Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

FSCO A13-005768

BETWEEN:

JEREMY JOSEY

Applicant

and

PRIMMUM INSURANCE CO.

Insurer

REASONS FOR DECISION

Before: Alec Fadel

Heard: September 6, 2014, in Hamilton, Ontario

Appearances: Sara Jones for Mr. Josey
Pamela Quesnel and Jessica Rogers for Primmum Insurance Co.

Issues:

The Applicant, Mr. Jeremy Josey, was involved in a motor vehicle accident on December 11, 2011. He applied for and received statutory accident benefits from Primmum Insurance Co. ("Primmum"), payable under the *Schedule*.[1] A dispute arose concerning his entitlement to accident benefits from his accident benefits insurer, Primmum Insurance Company ("Primmum") specifically an attendant care benefit. The parties were unable to resolve their dispute through mediation, and Mr. Josey 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 issues in this hearing are:

1. Is Mr. Josey entitled to attendant care benefits in the total amount of $15,795.00?

Result:

1. Mr. Josey is not entitled to the attendant care benefits claimed.

EVIDENCE AND ANALYSIS:

The parties agree that Mr. Josey required attendant care as a result of injuries sustained in the motor vehicle accident. However, Mr. Josey received attendant care services from his spouse, Ms. Ladd, and Primmum denied entitlement to an attendant care benefit given that Ms. Ladd did not sustain an economic loss. Mr. Josey claims that since Ms. Ladd was a full time caregiver to their three children before the accident, she was a person who provided care in the course of her "employment, occupation or profession" and he was therefore entitled to the attendant care benefit without needing to prove economic loss.

In the amendments to the 2010 *Schedule*, the Legislature set a new definition for the word "incurred" in relation to attendant care and other benefits. That definition is found at s. 3(7)(e), and states that an expense is not incurred 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

Mr. Josey claims that the attendant care expense was "incurred" as his spouse was a full-time caregiver for their three children before the accident and as a result falls into the class of person described under s. 3(7)(e)(iii)(A).

Primmum argued that Ms. Ladd's pre-accident activities cannot be described as "employment, occupation or profession" and therefore (A) does not apply. It argues that for the applicant to show that the attendant care was incurred, he must prove that Ms. Ladd sustained an economic loss as set out in s. 3(7)(e)(iii) (B).

The following are the relevant agreed facts pertinent to the issue I am asked to decide:

- As a result of his injuries, Mr. Josey required assistance with his personal care including, at times, partial assistance for dressing, wound care, splint/cast care and meal preparation
- Various Form 1s were created on behalf of Mr. Josey and also initiated by Primmum
- The parties agree that if Mr. Josey establishes that attended care expenses were incurred, the total amount owing is $15,795.00
- Mr. Josey's common law spouse, Misty Ladd, provided him with all of his personal care following the accident
- At the time of the accident Mr. Josey and Ms. Ladd had three children aged nine, six and four
- Prior to the accident, Ms. Ladd provided unremunerated care to their three children
- Ms. Ladd did not sustain an economic loss as a result of providing attendant care services to Mr. Josey
- Mr. Josey's insurance policy was renewed in June 2011, therefore he must show that attendant care expenses were "incurred" according to section 3(7)(e)(iii)(A) of the 2010 *Schedule*

The applicant noted that prior to the changes to the *Schedule*, effective September 1, 2010, a family member was entitled to be paid for attendant care services provided to the insured person. Therefore, it is argued that the *Insurance Act* should be construed broadly in accordance with the principle of *contra proferentem* in order to avoid an unfair result from a narrow interpretation of the new legislation.

The 2010 *Schedule* signifies a significant shift in how attendant care benefits are payable in comparison to the previous version. Prior to the 2010 *Schedule*, attendant care benefits were required to be "incurred" but did not require the use of professional caregivers or proof of economic loss. Evolving case law eventually relaxed the "incurred" requirement such that the benefit was payable if the services were found to be reasonable and necessary.

FSCO conducted a 5 year review and released a report shortly before the 2010 *Schedule* came into effect.[2] In the report, concerns were raised by the Insurance Bureau of Canada ("IBC") regarding the over-utilization of the attendant care benefit category of benefits. It proposed that the attendant care benefit be restricted to payments to family members only where it could be shown that an economic loss had been sustained. In the final report, FSCO appeared to oppose IBC's suggestion on the basis that requiring attendant care providers to demonstrate economic loss would add more complexity to the system.

Ultimately, however, the 2010 *Schedule* did include a definition for "incurred" that would require a non-professional attendant care provider to show they have sustained an economic loss as a result of providing attendant care services to the insured. If the services were provided by a professional service provider it must have been done so in the course of their "employment, occupation or profession…"

Although "employment," "occupation" and "profession" are not defined in the 2010 *Schedule* the parties provided various dictionary definitions. The applicant provided definitions for the word "occupation" that suggests remuneration is not a necessary factor. Primmum provided definitions for "employment," "occupation" and "profession" which supported that the person is either being paid, or there is an expectation or goal of financial gain.

In general, I find comparing dictionary definitions of limited value. What is most important is the context of the section, interpreted with all the amendments that took place in 2010.

[2]Report on the Five Year Review of Automobile Insurance, March 31, 2009

The plain meaning of s. 3(7)(e)(iii)(A) is that a professional care provider (usually an arm's length individual) be reimbursed for services provided in the course of their employment, occupation or profession. This implies remuneration is an aspect of that service. Also, given s. 3(7)(e)(iii)(B), it is clear that the intention was that family members must prove they have sustained an economic loss in order to be reimbursed for attendant care services from the accident benefit insurer.

Mr. Josey provided a number of cases to support his argument that "occupation" does not require remuneration. I did not find any of the cases helpful in leading me to conclude that there is no financial aspect to the word "occupation." A number of cases were presented where the relevant legislation or contract referred to "occupation" with qualifying words such as "for remuneration or profit"[3] and "for wages or profit."[4] However, these cases do not convince me that without those qualifying words "occupation" does not require remuneration.

The amendments to the 2010 *Schedule* show a distinct and deliberate shift in the determination of entitlement to attendant care benefits. There seems to be a concerted effort on the part of the Legislature to exclude family members from being reimbursed for attendant care services they provide to an insured without showing that an economic loss has been sustained. Insured persons are no longer entitled to receive an attendant care benefit strictly on the basis of a demonstrated need and family members or friends must show an economic loss prior to receiving reimbursement for the services they provided.

In *Henry v. Gore Mutual Insurance Company*[5], Justice Ray commented on the various versions of the *Schedule* since 1990 and noted that with regard to attendant care benefits:

> This latest revision was apparently to prevent a member of an insured's family who was not ordinarily an income earner or working outside the home, from profiting from an attendant care benefit, when they would likely be at home anyway - and would have looked after the injured insured without compensation.

[3] *Holt v. Nova Scotia Public Services Long Term Disability Plan Trust Fund*, 172 N.S.R. (2d) 1

[4] *Bradley v. ICBC*, 42 B.C.L.R. (2d) 323 and *Bragagnolo v. McIvor et al*, (1982), 35 O.R. (2d) 364

[5] 2012 ONSC 3687 (S.C.J.)

Justice Ray went on to state that he accepted "that the amended provisions now eliminate claims by non professional service providers who have not sustained an economic loss."

On appeal, the Court of Appeal[6] agreed with the insurer that:

> the evolution of the regulations governing payment for attendant care provided by family members and the five-year report on automobile insurance in Ontario released by FSCO shortly before SABS-2010 came into force support [the] argument that SABS-2010 was intended to provide a check on payments to family care-givers.

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."

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 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.

[6] *Henry v. Gore Mutual Insurance Company*, 2013 ONCA 480

Subsequent to the release of the Court of Appeal decision in *Henry*, the Legislature amended the *Schedule* to include s. 19(3)4 which stated that,

> . . . 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.[7] (emphasis added)

The applicant argued that by adding "for remuneration," implies that remuneration was not a necessary factor of s. 3(7)(e)(iii)(A) in the previous version of the 2010 *Schedule*. I disagree. I find that from its plain meaning, subsection 3(7)(e)(iii)(A) refers to a person who is trained in and/or working in the health care industry for remuneration. I find that any amendment to the meaning of "employment, occupation or profession," was simply clarifying the meaning and is not a factor in my decision.

EXPENSES:

If the parties are unable to reach an agreement on expenses, they may request an appointment before me in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

Alec Fadel Arbitrator	October 31, 2014 Date

[7] O. Reg. 34/10, s. 19 (3); O. Reg. 347/13, s. 2.

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

FSCO A13-005768

BETWEEN:

JEREMY JOSEY

Applicant

and

PRIMMUM INSURANCE CO.

Insurer

ARBITRATION ORDER

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

1. The application is dismissed.

Alec Fadel
Arbitrator

October 31, 2014
Date