

**LICENCE APPEAL
TRIBUNAL**

**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**



Tribunal File No.:18-002855/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:

Rossina Oppong

Applicant

and

Aviva Insurance Company of Canada

Respondent

DECISION

PANEL: **Nidhi Punyarthi, Adjudicator**

APPEARANCES:

For the Applicant: David Tomovski, Counsel

For the Respondent: M. Jennifer Cosentino, Counsel

HEARD: **In person on: May 21, 2019**

OVERVIEW

- [1] The applicant was involved in an accident on December 21, 2016. She claimed certain benefits from the respondent under the *Statutory Accident Benefits Schedule – Effective September 2010*, O. Reg. 34/10 (“*Schedule*”). The respondent denied her claim for benefits, and she applied to the Licence Appeal Tribunal (“Tribunal”) for an adjudication of the dispute arising from her denied benefits.

ISSUES IN DISPUTE

- [2] The application proceeded to a hearing before me. I was asked to decide the following issues:
- a. Is the applicant entitled to attendant care benefits in the amount of \$1,229.51 per month in accordance with a Form 1 submitted by Promed Rehabilitation, as opposed to the amount of \$975.07 per month for such benefits that was approved by the respondent?
 - b. Is the applicant entitled to attendant care expenses in the amount of \$3,400.00 in accordance with an expense form (OCF-6) that was dated July 5, 2017 and denied on August 11, 2017?

RESULT

- [3] I have made the following findings on the evidence before me:
- a. The applicant is not entitled to the additional amounts claimed on the Assessment of Attendant Care Needs (“Form 1”) submitted by Promed Rehabilitation on her behalf. The monthly amount of attendant care benefits approved by the respondent is reasonable and necessary to address the applicant’s needs for attendant care services.
 - b. The applicant has been unable to establish, on a balance of probabilities, that she incurred the expenses for attendant care claimed on her expense form. For this reason, I find that the expenses of \$3,400.00 claimed for attendant care services are not payable.

ANALYSIS

A. Form 1 Findings

- [4] Pursuant to s. 19(2) of the *Schedule*, a Form 1 is used to determine the amount of a monthly attendant care benefit for an insured person.
- [5] Both parties agree that the applicant needs attendant care benefits. However, they disagree on the amount payable per month. The applicant’s Form 1 is in a

higher amount compared to the respondent's Form 1. The difference is \$254.44 per month.

[6] Attendant care benefits payable under the *Schedule* must be "reasonable and necessary".¹ Therefore, I have to determine whether the additional amount claimed on the Form 1 submitted on behalf of the applicant is reasonable and necessary.

(i) *Evidence on the applicant's impairments caused by the accident*

[7] I was provided with evidence on the applicant's impairments caused by the accident and her corresponding needs for attendant care services. This evidence came from:

- a. the applicant's testimony at the hearing;
- b. the testimony of Ellen Bediako, her friend and neighbour, who also provided the attendant care services indicated on the expense form in issue;
- c. the applicant's medical and treatment records;
- d. the reports of the occupational therapists who prepared the Form 1s for each party; and
- e. other medical reports tendered by both parties in this matter.

[8] The common theme of this evidence is that the applicant experiences pain in her right arm, including her right shoulder and her right elbow. While some other impairments from the accident were also identified, such as headaches and back pain, the right arm issues were most salient in the evidence at the hearing. For example:

- a. The applicant's pain in her right arm and corresponding limitations in movements using the right arm (including shoulder and elbow) are reported by the occupational therapists for both parties in their reports.²
- b. The occupational therapist for the respondent quoted the orthopedic surgeon who assessed the applicant on behalf of the respondent. The orthopedic surgeon observed: "I believe she likely suffers an inability to perform...any overhead work or repetitive lifting with the right arm."

¹ Section 19(1) of the *Schedule*.

² Occupational Therapy Attendant Care Assessment & Report by Aniq Saeed dated March 17, 2017, and Section 44 Examination Report: In Home Assessment Report dated June 9, 2017 by Sarah Maddix.

- c. The medical records filed in evidence show a diagnosis of a tear in the applicant's right arm.
- d. The witnesses who testified at the hearing, being the applicant and Ms. Bediako, both indicated that the applicant experienced pain and limitations in the use of her right arm. The applicant testified that she needed help with washing and combing her hair and putting on a wig. On cross-examination, the applicant testified that she needed assistance with her personal care primarily because of her right shoulder problem. Ms. Bediako also testified that she helped the applicant because of pain in her right shoulder.

[9] Given this evidence, I find, on a balance of probabilities, that the applicant's ability to engage in activities that involve the use of her right arm is limited.

(ii) *Comparison of the Form 1s of both parties*

[10] The Form 1 submitted on behalf of the applicant was prepared by Aniq Saeed, occupational therapist from Promed Rehabilitation, and was dated March 17, 2017. The Form 1 submitted by the respondent was prepared by Sarah Maddix, occupational therapist, and was dated May 26, 2017. Both Ms. Saeed and Ms. Maddix provided reports to supplement their Form 1s.

[11] Neither Ms. Saeed nor Ms. Maddix provided viva voce evidence in addition to the reports in evidence. I was asked by the respondent to make certain findings with respect to Ms. Saeed's non-attendance as a witness at the hearing, but I will address that at a later point in this decision. For now, I will review the documentary evidence filed for the hearing in conjunction with the other evidence tendered.

[12] Ms. Saeed's Form 1 represents an amount that is higher than the Form 1 completed by Ms. Maddix. Specifically, her Form 1 is higher by \$254.44 per month. As indicated earlier, both of these occupational therapists agree that the applicant is limited in her use of her right arm. They have made certain assessments of how much attendant care is needed for each task in their Form 1s. There are certain differences in their Form 1s in terms of how they have allocated attendant care for each task.³

[13] The Form 1 is a standard form established under the *Schedule*. It is divided into three categories of assistance, represented by levels. According to the descriptions indicated on the standard Form 1, Level 1 attendant care is for routine personal care. Level 2 attendant care is for basic supervisory functions. Level 3 attendant care is for complex health/care and hygiene functions. As can be seen from these descriptions indicated on the standard form itself, the levels

³ Assessment of Attendant Care Needs by Aniq Saeed, dated March 17, 2017, and Assessment of Attendant Care Needs by Sarah Maddix, dated May 26, 2017.

on the form become progressively more complex. The higher the level of care on the Form 1, the more complex a person's attendant care needs are.

- [14] Both Ms. Saeed and Ms. Maddix agree that the applicant needs assistance under Level 1. They have different numbers under the various categories. The most important differences are under the categories of "Grooming" and "Feeding" in this level. Compared to Ms. Maddix, Ms. Saeed has recommended a greater number of minutes per week for grooming tasks (which include washing, combing, applying makeup). This being said, compared to Ms. Saeed, Ms. Maddix has recommended a greater number of minutes per week for feeding tasks (which include preparing for meals and providing assistance in serving or feeding meals).
- [15] It is reasonable and necessary for the applicant to require assistance in both the areas of grooming and feeding, given the evidence on a balance of probabilities that she experiences pain and limitations in her right shoulder and arm. It is reasonable to infer that these limitations affect her ability to engage in both grooming and feeding tasks independently.
- [16] With respect to Level 2 attendant care, both parties' occupational therapists agree that some time should be allocated with respect to the 'Hygiene' tasks. Both occupational therapists agree that basic supervisory care is not required for the applicant. There is disagreement between them as to whether co-ordination of attendant care is required for the applicant. The occupational therapists also disagree on whether the applicant needs help with extra laundering under Level 1.
- [17] It is not necessary for me to decide what the applicant is entitled to on a task-by-task basis, because of my analysis that follows with respect to Level 3 of the Form 1.
- [18] A significant difference between both parties' Form 1s is Level 3 attendant care. Ms. Saeed has indicated that the applicant needs some assistance with respect to tasks of exercise, skincare, medications, bathing assistance, and maintenance of supplies and equipment. Ms. Maddix has indicated that no attendant care is needed under Level 3.
- [19] The evidence before me does not establish on a balance of probabilities that the applicant's impairments arising from the applicant are so complex as to require Level 3 attendant care. I am not satisfied that the applicant requires assistance with complex health/care and hygiene functions.
- [20] For example, the evidence before me did not support the notion that the applicant needed help with the exercise tasks as specified under Level 3. Nor was it established, on a balance of probabilities, that the applicant needed assistance with skincare, medication management, bathing, and maintaining her supplies and equipment. While the applicant testified that Ms. Bediako helped

her bathe during the times that she helped her, there was nothing in the evidence to suggest that the applicant could not independently ambulate and bathe herself. Based on the evidence heard about the limitations experienced by the applicant in the use of her right arm, it can be inferred that she is consequently limited in that use when it comes to bathing-related activities. However, the degree of limitation experienced by the applicant in this regard did not reach the level of needing assistance with complex health/care and hygiene functions, based on my assessment of the evidence. Therefore, I find that the applicant does not require attendant care under Level 3.

- [21] If Ms. Saeed's amounts under Level 3 in her Form 1 are deducted, the resulting number is actually less than the amount in Ms. Maddix' Form 1. Therefore, based on my conclusion that Level 3 attendant care is not needed for the applicant, Ms. Maddix' Form 1 indicates amounts that are reasonable and necessary to address the applicant's attendant care needs. It is not necessary for me to therefore engage in the exercise of assessing the applicant's attendant care needs on a row by row basis.
- [22] Therefore, I find that the additional amounts indicated in the Form 1 of Ms. Saeed are not reasonable and necessary to address the applicant's attendant care needs. The applicant is not entitled to the additional amounts claimed on the Form 1 authored by Ms. Saeed.

(iii) *Issues with Ms. Saeed's evidence*

- [23] The respondent asked me to draw an adverse inference because Ms. Saeed was originally on the applicant's witness list, and then removed from it and because the respondent was unsuccessful in serving Ms. Saeed with the summons to witness for this hearing. The respondent was therefore unable to cross-examine Ms. Saeed on her Form 1 and her report. The applicant did not make any submissions in this regard.
- [24] I have found, on the basis of the documents in evidence at the hearing, as well as the in-person testimony of the two witnesses, that the additional amounts recommended by Ms. Saeed should not be payable to the applicant. It is therefore unnecessary for me to go through the exercise of determining whether an adverse inference should be drawn due to the issues with getting Ms. Saeed to testify in person at the hearing.

B. Expense Form Findings

- [25] Based on s. 19(1)(a) of the *Schedule*, an expense for attendant care is payable provided that it is "reasonable and necessary" and "incurred". In addition, based on s. 42(5) of the *Schedule*, an insurer may, but is not required to pay an expense that has been incurred before a Form 1 is submitted to the insurer.
- [26] Under s. 3(7) of the *Schedule*, for an expense to be "incurred" it must meet the following three criteria:

- a. The insured person has received the goods and services to which the expense relates;
- b. The insured person has paid the expense, promised to pay the expense, or is otherwise legally obligated to pay the expense; and
- c. The person who provided the goods or services did so either:
 - i. in the course of employment, occupation or profession in which he or she would have ordinarily been engaged but for the accident, or
 - ii. sustained an economic loss as a result of providing the goods or services to the insured person.

[27] In this case, both parties agree that the expenses being claimed are for periods that pre-date the submission of the Form 1.

[28] For the reasons that follow, I have made a finding that the expenses claimed have not been “incurred” under the *Schedule*. It is therefore not necessary for me to address whether the respondent should pay for the expenses that pre-date the Form 1.

[29] The description of the expenses claimed on the expense claim form dated July 5, 2017 was “attendant care”. An expense with this same description was claimed for each of the months of December 2016, January 2017, February 2017, and March 2017. The amount claimed for each month was \$800, save and except the month of February 2017, when the amount claimed was \$1,000. The expenses being claimed are intended to pay Ms. Bediako for the attendant care services she testified she provided to the applicant for these time periods.⁴

[30] Attached to this expense claim form were three Attendant Care Sheet Receipts (“Receipts”). Based on Ms. Bediako’s testimony at the hearing, these three Receipts were provided to her by Promed Rehabilitation. She was asked to complete them, and she testified that she did so.

[31] The Receipts contain a table for the number of days in the month. The person completing the Receipt simply has to check off the various days in the month on which services were provided. Then, the person completing the Receipt has to check off boxes in a table of “duties performed”. Then, the person completing the Receipt has to provide the Total hours worked for the entire month. Based on how the Receipt was prepared, there is no way of ascertaining what service exactly was provided on a given day, and how much time was spent on a given day in providing attendant care services. There is also no calculation showing how the number of hours per month translate into the total amount of the expense claimed per month. There is no hourly rate shown.

⁴ Expenses Claim Form (OCF-6) dated July 5, 2017.

- [32] The Receipt for the month of February 2017 was missing from the evidence. In any event, it would have likely shown the same information as the other Receipts, but with a greater number of total hours per month.
- [33] I accept that the Receipts were prepared by a third party, in this case Promed Rehabilitation, for Ms. Bediako to complete. Unfortunately, it is a concern to me that the Receipts do not contain additional detail to show what exactly was done each day for the applicant by Ms. Bediako. I am therefore unable to identify the actual “goods and services to which the expense relates” as required in the first criterion to establish that an expense is incurred under the *Schedule*. Both the applicant and Ms. Bediako testified that the services checked off on the Receipts were provided by Ms. Bediako to the applicant; however, they were both unable to specify what services were provided on what dates, how long the services were for, what issues or concerns caused the services to be asked for or scheduled, and what the rate was for hourly services. There was no additional documentation before me to assist in this regard, or to help clarify the witnesses’ testimony when they were asked these questions. Ms. Bediako testified that she got the information from her phone as to what dates she provided services, but none of that additional backup documentation was before me.
- [34] I am unable to find on a balance of probabilities that the applicant received goods and services from Ms. Bediako, because the Receipt as presented to me does not contain information to specify, for example: (i) what services were provided and when, (ii) why they were requested and provided, (iii) how long the services were on any given day, (iv) how the total number of hours was arrived at, and (v) what the hourly rate was. None of these questions could be conclusively answered by the applicant and Ms. Bediako when they gave oral testimony.
- [35] Therefore, the applicant does not, on the basis of the evidence before me, meet the first criterion for an expense to be incurred.
- [36] She needs to meet all three criteria in order to establish that her claim for an expense is incurred. Since she does not meet the first criterion, she is unable to meet all three components of the test as she is required to do under the *Schedule*. Accordingly, there is no need for me to go through whether she meets the second or the third criteria, as she would not be successful in establishing that her expense claim is “incurred” on the basis of this finding.
- [37] Furthermore, as stated above, there is no need for me to make a determination on whether the expense claims should be payable given that they were for periods prior to the submission of the applicant’s Form 1, as I have found that the expense claim has not been “incurred” as defined in the *Schedule*.
- [38] For the reasons given above, the expense claimed by the applicant in the OCF-6 dated July 5, 2017 is not payable as it was not incurred.

CONCLUSION

[39] The applicant is not entitled to the monthly amount of attendant care benefits or the attendant care expenses that were claimed in this application.

Released: August 27, 2019



Nidhi Punyarthi
Adjudicator