Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A15-007448

BETWEEN:

MICHAEL WALSH

Applicant

and

ECHELON GENERAL INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Arbitrator Benjamin M. Drory

Heard: In person at ADR Chambers on June 24, 2016

Appearances: Mr. Robert Ben for Mr. Michael Walsh
Mr. Jamie Pollack for Echelon General Insurance Company

Issues:

The Applicant, Mr. Michael Walsh, was injured in a motor vehicle accident on November 24, 2014 and sought accident benefits from Echelon General Insurance Company ("Echelon"), payable under the *Schedule*.[1] The parties were unable to resolve their disputes through mediation and Mr. Walsh, through his representative, applied for arbitration at the Financial Services Commission of Ontario ("FSCO") 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 Preliminary Issue Hearing are:

1. Was Mr. Walsh's spouse, Mrs. Cristin Walsh, providing attendant care services to him in the course of the employment, occupation, or profession in which she would ordinarily have been engaged but for the accident, in accordance with s. 3(7)(e)(iii)(A) of the *Schedule*, such that economic loss does not need to be demonstrated?
2. Is either party entitled to expenses respecting this Preliminary Issue Hearing?

Result:

1. Mr. Walsh's spouse, Mrs. Cristin Walsh, was providing attendant care services to the Applicant in the course of the employment, occupation, or profession in which she would ordinarily have been engaged but for the accident, in accordance with s. 3(7)(e)(iii)(A) of the *Schedule*. Accordingly, economic loss does not need to be demonstrated.
2. I defer a decision on expenses respecting this matter to the Hearing Arbitrator.

EVIDENCE AND ANALYISIS:

Background

A Pre-Hearing was held in this matter on March 3, 2016 with Arbitrator Alan G. Smith, who set this Preliminary Issue Hearing. The full matter concerns the extent of Mr. Walsh's entitlement to attendant care benefits. Both parties agree that Mr. Walsh is entitled to some quantum of attendant care benefits, and Echelon has in fact paid some attendant care benefits over time. The preliminary issue to be addressed in this decision is whether attendant care benefits were "incurred" by Mr. Walsh pursuant to s. 3(7)(e)(iii)(A) of the *Schedule*. That question turns on whether his attendant care service provider, Mrs. Walsh, provided those services in the course of the employment, occupation, or profession in which she would ordinarily have been engaged but for the accident. The parties agreed that if I find in favour of Mr. Walsh on that question (i.e., that Mrs. Walsh was providing the attendant care services in the course of her ordinary employment, occupation, or profession), then the parties would seek an appointment with the Pre-Hearing

Arbitrator to set a Hearing for what would be the remaining question in the proceeding—i.e., the quantum of attendant care benefits that Mr. Walsh may be entitled to.

Both parties mutually agreed on many of the facts of the case. They agreed that this present inquiry is strictly a legal determination of how the facts of this case relate to the "incurred" provision s. 3(7)(e)(iii) of the *Schedule*. The relevant portions of that provision read as follows (emphasis mine):

> (e) … an expense in respect of goods or services referred to in this Regulation is not incurred by an insured person unless,
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> (i) the insured person has received the goods or services to which the expense relates,
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> (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;

Submissions of the Parties

Mr. Walsh

Mr. Robert Ben, counsel for Mr. Walsh, submitted that Mr. Walsh was seriously injured in the motor vehicle accident and requires attendant care arising from it. At the time of the accident, his wife was working as a trained professional Personal Support Worker ("PSW"). She initially took some time off work to provide attendant care to her husband. She eventually returned to work, but continued to provide Mr. Walsh with attendant care outside her normal working hours. Mr. Ben submitted that Echelon refused to pay portions of the attendant care benefits claimed because

Mrs. Walsh continues to work as a PSW outside the home and has not demonstrated an economic loss.

Mr. Ben submitted that Echelon's denial of the benefit is improper. The *Schedule* requires payment of an attendant care benefit under two alternate scenarios—(1) where the attendant care is provided by a "professional" (i.e., a person who provides the attendant care in the course of the employment, occupation, or profession in which she would ordinarily have been engaged, but for the accident), or (2) where the attendant care is provided by a non-professional who can demonstrate an economic loss as a result of providing attendant care. Mr. Ben submitted that Mrs. Walsh clearly falls into the "professional" category. He noted that there is no requirement that a "professional" be arm's length, and no requirement for a "professional" attendant to demonstrate an economic loss. Mr. Ben submitted that Echelon's interpretation of the *Schedule* (which he suggested was that Mrs. Walsh could not provide attendant care to her husband and continue to work as a PSW outside the home) would render the distinction between the two alternate categories of attendant care providers meaningless, and would lead to an absurd result where even an arm's length professional attendant could not have other employment.

Mr. Walsh underwent a number of occupational therapy assessments to determine his monthly attendant care needs. The results of those assessments were as follows:

DATE	**ASSESSOR** *(initiated by)*	**HOURS**	**MONTHLY AMOUNT (FORM 1)**
December 2, 2014	A. Diaz *(Applicant)*	167.99	$8,160.18
February 20, 2015	A. Diaz *(Applicant)*	167.71	$8,395.98
March 9, 2015	J. Ford *(Insurer)*	71.95	$3,611.12
June 8, 2015	A. Amezquita *(Applicant)*	102.23	$5,216.11
July 23, 2015	J. Ford *(Insurer)*	25.76	$1,335.50

Mr. Ben submitted that Mrs. Walsh has been providing attendant care since the date of the accident (November 24, 2014). She provided those attendant care services in accordance with the

Assessments of Attendant Care Needs (Form 1s) prepared by Arely Diaz and Adriana Amezquita above. Mr. Walsh promised to pay his wife for the attendant care she provided in the amounts set in those assessments, subject to the $3,000.00 monthly non-catastrophic cap on attendant care benefits (catastrophic impairment was not a crystallized dispute between the parties at the time of this Hearing, although the parties acknowledged that could later change). Mrs. Walsh is a certified PSW, having obtained a diploma from the National Academy of Health and Business Career College in 2011. At the time of the accident, she was employed as a PSW at Darling Home for Kids in Milton, Ontario, where she provided attendant care services to severely disabled children. She earned a wage of $15.50 per hour and worked variable hours, typically night shifts.

From the date of the accident (November 24, 2014) to February 28, 2015, Mrs. Walsh cancelled, missed, or turned down a number of shifts at her PSW job in order to provide her husband with attendant care. On March 1, 2015, Mrs. Walsh commenced an unpaid leave of absence from her PSW job in order to provide Mr. Walsh with full-time attendant care. In November 2015, Mrs. Walsh returned to her job as a PSW at the Darling Home for Kids, but continued to provide Mr. Walsh with attendant care outside her regular working hours. Mrs. Walsh submitted in an Affidavit that Mr. Walsh has been unable to return to his self-employment as a carpenter because of his impairments, and he remains unemployed. Mrs. Walsh also provided confirmation from her employer regarding time she was permitted off of work to care for Mr. Walsh.[2] Mr. Ben submitted that Echelon has refused to pay Mr. Walsh an attendant care benefit except to the extent of Mrs. Walsh's loss of PSW employment income.

Mr. Ben provided four cases as precedents to support his position. He referred to *Henry v. Gore*[3] from the Ontario Court of Appeal for the proposition that general principles applicable to insurance coverage provisions apply—such provisions are to be interpreted broadly, while coverage exclusions or restrictions are to be construed narrowly, in favour of the Insured.[4] Mr. Ben asserted that on a plain and narrow reading of s. 3(7)(e)(iii), attendant care is payable under

[2] Exhibits F and G to Affidavit of Cristin Walsh—correspondence from Sharleen Sun, Clinical Manager at The Darling Home for Kids.

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

[4] Applicant's Factum, para. 12.

two distinctly alternate scenarios—(1) where attendant care is provided by a "professional", or (2) where attendant care is provided by a non-professional who has suffered an economic loss by reason of providing attendant care services. In oral submissions, he stressed that the "or" plainly written at the end of s. 3(7)(e)(iii)(A) clearly indicates that clauses (A) and (B) are intended to be read as distinct and unrelated branches of the rule, and that economic loss is explicitly a factor for consideration only in the (B) clause. He added that the existence of the two distinct categories is also further confirmed by recently-enacted s. 19(3)4 of the *Schedule*, which provides that the amount of an attendant care benefit will be limited to the amount of a non-professional attendant's economic loss—with no such limit imposed on attendant care provided by a "professional".

Mr. Ben referred to the FSCO decision *Josey and Primmum*[5] as authority for the assertion that there is nothing in s. 3(7)(e)(iii)(A) that requires a "professional" attendant to be arm's length from the recipient of the attendant care. There, Arbitrator Fadel stated the following:[6]

> 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 find that from its plain meaning, 3(7)(e)(iii)(A) refers to a person who is trained in and/or working in the health care industry for remuneration.

Mr. Ben referred to the Ontario Superior Court of Justice case *Shawnoo v. Certas*[7] for the proposition that a non-arm's length attendant care provider trained as a PSW would trigger an

[5] *Josey and Primmum Insurance Company*, FSCO A13-005768 (October 31, 2014).
[6] Applicant's Factum, para. 14.
[7] *Shawnoo v. Certas Direct Insurance Company*, 2014 ONSC 7014.

attendant care benefit if, at the time of the accident, that person could establish that she was employed as a PSW.[8]

Finally, he referred to the FSCO decision *E.B. and Security National*,[9] for the proposition that the Arbitrator held that only if an attendant care provider is a non-professional must the care provider demonstrate an economic loss in order for an insured to claim the benefit.[10]

Mr. Ben posited a hypothetical situation where an arm's length "professional" attendant were hired through an agency to provide attendant care to Mr. Walsh, yet also provided attendant care to other agency clients. He suggested that if Echelon's interpretation of the *Schedule* is correct then the hypothetical attendant's services would not trigger an attendant care benefit unless Mr. Walsh was the attendant's only client—which does not accord with the reality of how professional attendant care services are provided.

Echelon

Echelon advised that it has paid a total of $15,798.86 in attendant care benefits to date. For the period from March-August 2015, monthly payments had been made in the amount of $2,184.56. That figure was derived based on Mrs. Walsh's economic loss.

Echelon's payments of attendant care benefits were as follows:[11]

TIME PERIOD	**ATTENDANT CARE BENEFITS PAID**
January 1 – February 15, 2015	$20.60 (only economic loss demonstrated for this period)
February 16 – 28, 2015	$0

[8] Applicant's Factum, para. 15.
[9] *E.B. and Security National Insurance Company*, FSCO A12-005316 (January 16, 2015).
[10] Applicant's Factum, para. 16.
[11] Insurer's Factum, para. 7

	(no evidence of economic loss provided)
March 1 – August 7, 2015	$2,184.56 per month (Mrs. Walsh's economic loss as a result of not working)
August 8, 2015 to date and ongoing	$1,335.50 per month (per updated Form 1 of J. Ford)

Mr. Jamie Pollack, counsel for Echelon, submitted that pursuant to s. 19 of the *Schedule,* for attendant care benefits to be payable, expenses must have been "incurred" in accordance with the definition in s. 3(7)(e)(iii) of the *Schedule*. He submitted that Mrs. Walsh was employed as a personal support worker in the evenings, and she allegedly provided Mr. Walsh with attendant care services during the daytime. Therefore, she was not providing attendant care services during her course of employment, and as a result the "incurred expenses" definition has not been met. From the date of the accident through February 28, 2015, Mrs. Walsh was not providing attendant care services "in the course of her employment, occupation or profession", and had shown no evidence of economic loss. During that period, Mrs. Walsh reportedly provided attendant care services to Mr. Walsh *when she was not working*. As such, Echelon asserted that no attendant care benefits were owed for that timeframe. Echelon further asserted that from March 1, 2015 and ongoing, Mrs. Walsh was not a professional service provider, and was not "in the course of her employment, occupation or profession" while providing attendant care services. As such, the maximum quantum of attendant care owing for that timeframe was limited to Mrs. Walsh's actual economic loss, subject to the services being reasonable and necessary. Mrs. Walsh's income while employed as a PSW at Darling Home for Kids was $2,184.56 per month.[12] Consistent with Mr. Ben's submission, Mr. Pollack submitted that for attendant care benefits to be payable, Mrs. Walsh must have provided attendant care services either in the course of the employment, occupation or profession that she was engaged in prior to the accident (subsection "A"), or she must have sustained an economic loss as a result of providing the attendant care services (subsection "B").[13]

[12] Insurer's Factum, paras. 1-5.
[13] Insurer's Factum, para. 10.

Mr. Pollack advised that in *Henry*,[14] the Ontario Court of Appeal had held that if an economic loss on behalf of the attendant care service provider could be made out, the full Form 1 quantum for attendant care benefits was payable. However, on December 17, 2013, the Ontario government filed Ontario Regulation 347/13 under the *Insurance Act*, which came into force on February 1, 2014. O. Reg. 347/13 modified s. 19(3) of the *Schedule* to now include the following—s. 19(3)4:[15]

> Despite paragraphs 1, 2 and 3, 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.

Under this framework, if Mrs. Walsh's services fall under the definition of a professional service provider, per subsection "A" described earlier, the full quantum of the Form 1 would be the maximum quantum potentially owing. However, if Mrs. Walsh's services fall under the definition of a non-professional service provider, per subsection "B", the maximum quantum owing would only be the amount of economic loss actually incurred.

Mr. Pollack submitted that for the period from November 24, 2014 to February 28, 2015, Mrs. Walsh did not sustain any economic loss as a result of providing attendant care services to Mr. Walsh, as she remained employed. She did not provide her attendant care services in the "course of" her "employment, occupation or profession" as she was not at work when the services were provided. For the period of time starting March 1, 2015, Mrs. Walsh was again not providing attendant care services "in the course of her employment, occupation or profession" in that she was specifically *not employed* after taking a leave of absence from her job. Therefore, for that

[14] *Supra*, note 2.
[15] Insurer's Factum, para. 12.

period of time, the maximum quantum of attendant care benefits owing is Mrs. Walsh's economic loss as a result of unemployment, $2,184.56 per month, pursuant to the updated s. 19(3) of the *Schedule*, and subject to the benefits being reasonable and necessary on an ongoing basis.

On August 7, 2015, Jeff Ford prepared an updated Form 1 on behalf of Echelon, recommending payment of attendant care benefits in the reduced monthly amount of $1,335.50. Echelon has since paid Mr. Walsh attendant care benefits in that monthly amount accordingly.

In oral submissions, Mr. Pollack referred to the legislative history respecting attendant care benefits, and specifically the intent behind the various changes to the *Schedule* in 2010 and 2014. Mr. Pollack and Mr. Ben mutually agreed that there was a clear legislative intention to prevent abuse of the attendant care benefit by family members who are not trained professionally to do it. However, Mr. Pollack argued that if I were to find that Mrs. Walsh qualifies within clause "A" of the incurred provision, then hypothetically if she did 10 minutes of work, she could receive a windfall of up to $3,000.00 per month based on the Form 1s for that work, which would fly in the face of the legislative intention and also Arbitrator Fadel's comments in *Josey*.[16]

On this last point, Mr. Ben replied that, in accordance with Mrs. Walsh's Affidavit, there was no evidence that Mrs. Walsh was only doing 10 minutes of work, and she was in fact providing care in accordance with the Form 1 amount—i.e, this was not a windfall situation. He reiterated that Mrs. Walsh was employed as a PSW at Darling Home for Kids, and there was nothing in the legislation that requires an arm's length relationship for a professional services provider, while acknowledging that most injured individuals will not typically have the benefit of professional expertise available within their families. Mr. Ben and Mr. Pollack mutually agreed that Mrs. Walsh's qualification and work as a PSW constitutes appropriate qualification to provide arm's length professional attendant care services for the purposes of the *Schedule*.

Decision

[16] *Supra*, note 4.

I agree with the submissions by both parties that the wording of s. 3(7)(e)(iii) creates a clear bifurcation between its (A) and (B) clauses. By virtue of the "or" following clause (A), a service provider either falls under (A) or (B) when considering the "incurred" provision, and satisfying either clause is sufficient to satisfy that portion of the test. Further, an analysis of the service provider's economic loss is only an element of the (B) clause—it is not an element of the (A) clause. The wording of the clause is as follows:

> (e) … an expense in respect of goods or services referred to in this Regulation is not incurred by an insured person unless,
>
> …
>
> (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;

Therefore, I find that a service provider falling into the (A) clause—i.e., one that did so in the course of the employment, occupation or profession in which he or she would ordinarily have been engaged—does not need to establish economic loss for the purpose of these provisions. This appears to have been a deliberate effort of legislative drafting, and I accept that if the legislature had intended for the provision to read differently, it could have done so.

I also accept that the legislative intent behind these provisions, as advised to me by both parties, was an intention to prevent abuse of the attendant care benefit by family members who are not trained professionally to do it.

The sole question before me is whether the services provided by Mrs. Walsh to the Applicant were done in the course of the employment, occupation or profession in which she would ordinarily have been engaged. I find that the answer is yes, based on both the case law and the legislative intention presented to me.

Some further elaboration on the case law is merited. *Henry*[17] was a 2013 decision of the Ontario Court of Appeal. As mentioned, the *Henry* decision led the legislature to enact O. Reg. 347/13, effective February 1, 2014, which amended the *Schedule* thereafter to limit the compensable services by a non-professional attendant care provider (i.e., under the (B) clause) to the actual amount of economic loss sustained. Some of the comments by Hoy, J.A. in *Henry* remain relevant background, though. She noted that the evolution of the regulations governing payment for attendant care, and the five-year report on automobile insurance in Ontario released by FSCO shortly before the 2010 amendments came into force,[18] both supported the argument that the 2010 amendments were intended to provide a check on payments to family caregivers.[19] The Insurance Bureau of Canada ("IBC") had raised concerns respecting attendant care. At pages 44-45 of the Five Year Report, FSCO reported that IBC indicated that over-utilization of the attendant care benefit was becoming a problem, with a 59.1% increase in attendant care costs between 2004-2007.[20] Respecting the payment of attendant care benefits to family members, FSCO noted at p. 47 of its Report:

> Another issue raised in the IBC submissions related to the payment of attendant care benefit to a claimant's family members and friends. Insurers are concerned that the benefit can become a windfall for the claimant if no actual services are provided. … The IBC's solution is to restrict payment to family members only where it can be shown that an economic loss has been incurred.[21]

However, as noted in *Henry*, FSCO rejected IBC's solution:[22]

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[17] *Supra*, note 2.

[18] *Report on the Five Year Review of Automobile Insurance,* March 31, 2009 (Financial Services Commission of Ontario).

[19] *Henry*, para. 26.

[20] *Henry*, para. 30.

[21] *Henry*, para. 31.

[22] *Henry*, para. 32.

> …The issue is not so much who is providing the care but whether care is actually required. FSCO believes that proper use of the Form 1 to screen claims is the most effective approach to ensuring that the benefit is paid to those who truly need the care. Introducing additional disability or functional eligibility tests or requiring caregivers to demonstrate economic loss would add more complexity to the system.

Hoy J.A., speaking for the Court, stated that in her view the requirement ultimately adopted in the 2010 amendments (i.e., that a family caregiver under the (B) clause must have sustained an economic loss) provided a rough check on attendant care costs.[23]

As mentioned, *Josey* was a FSCO case decided by Arbitrator Fadel. Mr. Josey received attendant care services from his spouse, Ms. Ladd; he claimed 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 therefore satisfied the (A) clause of the "incurred" provision. Arbitrator Fadel reviewed the history of the provision and concluded, in part, as follows:[24]

> FSCO conducted a 5 year review and released a report shortly before the 2010 *Schedule* came into effect. 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

[23] *Henry*, para. 35.
[24] *Josey*, *supra*, pp. 4-6.

> services were provided by a professional service provider it must have been done so in the course of their "employment, occupation or profession…"
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> Although "employment", "occupation" and "profession" are not defined in the 2010 *Schedule* the parties provided various dictionary definitions. …
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> 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.
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> …
>
> 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."

Arbitrator Fadel concluded that the amendments did not contemplate a stay-at-home parent would be considered someone providing attendant care services in the course of their employment, occupation, or profession, and thus Ms. Ladd did not meet the wording of the provision.

In *Shawnoo*, the Applicant suffered a catastrophic brain injury from a December 2010 motor vehicle accident. Her mother ('CB') was a certified healthcare aide, having received a certification akin to a PSW in January 1994. Her roommate ('CP') was a certified child and youth worker ("CYW") who obtained her professional certification in 2007. CB and CP both provided some attendant care services to the Applicant. Both counsel agreed that neither CP nor CB incurred economic losses within the meaning of s. 3(7)(e)(iii)(B) of the *Schedule*—thus, the focus of the case was on s. 3(7)(e)(iii)(A). Justice Garson of the Ontario Superior Court of Justice, in his 2014 judgment, stated that the 2010 amendments were designed to provide a system of checks

and balances on attendant care, and address concerns respecting historical abuses by family members in the provision of attendant care services.[25] Garson, J. found that CP didn't possess the appropriate professional qualifications to provide the attendant care required by the Applicant. But his more notable conclusions related to the Applicant's mother, CB. Garson, J. noted that she was trained as a healthcare aide, and had been employed in that capacity in the past; but she had not been employed in that capacity since 2006, and immediately prior to the accident was in receipt of Ontario Works.[26] The Insurer argued that because CB was not employed for remuneration at the time of the accident, her services did not meet the requirements of clause (A). Garson, J. concluded that prior to the accident, CB was not employed for remuneration as a PSW or healthcare aide. There was no evidence she was actively seeking such employment or likely to receive an offer of such employment. Therefore, he was not satisfied that but for the accident, CB would ordinarily have been engaged in healthcare services employment.[27] Garson, J. also referenced s. 19(3)4 of the *Schedule*, and stated that the February 2014 amendment makes clear that persons who are not ordinarily engaged in healthcare services employment, prior to the accident, are required to show an economic loss in order to receive *Schedule* benefits for their attendant care services.[28]

The final case before me, *E.B.*,[29] was a 2014 FSCO decision of Arbitrator Mutch. The Applicant testified that her mother, father, sister, and housecleaners hired by her parents all provided her caregiving, attendant care, and housekeeping services. Arbitrator Mutch noted under the "incurred" provisions of the *Schedule*, "non-professional" cleaners such as the Applicant's parents would have to demonstrate an economic loss to receive benefits for their services—which they had not demonstrated.[30]

The present case is distinguishable from the precedents provided, most notably on the basis that Ms. Cristin Walsh was demonstrably employed as a health care services provider at the time of

[25] *Shawnoo*, *supra*, para. 20
[26] *Shawnoo*, paras. 41-42.
[27] *Shawnoo*, paras. 53-54.
[28] *Shawnoo*, para. 57.
[29] *Supra*, note 8.
[30] *E.B.*, pp. 16-17.

the accident. Both parties agreed that Ms. Walsh's certification and experience as a PSW qualified her as a professional fit to provide services under clause (A) (i.e., *Schedule*, s. 3(7)(e)(iii)(A)).

From my reading of *Shawnoo*, Garson J. agreed with Arbitrator Fadel's opinion in *Josey* that clause (A) refers to a person who is trained in and/or working in the health care industry for remuneration, and his disposition of *Shawnoo* owed to the fact that CB had not been working outside the home as a healthcare aide or PSW for remuneration.[31] In the present case, Mrs. Walsh was working outside the home as a PSW for remuneration at the time of the accident. She also continued working as a PSW outside the home for remuneration at various times following the accident. Meaningful evidence in this case established that Mrs. Walsh's employer granted her time off and a leave of absence specifically to care for Mr. Walsh.[32] I do not agree with Echelon's suggestion that Mrs. Walsh was "unemployed" during the time that she was on an approved leave of absence by her employer, specifically for the purpose of caring for her husband. I concur with Arbitrator Fadel's conclusion in *Josey* that if a family member is trained and/or working in the healthcare field, then the attendant care benefit ought to be payable for work they did for the Insured in the course of the employment, occupation or profession in which he or she would ordinarily have been engaged, but for the accident. Mrs. Walsh would ordinarily have been engaged as a PSW but for the accident.

I note that I am not persuaded by the hypothetical situation posited by Mr. Ben—i.e., that if Echelon's position were accepted, then a "professional" attendant's services could never trigger an attendant care benefit unless the Insured was their only client. I agree with Mr. Pollack that the hypothetical is addressed by virtue of the fact that such a professional is acting in the course of their job, which by its nature typically involves caring for a number of individuals during the same time span. However, I believe a different analogy is more apt. If a lawyer working for salary were to offer legal services *pro bono* to a cause they cared about outside working hours, would they cease being a lawyer during that time because they weren't being remunerated for it? The answer would quickly be no—and I suspect many might even be offended at the suggestion. The

[31] *Josey*, paras. 60-61.
[32] See, for example, Exhibits F and G to Affidavit of Cristin Walsh.

question of what makes one a lawyer should consider one's ability to be remunerated for it—but it also needs to take into consideration one's acquired knowledge and skills relevant and/or necessary to the work, and any licensing authorities involved. One does not lose their skill set or status merely because they will not be remunerated financially in undertaking a particular task. I believe the question of what makes one a PSW is analogous—and is consonant with the decisions of Garson, J. and Arbitrator Fadel. I find it in harmony with the ordinary understanding of what it means to be part of a profession, and the common day-to-day usage of that term.

It also fits with the legislature's intention to restrict access to attendant care benefits by untrained family members and friends reflected in the 2010 and 2014 amendments. Where a family member is a trained professional working in the relevant field, concerns respecting qualification seem to be directly addressed. It would seem odd, as a matter of public policy, to mandate that insureds with trained professionals in their direct families who care for them be obligated to arrange equivalent support services from outside the family in order for it to be compensable. As Arbitrator Fadel noted, there is no restriction in clause (A) of the *Schedule* that mandates a professional healthcare aide be arm's length, nor do I find it appropriate to read one into it.

EXPENSES:

I defer a decision on expenses respecting this matter to the Hearing Arbitrator for the case.

Benjamin M. Drory Arbitrator	August 31, 2016 Date

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A15-007448

BETWEEN:

MICHAEL WALSH

Applicant

and

ECHELON GENERAL INSURANCE COMPANY

Insurer

ARBITRATION ORDER

Under section 282 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 Ontario *Regulation 664*, as amended, it is ordered that:

1. Mr. Walsh's spouse, Mrs. Cristin Walsh, was providing attendant care services to him in the course of the employment, occupation, or profession in which she would ordinarily have been engaged but for the accident, in accordance with s. 3(7)(e)(iii)(A) of the *Schedule*. Accordingly, economic loss does not need to be demonstrated.
2. I defer a decision on expenses respecting this matter to the Hearing Arbitrator.

Benjamin M. Drory
Arbitrator

August 31, 2016
Date