LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

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

Ontario

Date: 2017-10-31
Tribunal File Number: 16-004363/AABS
Case Name 16-004363 v Coseco Insurance Company

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:

A. P.

Applicant

and

Coseco Insurance Company

Respondent

PRELIMINARY HEARING DECISION

ADJUDICATOR:	**Anna Truong**
APPEARANCES:	
For the Applicant:	R. P., Applicant's Mother I. P., Applicant's Uncle Darcy Merkur, Counsel
For the Respondent:	Kaila Wiley, Representative Stacey Morrow, Counsel
Interpreter:	Harsha Baxi, Gujarati Interpreter
Court Reporter:	Keefer Marr
Observers:	Erica Lewin, John-Paul Zeni
Heard in-person on:	May 29, 2017

OVERVIEW

[1] A.P. (the "applicant") was involved in an automobile accident on October 30, 2015 and sustained a catastrophic impairment as a result of the accident. He sought attendant care benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "*Schedule*")[1], which were denied by the respondent.

[2] The applicant disagreed with the respondent's decision and submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal"). The matter proceeded to a Case Conference, but the parties were unable to resolve the issues in dispute.

[3] At issue in this preliminary hearing is the definition of incurred expenses, and whether the applicant's mother, R. P., qualifies as a professional service provider and therefore not required to prove an economic loss in order for the applicant to recover attendant care expenses.

ISSUES TO BE DECIDED

[4] The following are the issues to be decided:

1. Does the applicant's mother qualify as a professional service provider to provide attendant care services to her son as defined by the *Schedule*?

2. Is the applicant's mother required to prove an economic loss, and if so, as of what date?

RESULT

[5] Based on the totality of the evidence before me, I find the applicant's mother is a professional service provider qualified to provide attendant care services to her son as defined by the *Schedule*. I find she is not required to prove an economic loss from the date of accident onward.

ANALYSIS

[6] A half day in-person hearing was conducted. R.P., the applicant's mother, testified and was cross-examined using a Gujarati interpreter. Both parties submitted a factum with extensive jurisprudence. I have reviewed all the submissions and evidence and I have summarized what I found relevant to my determination below.

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

[7] Section 19 of the *Schedule* states the insurer shall pay for all 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 [Emphasis added].

[8] Section 3(7)(e)(iii) provides two situations for an expense to be considered incurred:

> (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.

Are professional service providers required to prove economic loss?

[9] The principles of statutory interpretation are well-established. The *Legislation Act* states at section 64(1):

> An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.[2]

[10] On a plain reading of section 3(7)(e)(iii), it is evident the drafters intended to create two different classes of service providers given the splitting of the two clauses by the word “or”. A service provider either falls under clause (A) or (B) of section 3(7)(e)(iii).

[11] Service providers that fall under clause (B) must sustain an economic loss in order to satisfy the definition of incurred. Had the drafters intended for economic loss to be a consideration in clause (A), they would have expressly written that requirement into clause (A). Since they did not do so, it would logically follow service providers who fall under clause (A) would therefore be exempt from having to sustain an economic loss in order to satisfy the definition of incurred.

[12] From the wording of clause (A), one can deduce the drafters intended clause (A) to apply to service providers, who are trained to provide these services and clause (B) was meant to apply to untrained service providers. In other words, clause (A) was meant to apply to professional service providers and clause (B) to non-professional service providers.

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[2] *Legislation Act*, 2006, c. 21, Sched. F, s. 64 (1).

[13] The use of the term “professional” when referring to a service provider in the remainder of this decision will indicate an individual that meets the definition of section 3(7)(e)(iii)(A).

Can a family member be a professional service provider?

[14] The difference between a professional and non-professional service provider is important, because they are paid at different rates. Professional service providers may charge for the services they provide at the full hourly rate outlined in the approved Assessment of Attendant Care Needs (“Form 1”).

[15] Non-professional service providers must prove an economic loss in order to be compensated for their services. In order to prove economic loss, these service providers must show they had to give up other paid work, or incur additional expenses to provide their services. Since February 2014, the compensation for non-professional service providers is limited to the actual amount of economic loss sustained, i.e. the actual amount of lost wages, or additional expense incurred, and not the actual recommended or reasonable and necessary attendant care expense.

[16] Professional service providers are not usually family. They are usually arm’s length individuals hired to provide care to an injured individual in need of these services. However, it is possible for a family member to be a professional service provider and provide attendant care services when a family member is injured in an accident. Given the personal nature of these services, this is at times preferable. There is no restriction in the wording of clause (A) of the *Schedule* which states a professional service provider must be at arm’s length with the insured.

[17] The applicant submitted the Ontario Court of Appeal (“ONCA”) decision of *Henry v. Gore Mutual Insurance Co.*[3], which dealt with the interpretation of section 3(7)(e) of the *Schedule*. With respect to interpretation of the *Schedule,* the ONCA held that coverage provisions are to be interpreted broadly, while exclusions and restrictions are to be construed narrowly in favour of the insured.[4]

[18] As mentioned above, the *Schedule* was amended on February 1, 2014 to limit the amount of attendant care benefits payable up to the amount of the actual economic loss for non-professional service providers. It is clear the intent of the drafters in making these amendments was to prevent abuse of attendant care benefits by individuals who are not professionally trained to do so, family or otherwise.

[3] *Henry v. Gore Mutual Insurance Co.*, 2013 ONCA 480 (“*Henry*”).
[4] *Ibid* at para. 21.

[19] Had the drafters intended to prevent professionally trained family members from providing attendant care, they could have expressly stated so, but they did not. I find based on a plain reading of section 3(7)(e), family members can be professional service providers under clause (A).

Is R.P. a professional service provider as defined by the *Schedule*?

[20] R.P. is a 49 year old mother of two boys, one of which is the applicant. She was born in India and came to Canada in 1993 with her brothers. After arriving in Canada, she worked mainly in manual labour and sewing. In 2012, she commenced a Personal Support Worker ("PSW") course at CJ Health Care College. She graduated in December 2012 with a Diploma in the Personal Support Worker Program. In order to obtain her Certificate from the National Associate of Career Colleges as a PSW, R.P. had to complete a final examination and a four week placement in the field. R.P. earned her PSW Certificate in February of 2013.

[21] Based on her testimony and the evidence provided at the hearing, I find R.P. is a professionally trained and certified PSW. There is no disagreement between the parties on this point. The disagreement is with respect to whether she is a professional service provider as defined by section 3(7)(e)(iii)(A) of the *Schedule*. The applicant submits that R.P. meets the definition, because she is trained and certified to be a PSW and worked as one after the accident. The respondent submits she does not meet the definition, because she was never employed as a PSW prior to the accident.

[22] The parties provided many cases in support of their positions, mainly from the Financial Services Commission of Ontario (FSCO) and the Tribunal. However, I am not bound by these decisions and I did not find any of them directly on point. Having said that, I am compelled to comment on the Ontario Superior Court case of *Shawnoo v. Certas Direct Insurance Company ("Shawnoo")*[5], which was submitted by the respondent. The respondent submits I am bound by this case. However, I find *Shawnoo* can be distinguished from this matter based on the facts.

[23] In *Shawnoo*, the service provider in question had been retired for three years prior to being hired by the applicant. In finding she did not meet the definition of a professional service provider under the *Schedule*, the judge noted there was no evidence she was actively seeking employment or likely to receive an offer of employment.[6] This is not the case in this matter. R.P. is not retired and she was actively seeking employment as a PSW at the time of the accident. Furthermore, R.P. did go on to obtain employment as a PSW, albeit after the accident. As of the hearing, R.P. is still working as a PSW.

[5] *Shawnoo v. Certas Direct Insurance Company, 2014* ONSC 7014 ("*Shawnoo"*).
[6] *Ibid* at para. 53.

[24] During the hearing and in its submissions, the respondent emphasized the fact that R.P. was not employed as a PSW at the time of the accident and was never employed as a PSW until approximately 10 months post-accident. Therefore, the Respondent argued R.P. did not meet the definition of a professional service provider.

[25] Clause (A) states in the course of "employment, occupation, or profession". It would be a very narrow definition, if the only criterion for clause (A) was employment, because that would mean that anyone who was temporarily between jobs, or unable to obtain a position in their profession would be ineligible despite being professionally qualified. Clearly, on a plain reading of the legislation, the inclusion of the words "occupation" and "profession" is an expansion of the criteria to be taken into consideration in such an assessment.

[26] Based on the evidence, it is clear R.P. was not employed at the time of the accident, so she would not qualify under the term "employment" of clause (A) of section 3(7)(e)(iii). This does not automatically disentitle her from qualifying as a professional service provider. The question that must be answered is whether or not R.P. is a professional service provider by occupation or profession? Whether or not R.P. is a professional service provider will turn on this.

Was R.P. ordinarily engaged in her profession as a PSW, but for the accident?

[27] With respect to the term "profession", I find the plain meaning of that word is a vocation with specialized training and/or certification. One does not necessarily need to be employed in order to have a profession. For example, in order to be a lawyer in Ontario, one must hold a law degree, complete the licensing process and pass the bar exams. Once an individual is called to the bar that individual is a lawyer by profession and is licensed to practice law in Ontario. If the individual is unable to find a job, but continues to actively seek employment as a lawyer, does the individual then cease to be a lawyer even though they are licensed and trained as one? I would think not.

[28] An individual's profession is not dependent on whether or not they are employed. It is dependent on whether or not the individual has the training, competency, any required professional/regulatory certification and whether or not they are actively trying to obtain employment in that profession. Practically speaking, can they do the job? Actively seeking employment is important, because if the individual stops seeking employment in their profession, they are no longer "ordinarily engaged in" that profession.

[29] The phrase “ordinarily engaged in” must be read in context with the rest of the section. “Ordinarily engaged in” can include employment, but that cannot be the exclusive meaning of the phrase given the section’s wording also includes profession and occupation. Broadly speaking, “ordinarily engaged in” a profession can also include training, the professional licensing or regulatory certification process and actively seeking employment. Basically, if the individual is taking steps to become employed in a profession, they are “ordinarily engaged in” that profession.

[30] In this matter, R.P. was trained and certified as a PSW, but she had not yet obtained her first position as a PSW at the time of the accident. The respondent argued based on the current evidence produced, R.P. was not actively searching for a job as a PSW. The respondent submits that R.P. has not adduced evidence of her active job search, especially in the year prior to the accident. The respondent pointed out the large gaps of time in between the e-mails R.P. sent to potential employers.

[31] During her testimony, R.P. explained that other than the e-mails, she also cold called potential employers and dropped off physical copies of her resume. She explained she was “not very good with computers”, so she utilised other means of job searching. Furthermore, R.P. explained she did not have copies of every e-mail she sent, only some of them. I accept R.P.’s evidence as I find her to be credible and I find her explanation plausible. R.P. cannot be expected to have a perfect record of her job search activities, especially, because at the time she was conducting her job search, she did not know that her son would be involved in an accident requiring these records. No one is able to predict the future. To expect an individual would have a complete record of their activities years pre-accident would create too high a burden.

[32] I find R.P. was actively searching for a position as a PSW prior to the accident. On page 74 of Exhibit 1[7], there is an e-mail dated November 20, 2013 from R.P. to “admin@nhihealthcare.com” attaching her resume. On page 77, there is another e-mail dated January 28, 2014 to “admin@nhihealthcare.com”, which appears to show R.P. inquiring about PSW positions and attaching her resume. It is NHI Healthcare that ultimately hired R.P. as a PSW in August 2016 and she is still employed with them. The evidence shows it took R.P. years of cold calling and e-mails to obtain her first position as a PSW.

[33] The applicant also submitted the ONCA decision of *Monks v. ING*[8] in which the ONCA rejected a narrow interpretation of the phrase “incurred” and confirmed that a broader interpretation is consistent with the policy objective of the *Schedule*, which is ensuring accident victims receive benefits to which they are entitled.[9]

[7] The applicant’s Document Brief (“Exhibit 1”)
[8] *Monks v. ING*, 2008 ONCA 269 (“*Monks*”).
[9] *Ibid* at paras. 49-51.

[34] It would run contrary to the consumer protection objective and the broad interpretation of the *Schedule*, if a catastrophically injured child was prevented from being cared for by his own mother, who is a trained and certified PSW, just because his mother was unable to obtain employment as PSW prior to the accident. An applicant should not be penalized for something completely out of his control. R.P. should not be prevented from caring for her son due to her inability to obtain employment, despite her best efforts, especially when the *Schedule* does not expressly require her to be employed prior to the accident.

[35] I find R.P. is a professional service provider by profession, because she was a trained and certified PSW who was actively seeking employment as a PSW prior to the accident, which she did obtain subsequent to the accident. She is currently working as a PSW, so there is no reason why she should not qualify as a professional service provider. To make any other finding would lead to an absurd result. If R.P. had been employed by another individual who was at arm's length to provide attendant care, she would certainly qualify as a professional service provider even if it was her first job as a PSW.

[36] There is nothing in the *Schedule* that mandates a professional service provider must have prior experience. If the applicant had hired another professional PSW without any familial connection and that PSW had no prior experience, the respondent would still have to pay that PSW at the professional rate. The fact that R.P. is caring for her own son does not have any bearing on her status as a professional PSW. For the reasons outlined above, I find R.P. is a professional service provider as defined by the *Schedule*.

Is R.P. required to prove an economic loss?

[37] I have already found professional service providers can be family members. I have also found professional service providers are not required to sustain an economic loss in order to satisfy the definition of incurred. Since I found R.P. is a professional service provider, she is not required to prove an economic loss.

[38] Since I found R.P. qualified as a professional service provider prior to the accident, R.P. is not required to prove an economic loss from the date of the accident onward.

CONCLUSION

[39] For the reasons outlined above, I find R.P. is a professional service provider qualified to provide attendant care services to her son as defined by the *Schedule*. Therefore, she is not required to prove an economic loss and may charge for her services at the professional rate.

Released: October 31, 2017

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Anna Truong, Adjudicator