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**

2018 CanLII 39376 (ON LAT)

Date: 2018-02-28
Tribunal File Number: 17-001328/AABS
Case Name: 17-001328 v Allstate Insurance Company

In the matter of an Application pursuant to subs. 280(2) of the *Insurance Act*, RSO 1990, c I.8, in relation to statutory accident benefits.

Between:

M. F.

Applicant

and

Allstate Insurance Company

Respondent

DECISION

ADJUDICATOR: **Karina Kowal**

APPEARANCES:

For the Applicant: Fawad Siddiqui, Counsel

For the Respondent: Peter Yoo, Counsel

Heard in Writing: **July 24, 2017**

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OVERVIEW

[1] The applicant was injured in a motor vehicle accident on January 29, 2015 and applied for benefits under the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the *'Schedule"*). The respondent denied the benefit on the basis that the assessment requested was not incurred, was not reasonable and necessary and there was insufficient medical information to determine attendant care needs. The applicant submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("the Tribunal") for resolution of the dispute.

ISSUES IN DISPUTE

[2] According to the Case Conference Order dated June 6, 2017, the following issues need to be determined:

1. Is the applicant entitled to payment for the cost of examination in the amount of $2,200.00 for an attendant care assessment and Form 1 by MedEx Health Services as set out in a treatment plan dated September 28, 2016, denied by the respondent on November 1, 2016?
2. Is the applicant entitled to interest on any overdue payment of benefits?
3. Are the parties entitled to their costs for this application?

RESULT

[3] After reviewing the submissions and evidence, I find:

1. The applicant is not entitled to the cost of an attendant care assessment and Form 1 in the amount of $2,200.00 by MedEx Health Services as set out in a treatment plan dated September 28, 2016, denied by the respondent on November 1, 2016.
2. The applicant is not entitled to interest, as the assessment was not incurred and not overdue payments are owing.
3. Costs are not payable on this application.
4. This application is dismissed.

Background

[4] The applicant was involved in a motor vehicle accident on January 29, 2015. She submitted a treatment and assessment plan (OCF-18) for an assessment of attendant care needs and Form 1 on September 28, 2016, 1 year, 8 months (87

weeks) after the accident. The respondent denied the plan for the attendant care assessment on November 1, 2016, citing that the applicant did "not have sufficient medical information indicating the requirement for personal care needs, that the injuries were essentially soft tissue in nature, and that the applicant's return to work on a full time basis were inconsistent with a claim for attendant care".

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Test

[5] Pursuant to s. 25(1)4 of the *Schedule*, "an insurer shall pay the reasonable fees charged by an occupational therapist or a registered nurse for preparing an assessment of attendant care needs under s. 42, including any assessment or examination necessary for that purpose, if incurred by or on behalf of an insured person".

[6] This section should be read together with s. 42 regarding applications for attendant care benefits and s. 14.2 where the insurer is only liable to pay attendant care benefits if the impairment is not a minor injury.

[7] Pursuant to s. 42(5): An insurer may, but is not required to, pay an expense incurred before an assessment of attendant needs that complies with this section is submitted to the insurer.

The Attendant Care Assessment Submission Process

[8] Ideally, an insurer would inform their insured that they are no longer subject to the Minor Injury Guideline and would provide information on their eligibility to the attendant care benefit. The insured would then notify the insurer within 7 days, or as soon as practicably thereafter (pursuant to s.32.1), of their intention to apply for the attendant care benefit. A treatment and assessment plan for an attendant care assessment can serve as notice of an intention to apply for this benefit.

SUBMISSIONS AND REASONS

[9] Neither party has confirmed whether the applicant's impairments are outside of the Minor Injury Guideline. For the purpose of this analysis, I am making the assumption that they are, as neither party has argued that they are not. In the alternative, if the applicant is within the Minor Injury Guideline, she would not be eligible for payment of the attendant care assessment (or benefit).

I. Liability to Pay for the Assessment

[10] The applicant submits that the respondent is liable to pay the assessment pursuant to s.25(1)4 and the plain meaning of "shall pay" making the provision mandatory.

[11] The respondent submits that the applicant failed to demonstrate that the subject OCF-18 was “reasonable and necessary”.

[12] I agree with the applicant that the respondent is liable to pay the assessment pursuant to s.25(1)4 on the plain meaning of “an insurer ***shall pay*** the reasonable fees charged by an occupational therapist or a registered nurse for preparing an assessment”.

[13] The respondent’s main argument was that the assessment is not reasonable and necessary. I find that “reasonable and necessary” is not the correct test for determining whether an attendant care assessment with Form 1 is payable.

[14] Attendant care and medical/rehabilitation benefits have separate and distinct application processes as set out in the Schedule. Similarly, assessments for each are also treated differently in the Schedule. Section 25.4 regarding attendant care assessments simply refers to “reasonable fees charged” while s.25.3, sets out that assessments for the purpose of medical and rehabilitation benefits are payable only once the medical/rehabilitation assessment has been approved.

[15] The attendant care assessment pursuant to s. 25.4 is still subject to review based on “reasonable fees”, and whether it will be performed by an occupational therapist or registered nurse. However, I find that once these requirements are met and once the assessment is incurred and invoiced, the assessment becomes payable.

II. Incurred

[16] The Applicant acknowledges that the attendant care assessment was not incurred as defined by s. 3.7(e), but argues that the Tribunal should deem this assessment incurred, pursuant to s. 3(8), because the respondent unreasonably withheld or delayed payment.

[17] The respondent submits that the applicant did not incur the assessment. The respondent also submits that the Tribunal should not consider the assessment “deemed incurred” pursuant to s.3(8), as it was the applicant who failed to comply with the requirement under s.32(1) to notify the insurer of her intention to apply for a benefit within 7 days (or as soon as practicably after).

[18] Both parties agree that that the assessment was not incurred pursuant to the definition set out in s. 3.7(e):

> (i) subject to subs. (8), 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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(ii) the insured person has received the goods or services to which the expense relates,

(iii) the insured person has paid the expense, has promised to pay the expense or is otherwise legally obligated to pay the expense,

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[19] The applicant submits that the Tribunal should deem the expense incurred pursuant to s.3(8) of the Schedule. Section 3(8) states:

> (8) If in a dispute described in subs. 280 (1) of the Act, the Licence Appeal Tribunal finds that an expense was not incurred because the insurer unreasonably withheld or delayed payment of a benefit in respect of the expense, the Licence Appeal Tribunal may, for the purpose of determining an insured person's entitlement to the benefit, deem the expense to have been incurred. O. Reg. 44/16, s. 1.

[20] I do not find any evidence that the respondent unreasonably withheld or delayed payment in this case. A letter was sent to the applicant within 3 days of receiving the OCF-18 of the attendant care assessment providing reasons for not approving payment of the attendant care assessment.

[21] The respondent also argues that the timing of submitting the OCF-18 for the attendant care assessment (notice) is in contravention of s. 32, which requires that an application for a benefit be submitted within 7 days, or as soon as practicably after the circumstances giving rise to the entitlement of the benefit.

[22] Neither respondent or applicant provide information regarding when the applicant was removed from the Minor Injury Guideline, therefore it is difficult to ascertain whether there was a delay in notice to the insurer in applying for the attendant care benefit.

III. Period of Eligibility

[23] The applicant argues that she is eligible for this benefit from the date of submission of the OCF-18 treatment and assessment plan in question, up to the 104 week mark. The applicant argues that this treatment plan was submitted on September 28, 2016, 1 year, 8 months (87 weeks) after the accident. This would mean that the applicant would be eligible for a maximum of 17 weeks of attendant care benefits. She argues that no prejudice arises to the respondent, as an insurer attendant care assessment (s.44) could have been scheduled without an impact to the period of eligibility for attendant care benefits.

[24] The respondent argues that the eligibility period for the attendant care benefit would be less than 17 weeks as a responding attendant care assessment would need to be performed.

[25] Certainly, the insurer is entitled to perform their own attendant care assessment and Form 1 if they dispute the attendant care benefit amount and any associated recommendations according to processes set out in s.42.

[26] Pursuant to s.20, the parties have agreed that the applicant did not sustain a catastrophic impairment, nor did she have optional benefits coverage for attendant care benefits, which would limit her eligibility for attendant care benefits to 104 weeks. However, pursuant to s. 42(5), any potential attendant care claim can only be claimed from the date of submission of an Attendant Care Assessment with Form 1 to the 104 week mark:

> "An insurer is not required to pay the attendant care benefit or any associated expenses prior to the submission of an assessment of attendant needs".

[27] The period of eligibility for the attendant care benefit is from the date of submission of the assessment of attendant care needs, and not the treatment and assessment plan (OCF-18) for the assessment. In this case, the attendant care assessment and Form 1 were not incurred within the 104 week period. The applicant is not eligible for attendant care benefits.

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CONCLUSION

[28] In summary, a s.25 (applicant) attendant care assessment and Form 1 are payable from the insured's medical rehabilitation policy limits when the following criteria are met:

1. The applicant's impairments are not within the Minor Injury Guideline,

2. An OCF-18 informing of an intent to perform an attendant care assessment and Form 1 are submitted to the insurer (compliant with s.32);

3. The attendant care assessment has been incurred (attended by the insured);

4. The attendant care assessment and Form 1 are completed by a registered nurse or occupational therapist; and

5. The fees are reasonable (s. 25.3 provides that the incurred expense/assessment is subject to the FSCO Superintendent's contemporaneous Professional Services Fee Guidelines, and/ or pursuant to s. 25.5(a) under $2,000.00)

[29] In this case, I find that the attendant care assessment fee was reasonable and was performed by an occupational therapist. However, it should have also been subsequently incurred by the applicant. Once incurred and invoiced, it would

have become payable. As it was not incurred, I find the applicant is not entitled to the assessment.

COSTS

[30] Both parties have requested their costs in this matter, pursuant to Rule 19 of the Tribunal's *Rules of Practice and Procedure*, which states that where a party believes that another party in a proceeding has acted unreasonably, frivolously, vexatiously, or in bad faith, that party may make a request to the Tribunal for costs.

[31] The criteria for a costs award applies to behaviour during a Tribunal proceeding. Although both parties submit that they are entitled to costs, neither party has submitted evidence sufficient to meet the test. Accordingly, I award no costs.

ORDER

[32] As such, the applicant is not entitled to the cost of the examination in the amount of $2,200.00 for an attendant care assessment and Form 1 by MedEx Health Services as set out in a treatment plan dated September 28, 2016, denied by the respondent on November 1, 2016.

[33] As the assessment was not incurred and no payments are overdue, no interest is owed.

[34] Costs are not payable on this application.

[35] This application is dismissed.

Released: February 28, 2018

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Karina Kowal, Adjudicator

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