Tribunals Ontario
Safety, Licensing Appeals and Standards Division

77 Wellesley Street West, Box 250
Toronto ON M7A 1N3
Tel: 1-844-242-0608
Fax: 416-327-6379
Website: www.slasto-tsapno.gov.on.ca

Tribunaux décisionnels Ontario
Division de la sécurité des appels en matière de permis et des normes

77 rue Wellesley Ouest, Boîte no 250
Toronto ON M7A 1N3
Tél. : 1-844-242-0608
Téléc. : 416-327-6379
Site Web : www.slasto-tsapno.gov.on.ca

Ontario

RECONSIDERATION DECISION

Before: Jesse A. Boyce, Adjudicator

Date: May 24, 2019

File: 17-003463/AABS

Case Name: D.M. v. Aviva Insurance

Written Submissions by:

For the Applicant: Andra Preda, counsel

For the Respondent: Ramandeep Kaur Pandher, counsel

OVERVIEW

[1] This Request for Reconsideration was filed by the respondent, Aviva. It arises out of a decision in which the Tribunal found, amongst other benefits, that the applicant, D.M., was entitled to post-104 week attendant care benefits despite not being designated catastrophically impaired.

[2] Aviva submits the Tribunal made two significant errors of law that directly affect the outcome of the decision. First, Aviva submits that the Tribunal erred when it awarded D.M. attendant care benefits for the period 104 weeks post-accident despite the fact he has not been designated as catastrophically impaired, a requirement under the *Schedule*[1]. Second, Aviva submits that the Tribunal erred when it deemed the attendant care benefits incurred, pursuant to s. 3(8) of the *Schedule*, despite its finding that Aviva did not unreasonably withhold or delay the payment of benefits to D.M.

[3] Aviva requests the Tribunal amend its decision to reflect the proper period for payment of attendant care—being March 5, 2016 to January 20, 2017—and requests it overturn its decision that the attendant care be deemed incurred.

[4] Pursuant to s. 17(2) of the *Adjudicative Tribunals Accountability, Governance and Appointments Act*[2], I have been delegated responsibility to decide this matter in accordance with the applicable rules of the Tribunal.

RESULT

[5] The respondent's Request for Reconsideration is granted.

ANALYSIS

[6] The grounds for a Request for Reconsideration are contained in Rule 18 of the Tribunal's *Common Rules of Practice and Procedure*. A request for reconsideration will not be granted unless one of the following criteria are met:

> a) The Tribunal acted outside its jurisdiction or violated the rules of natural justice or procedural fairness;
> b) The Tribunal made a significant error of law or fact such that the Tribunal would likely have reached a different decision;
> c) The Tribunal heard false or misleading evidence from a party or witness, which was discovered only after the hearing and would have affected the result; or

[1] O. Reg. 34/10, *Statutory Accident Benefits Schedule – Effective September 1, 2010* [the "*Schedule*"].
[2] 2009, S.O. 2009, c. 33, Sched. 5.

d) There is new evidence that could not have reasonably been obtained earlier and would have affected the result.

[7] Here, Aviva argues that Rule 18.2(b) applies. Specifically, it argues that the Tribunal made a significant error of law when it awarded post-104 week attendant care benefits despite D.M. not being catastrophically impaired, and that this error is such that the Tribunal would likely have reached a different decision. In a similar vein, Aviva argues that Rule 18.2(b) applies where the Tribunal made an error of law in deeming the attendant care incurred.

The Tribunal made an error of law when it awarded D.M. post-104 week attendant care benefits despite D.M. not being designated as catastrophically impaired

[8] Section 20(2)(a) of the *Schedule* indicates that no attendant care benefit is payable for expenses incurred more than 104 weeks after the accident unless the insured person sustains a catastrophic impairment. As D.M.'s accident occurred on January 20, 2015 and he has not been designated as catastrophically impaired, Aviva submits his claim for attendant care benefits is limited to 104 weeks post-accident, being January 20, 2017.

[9] I agree. In its decision, the Tribunal determined that D.M. is entitled to attendant care in the amount of $404.90 for the period March 5, 2016 *to date and ongoing*. This was a clear error. The Tribunal has no authority to order attendant care benefits on an ongoing basis in the absence of a catastrophic designation. Catastrophic impairment was not an issue in dispute at the hearing and no arguments were ever put forth by D.M. in support of that position.

[10] In response, D.M. does not offer much of a counter-argument. He does not argue that Aviva's interpretation of the *Schedule* is incorrect or, really, that the Tribunal did not err in law. Rather, his response is rooted in procedure, submitting that Aviva had multiple opportunities over the life of the file to correct or remove the "to date and ongoing" language from the framing of the issue, despite it being incorrect in law. Further, D.M. argues that since Aviva failed to address the length of time attendant care was disputed, the Tribunal was somehow free to infer that catastrophic impairment was not an issue and benefits could be payable 104 weeks post-accident.

[11] I disagree. While creative, D.M.'s argument would result in the burden of proof improperly shifting to Aviva and the Tribunal's jurisdiction expanding beyond the scope of the application before it. Both outcomes are, obviously, problematic and would result in further legal and procedural errors.

[12] For these reasons, I find the Tribunal committed an error of law when it determined that D.M. was entitled to post-104 week attendant care benefits to date and ongoing, despite D.M. not being designated as catastrophically impaired. Accordingly, I grant Aviva's request and order the Tribunal's decision be amended to reflect the correct period of entitlement permitted under the *Schedule*: The applicant is entitled to an attendant care benefit of $404.90 per month from March 5, 2016 to January 20, 2017.

The Tribunal erred in deeming attendant care incurred under s. 3(8) of the Schedule

[13] Having determined that D.M. was entitled to attendant care benefits, the Tribunal then relied on s. 3(8) of the *Schedule* to "deem" the expenses incurred. Aviva argues that this was an error of law, as the Tribunal made no findings in its decision that Aviva unreasonably withheld or delayed the payment of a benefit to justify deeming attendant care incurred. In response, D.M. argues that the Tribunal did not err because he asked for costs, allegedly made oral submissions on Aviva's conduct and the Tribunal preferred his report over Aviva's.

[14] Again, I agree with Aviva. Section 3(8) of the *Schedule* states that the Tribunal may, for the purposes of determining an insured person's entitlement to a benefit, deem the expense to have been incurred if it finds that the insurer unreasonably withheld or delayed the payment of a benefit in respect of the expense.

[15] On review of the decision, an award under s. 10 of O. Reg. 664—which could have formed the basis for an argument under s. 3(8)—was not in issue and no submissions were made on this issue. Similarly, the Tribunal's decision does not contemplate or even mention unreasonable or bad faith behavior on Aviva's part and does not address any oral submissions allegedly made by D.M. on same. The Tribunal does address costs in the decision, however, it ultimately finds that costs are not appropriate. In sum, on its face, the decision does not give any indication why s. 3(8) would apply on the facts or, in my view, provide a substantive reason why the Tribunal used the section to deem the attendant care incurred. In the absence of an explanation detailing why expenses were deemed incurred where there has been no finding of unreasonable withholding or delay to prevent the benefit from being incurred, I find this to be an error of law.

[16] On this basis, I find the Tribunal made an error of law in relying on s. 3(8) of the *Schedule* to deem the attendant care benefits incurred by D.M. Further, after reviewing the documentation in evidence for the written hearing and filed with the reconsideration, I find there is no proof that the attendant care has been incurred by D.M., as required by s. 3(7)(e) of the *Schedule*. While D.M.'s written and oral submissions refer to the services of a maid procured by D.M.'s father, no documentation has been provided evidencing that D.M. has paid the expenses

for the maid or sustained an economic loss as a result. For this reason, I find D.M. has not proven the attendant care benefits in dispute were incurred. While I confirm D.M. is entitled to the benefits, he is still required to prove that attendant care benefits for the relevant period have been incurred, pursuant to s. 3(7)(e) of the *Schedule*.

CONCLUSION

[17] For these reasons, Aviva's request for reconsideration is granted. The applicant is entitled to an attendant care benefit of $404.90 per month from March 5, 2016 to January 20, 2017. However, I find that D.M. has not proven that the benefit has been incurred, pursuant to s. 3(7)(e) of the *Schedule*.

Jesse A. Boyce
Adjudicator
Tribunals Ontario – Safety, Licensing Appeals and Standards Division

Released: May 24, 2019