. She gave evidence that along with her mother and brother, she lived with Mr. Terranova and provided assistance to him.

Ms. Terranova sought to have herself considered as someone providing attendant care to her father and to be paid for those services. She submitted three types of accounting forms for her work over 25 months, the last two claiming $25 an hour. However, only one form indicated a total number of hours. She was paid $12,000 for the first four of those months until the benefits were terminated.

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

For the same period that Ms. Terranova sought attendant care expenses, she also worked on a part-time and then full-time basis at Oakdale Child and Family Services in Barrie, a facility providing care for youth and young adults, and continued to work there full-time. Her work in her employment at Oakdale included positions entitled "Residential Counsellor-Part-time Worker," "Housemother," and "Residential Counsellor-Primary Worker." Based on the work time sheets, the Arbitrator found that since shortly after her father's accident, she was engaged in a full-time position with her employer.

The Arbitrator set out the statutory basis of Ms. Terranova's ACB claim in s. 3(7)(e)(iii)(A)[2] of the *SABS*; 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." Mr. Terranova submitted that since Ms. Terranova worked in a field analogous to attendant care providers, she should be paid for her work with her father at home.

The Arbitrator found that all of the services that Ms. Terranova provided could also have been provided by her mother or her brother and that there was no service that she provided to the Applicant that could only be provided by her. The Arbitrator also found that there was no evidence that any assistance or care that Ms. Terranova provided to Mr. Terranova entailed an economic loss for her because she essentially worked full-time after the accident.

The Arbitrator then set out the relevant statutory provisions. First, s. 19(1)(a) provides that ACBs are only payable if they are reasonable and necessary expenses 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. While s. 3(7)(c) provides that an aide or attendant may be a family member or friend with no special qualifications, s. 3(7)(e) then defines "incurred," with limitations for non-professionals. Not only must the goods or services have been received by the insured person (s. 3(7)(3)(i)) who has paid the expense, has promised to pay the expense or is otherwise legally obligated to pay the expense (s. 3(7)(3)(ii)), but also, as set out in s. 3(7)(3)(iii)), the ACB is not incurred unless:

[2]I refer to the provision occasionally as simply (iii)(A).

(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.

There is a further restriction under s. 19, in that s. 19(3)(4) makes it clear that the services provided in the course of employment, occupation or profession had to be for remuneration.

As already noted, Ms. Terranova claimed she fit within (iii)(A). Economical submitted that she fit within s. 3(7)(e)(iii)(B), in which case, pursuant to s. 19(3), the amount of the ACB payable would be limited to the amount of economic loss sustained by her while providing the attendant care and, it submitted, she sustained no economic loss in any event.

The Arbitrator found that there were four reasons that Mr. Terranova was not entitled to claim attendant care benefits for services provided by Ms. Terranova, any one of which he found would be sufficient to defeat the claim:

1) The authorities indicate that in order to claim for attendant care, a family member must have an economic loss.

Under this head, the Arbitrator reviewed several decisions, starting with *Henry v. Gore Mutual Insurance Company*, 2013 ONCA 480. He stated that although *Henry* did not directly consider the issue of clause 3(7)(e)(iii)(A), but rather (iii)(B), payment for economic loss, it did provide guidance on the issue of paying family members for attendant care. Clause (iii)(A) was discussed in *Josey and Primmum Insurance Co*., (FSCO A13-005768, October 31, 2014). The Arbitrator cited Arbitrator Fadel's statement that, in general, this clause was intended to address the arm's length professional attendant care service provider, not family and friends, but if a family member was working in the field of providing attendant care services, the benefit would 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." Finally, Arbitrator Mongeon discussed *Shawnoo v. Certas Direct Insurance Company*, 2014 ONSC 7014, in which the court stated that clause (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. Arbitrator Mongeon concluded that (iii)(A) was not designed to have family members paid for attendant care services; rather, the intention of the *SABS* was that a family member must be able to show an economic loss. As he found there was no such loss in this case because Ms. Terranova kept working, there could be no benefit paid.

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.

The Arbitrator noted that Ms. Terranova was engaged in caring for youth and young adults. However, he found there was no evidence to show that working as a Housemother for a number of youth and young adults was the same employment, occupation or profession as providing convalescent care to a middle age man recovering from a serious car accident. The Arbitrator agreed that Ms. Terranova had generic skills respecting life safety, fire skills, medication dispensing and the like which are applicable to both situations. He noted that the Form 1s indicated her abilities to perform those tasks. However, he stated, just because she can perform the tasks did not suggest to him that they are the same function. He then stated:

> 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.

3) The facts do not show that the Applicant was legally obligated to pay Ms. Terranova for her services.

The Arbitrator stated that a legal obligation typically pre-supposes some type of contract, which in turn implies significant record-keeping and reporting obligations and the collection of taxes. However, the only evidence was three different types of forms submitted by Ms. Terranova, only one of which contained any breakdown of actual time spent and on which day. He also noted there was no evidence presented that the $25 per hour claimed was a reasonable rate, noting that in her full-time employment Ms. Terranova was paid less than $16 an hour. He found there was no real

contract here; it was merely a strategy to be paid the ACBs. Accordingly, he found that there was no legal obligation governing Ms. Terranova's work.

4) It is neither reasonable nor necessary that Ms. Terranova should provide compensated attendant care services.

Under this head, the Arbitrator noted that among the family members, only Ms. Terranova had made a claim for ACBs. He found there were no services she provided that no one else could have provided. He stated there was no evidence that she was required to cover time periods when no one else was available and added that, because of her busy schedule, she was the one who was likely least available compared to her mother who worked part-time and her brother who was unemployed. He then asked:

> In circumstances where a number of family members are available, can it be said to be reasonable or necessary that Ms. [Jennifer] Terranova should provide attendant care services because she can charge for them rather than another family member providing such services?

He concluded that in these circumstances payment of the attendant care expense would be neither reasonable nor necessary.

Accordingly, the Arbitrator found that ACBs were not payable.

III. ANALYSIS

While I find the Arbitrator erred in one respect, I find the result is correct because the Arbitrator's finding that the test in s. 3(7)(e)(iii)(A) was not met was a finding of fact.

The parties agree that the Arbitrator erred when he stated that (iii)(A) was not designed to have family members be paid for attendant care services. Mr. Terranova even raised the issue that this finding violated s. 15(1) of the *Canadian Charter of Rights and Freedoms*,[3] as well as sections 3

[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c. 11.

and 9 of the *Human Rights Code*,[4] in that it discriminated against family members. However, Economical concedes that family members could indeed fit within (iii)(A), which would seem to render the *Charter* and *Code* issues moot.

Nonetheless, Economical submits that only if Ms. Terranova was an employee of the company that was providing some attendant care services[5] could there be compensation. Mr. Terranova submits that position is also discriminatory.

However, I do not take as narrow a view as Economical. I believe a family member who had been providing attendant care services as part of her job could start working for her family member instead and still fit within (iii)(A). As noted in *Josey*, cited above, a family member who had worked providing attendant care for remuneration could conceivably fit within (iii)(A). I see nothing in the legislation to suggest that this arrangement could not be made directly between the insured and the family member.

Along the same lines, I believe the adjudicator in *16-000525 (M.P.) v Certas Home and Auto Insurance Company*, 2017 CanLII 9810 (ON LAT) misinterpreted the legislation. To repeat, (iii)(A) requires that the person providing the services "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." In *M.P.*, the applicant's wife was a trained and accredited professional within the criteria under (iii)(A). After the subject accident, she provided attendant care services to her husband four days a week, and the other three days she continued providing services as part of her employment in the same amount as before. However, the adjudicator found that, since the wife did not change the amount of work she did for her employer, she did not have to forgo work to care for her husband. Further, while there was a period the wife only provided services to her husband, the adjudicator found that she did not do so in order to care for her husband full-time but rather because no work was available for that period. In other words, the adjudicator treated the "but for" test as a kind of causation test for economic loss. But economic loss is precisely what (iii)(B) is meant for. The adjudicator's analysis renders (iii)(A) redundant. Rather, I find the

[4]*Human Rights Code*, RSO 1990, c. H.19.

[5]Although not discussed by the Arbitrator, a healthcare agency called Modern Angels has been providing services paid for by Economical.

"but for" test in this case is simply descriptive: the issue is whether the attendant care done before the accident equates between with that done afterwards.

I am also concerned about Arbitrator Mongeon`s finding that payment of the attendant care expense would be neither reasonable nor necessary if other family members are available to do the work for free. This seems to be placing extra restrictions on payment that are not present in the legislation. What really seems to be happening here is the Arbitrator simply did not believe Ms. Terranova did the work she said she did. The Arbitrator should have said so, in that case. I put his comments about whether an obligation to pay has been created in the absence of indicia of a contract-like withdrawal of taxes in the same light, as it has long been the case here that a sensible and flexible approach to family financial arrangements should be applied: see for instance *Zurich North America Canada and Stargratt*, (FSCO P01-00045, March 31, 2003).

Accordingly, I do not see any possible *Charter* or *Code* violations, especially since, as I noted above, s. 3(7)(c) provides that "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." Any restrictions in the law apply not just to family members but also to friends, but in any event, for the reasons given above, the same analysis about the comparison of pre- and post-accident care should be performed under (iii)(A) whether the care provider is family, friend or stranger. Issues of economic loss that belong under (iii)(B) should not be imported. With these considerations, I find the *Charter* and *Code* issues about discrimination against family members are moot.

However, with respect to the second ground examined by the Arbitrator, the comparison between Ms. Terranova's work at Oakdale and the services she provided to her father, I find no basis to intervene. Ms. Terranova's submission on this point basically consists of allegations that the Arbitrator failed to consider certain evidence or did not give certain evidence proper weight. It is not my role to weigh the evidence, as s. 283(1) of the *Insurance Act* provides that appeals are only on questions of law. While the Arbitrator's reasons on this point are brief, I am not persuaded that they are so inadequate as to constitute an error of law.

Therefore, I have no basis for overturning the Arbitrator's conclusion that Ms. Terranova's work at Oakdale did not equate with the services she provided her father after the accident and so the claim did not fit within (iii)(A).

Accordingly, the appeal is dismissed and the order is affirmed.

IV. EXPENSES

If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

David Evans Director's Delegate	December 5, 2017 Date