



FSCO A14-001758

BETWEEN:

LEE-ANNE HENDERSON

Applicant

and

WAWANESA MUTUAL INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Arbitrator Patrick N. Bowles

Heard: In person at Barrie, Ontario on February 9, 2015 and by teleconference on April 13, 2015

Appearances: Ms. Deborah Lewis, counsel, for Ms. Lee-Anne Henderson
Ms. Tracy Romanowski, paralegal, for Ms. Lee-Anne Henderson
Ms. Anju Sharma, counsel, for Wawanesa Mutual Insurance Company

Issues:

The Applicant, Ms. Lee-Anne Henderson, was injured in a motor vehicle accident on September 18, 2011. She applied for and received statutory accident benefits from Wawanesa Mutual Insurance Company ("Wawanesa"), payable under the *Schedule*.¹ Wawanesa denied funding for a Catastrophic Assessment. The parties were unable to resolve their disputes through mediation and Ms. Henderson, through her representative, 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 Preliminary Hearing are:

1. Is Ms. Henderson entitled to examination expenses for the funding of a Catastrophic Impairment Assessment (“CAT Assessment”)?
2. Is Ms. Henderson entitled to interest on all overdue payments?
3. Is Ms. Henderson entitled to her expenses of this Preliminary Issue Hearing?
4. Is Wawanesa entitled to its expenses of this Preliminary Issue Hearing?

Result:

1. Ms. Henderson is entitled to examination expenses for the funding of a Catastrophic Impairment Assessment.
2. Ms. Henderson is not entitled to interest on all overdue payments.
3. Ms. Henderson is entitled to her expenses of this Preliminary Issue Hearing.
4. Wawanesa is not entitled to its expenses of this Preliminary Issue Hearing.

EVIDENCE AND ANALYSIS:

BACKGROUND

By September, 2013, two years post-accident, Ms. Henderson had exhausted her Medical and Rehabilitation Benefit (“Med/Rehab Benefit”) entitlement. In order to claim more benefits for her medical and rehabilitation treatments under the *Statutory Accident Benefits Schedule* (“SABS”), the Applicant has to be medically assessed through a defined assessment process, as catastrophically impaired to qualify for the next upper tier of benefits.

Motor Vehicle Accident of September 18, 2011

Ms. Henderson was seriously injured in a motor vehicle accident (“MVA”) on September 18, 2011. Her counsel, Ms. Lewis, provided details of her injuries as recorded in medical reports at the time. Her injuries are very numerous, wide ranging and disabling. They are set out as follows:

cervical sprain, thoracic sprain, lumbar sprain, muscle spasm/lumbar, post-concussion syndrome, cervical myalgia, sleep disturbance, sciatica left leg, subluxation due to injury C3-C7, subluxation due to injury T4-T8, subluxation due to injury L4-L5, disturbance of skin sensation, numbness, neuralgia/neuritis-cervical, nausea, lumbar enthesopathy, constant and severe low back pain, mid back pain, neck pain, numbness of the left leg and arms, along with hands.

During the course of the two years after the MVA, the Applicant was in receipt of Medical and Rehabilitation Benefits. Her insurance company, Wawanesa, provided periodic updates as to what was paid on her behalf. The letters also showed a declining balance available to the Applicant from the policy limit of \$50,000.

To cover the expense of her ongoing medical and rehabilitation requirements beyond the two years, it became evident Ms. Henderson had to apply for the next tier of benefits. To access this tier, she requested that her Insurer cover the expense of a CAT Assessment, a prerequisite before the third tier of benefits would be available. From the information provided by Ms. Henderson's counsel, it appears that her ongoing complaints post-accident continued to be significant.

Current Complaints

Ms. Henderson's ongoing medical symptoms required continued access to Medical and Rehabilitation Benefits. Her current complaints and symptoms remain very disabling and are detailed as follows:

- 1) Cervical facet joint injury causing myofascial neck pain;
- 2) Posttraumatic cervicogenic headaches with migraine features;
- 3) Facet joint injury to lumbosacral spine, causing myofascial lower back pain;
- 4) Temporomandibular joint dysfunction, causing residual pain;
- 5) Post-traumatic blepharospasm;
- 6) Bilateral carpal tunnel syndrome;
- 7) Thoracic disc herniation, causing mid-back pain;

- 8) Major depressive disorder;
- 9) Elements of post-traumatic stress disorder;
- 10) Chronic pain disorder associated with a psychological and general medical condition, causing short-term memory loss and difficulty in concentrating and focusing.

The Applicant also reports panic attacks, numbness and tingling in the limbs, extreme swelling of ligaments at the back of the neck, neck pain, shoulder pain, suicidal ideation and nightmares.

OCF-18 Treatment Plan

On October 26, 2013, the Applicant submitted to the Insurer, Wawanesa, a treatment plan on an OCF-18 Form, requesting Wawanesa to fund the expense of the CAT Assessment.

The expense of the CAT Assessment was set at \$9,492, including tax. The OCF-18 Form was prepared by Omega Medical Associates. The expenses are itemized as follows:

1. Psychological Assessment for \$2,000
2. Psychiatrist Assessment for \$2,000
3. Functional Assessment for \$2,000
4. Overall Assessment Summary, Analysis, and Case Conferencing, Final Rating for \$2,000
5. OCF-18 completion \$200
6. OCF-19 completion \$200

Wawanesa's Response

In rejecting Ms. Henderson's application for the expense of the CAT Assessment on November 4, 2013, Wawanesa stated that no funds were available to carry out the assessment. Any assessment expenses were to be deducted from the \$50,000 limit, and as Ms. Henderson had exhausted her entitlement limit for Medical and Rehabilitation Benefits, there were no remaining funds available to carry out the CAT Assessment.

Ms. Henderson has brought Arbitration proceedings in respect to the funding of the expenses for the CAT Assessment. If it was ascertained that after the assessment, Ms. Henderson is determined as being catastrophically impaired, the statutory limits of her Med/Rehab Benefits would thereby be increased to \$1 million.

SUBMISSIONS

Written submissions were received from both parties prior to the oral hearing. Following the Hearing in Barrie, further submissions were sent in response to a series of questions.

Applicant's Submissions

The dispute lies in whether the expenses for the CAT Assessment are a Med/Rehab "benefit" pursuant to section 18 of the *SABS* and therefore subject to the policy limit of \$50,000; or an "adjusting expense" pursuant to section 25 of the *SABS* and outside the limit.

It is the Applicant's submission that the CAT Assessment is not a Med/Rehab Benefit. Additionally, the expense of carrying out the assessment is an adjusting expense. The Form completion (referencing OCF-19) is not a Med/Rehab Benefit. This expense is covered by section 25 of the *SABS*.

Should Ms. Henderson be expected to set aside a portion of the Med/Rehab Benefits from the available funds of \$50,000 that she had access to in 2012 and 2013; she would have to forego or curtail her treatment. It is unreasonable to set aside a significant portion of the \$50,000 so funding could be made available for the CAT Assessment at a later date.

Additionally, the Applicant's counsel points to the provision of section 57 of the *SABS*. This section requires the Applicant to try and mitigate her injuries by participating in any recommended treatment plans. Ms. Henderson would run the risk of failing to meet these obligations pursuant to this section if funds were diverted from her Med/Rehab Benefits to cover the expense of the CAT Assessment.

It is the Applicant's position that the CAT Assessment expense is covered by section 25 of the *SABS* which provides that the Insurer "shall pay" all fees and expenses for conducting assessments and examinations and preparing reports relating to an application for a CAT Determination.

The Applicant submits Wawanesa has to pay the expenses of the CAT Assessment as requested in the Applicant's OCF-18 of October 2013.

Respondent's Submissions

In the Insurer's view, there is no basis on which the award can be made. The applicable section of the *SABS* in Ms. Henderson's case is section 18. Nothing is payable to the Applicant as she has exhausted her Medical and Rehabilitation Benefits.

The Insurer's position is that the cost of the CAT Assessment is to be included in the Medical and Rehabilitation limits. The intent of subsection 18(5) of the *SABS* is quite clear – all fees and expenses for conducting assessments and examinations and preparing reports in connection with any benefit or payment to or for an insured person is to be included in the benefit limit, which is not to exceed \$50,000.

In the Insurer's view, there is a clear legislative intent to limit the benefits payable, inclusive of the cost and expenses of assessments, to \$50,000.

Ms. Sharma submits for the Insurer that whenever the *SABS* uses the term "assessments and examinations" in relation to costs, it is to be understood as referring to all situations relating to *SABS* benefits including section 25, in addition to section 18, and should therefore be properly deducted from the Insured's Medical and Rehabilitation limits. It is counsel's view that had the legislature intended to exclude the cost of a CAT Assessment from the benefit limits, it would have expressly done so.

The Insurer also takes issue with the quantum sought as being excessive. If there is an expense payable for the CAT Assessment the expense is to be limited to \$2,000, the maximum payable for the preparation of a medical report pursuant to section 2 of the *SABS*.

Wawanesa submits that the Applicant is not entitled to interest as the expenses claimed have not been incurred.

ANALYSIS AND FINDINGS

CAT Assessment Process

To qualify for the third level of funding of \$1 million, Ms. Henderson has to undergo a comprehensive evaluation by a multidisciplinary clinical team to determine if her impairment meets the criteria of a catastrophic impairment. The actual tests applied by the medical assessors to determine if the Applicant meets the definition of Catastrophic Impairment are based on the impairment ratings under the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th Edition, 1993. In sections (f) and (g), likely applicable to Ms. Henderson given her current complaints listed above, the definition of impairment means:

- (f) any impairment or combination of impairments that results in 55 per cent or more impairment of the whole person, or
- (g) any impairment that results in a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioural disorder.

Given Ms. Henderson's continuing symptoms two years after the accident, I believe she has a reasonable chance of success in meeting the definition of impairment. However this determination is to be left to the assessors at Omega Medical Associates.

The Insurer has relied on the wording of subsection 18(3)(a) of the *SABS* which establishes the limit of the second tier to \$50,000 as the total sum of the Medical and Rehabilitation Benefits. Ms. Henderson was precluded from accessing any further funds to conduct a CAT Assessment. Reading further, subsection (5) states:

For the purposes of subsections (1) and (3), medical and rehabilitation benefits payable in respect of an insured person include all fees and expenses for conducting assessments and examinations and preparing reports in connection with any benefit or payment to or for an insured person under this Regulation...

Section 18(1) of the *SABS* relates to the first tier of benefits, \$3,500; and subsection 3 relates to the second tier, \$50,000.

This is not the situation with Ms. Henderson's claim for the expense of a CAT Assessment. The Applicant is not applying for a benefit or any assessment or examination in relation to a Med/Rehab Benefit. I find she is following a procedure set out in section 45 of the *SABS*. An Applicant has to abide by the specified process in order to have access to the third tier of benefits.

There have been a number of FSCO decisions relating to CAT Assessments.

In *Do and Guarantee* [Appeal P12-00037; October 11, 2013], Delegate Lawrence Blackman is of the opinion that a CAT designation is not a benefit. In his Decision, he wrote:

There is no Part in the Schedule entitled: "Catastrophic Impairment Benefits". Rather subsection 40(1) of the Schedule pertains to "Determination of Catastrophic Impairment." It comes under Part X of the schedule. Part X is entitled "Procedures for Claiming Benefits".

Delegate Blackman's decision went to a Judicial Review.

For the court, Justice Harvison Young [Divisional Court, 2015 ONSC 1891, April 14, 2015] upheld Delegate Blackman's decision. In reviewing the description of a 'benefit' in relation to a CAT determination, she writes:

In the case at bar, the Director's Delegate began by stating:

The heart of this appeal is whether an insurer's refusal to accept an insured as catastrophically impaired is a refusal of a benefit and, if so, was the Appellant's refusal clear and unequivocal such as to trigger the limitation period. (Reasons for Decision, p. 9)

Although the issue is one of the application of a limitation period and a refusal of a benefit, the CAT determination is a test of eligibility as Justice Young states:

[at paragraph 41] In support of this point, he cited the decision of Arbitrator Slotnick in *Shannahan and Optimum Frontier*, [2005] O.F.S.C.D. No. 41, FSCO A04-000965, who stated that a CAT determination is a test of eligibility, [my emphasis] which entitles an insured person to claim a greater level of benefits. Further, in *Bains and RBC General Insurance Company*, [2010] O.F.S.C.D. No. 65, FSCO P09-00005, the arbitrator stated that it does not automatically entitle a claimant to a higher level of accident benefits such as attendant care or housekeeping benefits.

From a reading of these decisions, it can be inferred that any assessment expenses in relation to a CAT Assessment are not considered an expense pursuant to section 18 of the *SABS*.

In reference to *Shannahan and Optimum Frontier* [FSCO A04-000965, April 14, 2005, Preliminary Issue], a CAT designation does not, by itself, bestow any monetary award. A determination that an insured person has sustained a catastrophic impairment is not in itself a benefit – even though it leads to a greater level of benefits.

A similar view is expressed in *Baines and RBC General* [FSCO-P09-00005, June 3, 2010] where a finding of CAT impairment, by itself, provided no compensation to an injured person. It simply opens the door to a higher threshold of possible benefit entitlement. A CAT designation simply recognizes significant initial injury or a significant impairment. It is the legislative means of differentiating, in a tiered system of first-party accident benefits, who has access to an upper tier of first-party automobile insurance coverage.

In view of the cases above, it appears that a Catastrophic Impairment Determination is not a benefit and by extension, the provisions in section 18 of the *SABS* do not apply to a CAT Assessment funding request. In my view, the CAT Assessment is not in relation to a “benefit” and the provisions of section 18 of the *SABS* do not apply.

***Cook and RBC General* [A13-015449, September 18, 2014]**

Ms. Sharma, in her submissions, relied on the decision of Arbitrator Mutch. Mr. Cook filed a motion requesting an interim order for the funding of a CAT Assessment Report in the amount of \$12,960. One of the questions considered by the Arbitrator was whether Mr. Cook was seeking payment of a benefit or payment of an expense. The Arbitrator determined that the funding of a CAT Assessment “is properly characterized as an expense” [paragraph 13]. However the Arbitrator denied the expense as he was prevented by subsection 18(3) from doing so: “To order otherwise would be to defy the legislation limits set out in subsection 18(3)”.

On Appeal [P14-00038, May 4, 2015], Delegate Blackman, in reversing the decision, is of the view that a CAT impairment is not a benefit or payment. The fee or expense sought is in regard to a threshold determination and not in any connection with any benefit or payment.

It is to be noted that Delegate Blackman’s decision in the *Cook* case, released in May 2015, came out in the time period between this Hearing in April 2015 and prior to the release of this decision.

A Process

It can be inferred from the decisions that the CAT Assessment is a procedure to be followed to have access to the next tier of benefits. The Applicant has to meet a standard before qualifying. It is a prerequisite upon which a benefit may be based. Similarly, a “minor injury” designation is not a benefit nor is the definition of an injury “as sustaining an impairment as a result of an accident”.

This procedural process is set out in Part VI, section 45 of the *SABS*. In my view, Part VI clearly states what Ms. Henderson has to follow when applying for a CAT Assessment. She may apply to Wawanesa for a determination of whether her impairment is a catastrophic impairment.

PART VI
PROCEDURES FOR CLAIMING BENEFITS

[Sections 36 to 46]

Additional Matters

Determination of catastrophic impairment

45. (1) An insured person who sustains an impairment as a result of an accident may apply to the insurer for a determination of whether the impairment is a catastrophic impairment.
O. Reg. 34/10, s. 45 (1).

In my view, the combined effect of the decisions and section 45 of the *SABS* make it clear that section 18 does not apply to a request for the funding of a CAT Assessment. Quite simply, as a process, Ms. Henderson can apply to Wawanesa for a determination of whether her impairment meets the definition of a CAT Impairment as defined in the *AMA Guides*. The question remains – does Ms. Henderson’s policy respond to the funding costs of the Assessment?

Funding Costs

To answer this question, I refer to subsection 25(1) of the *SABS* which reads:

The insurer shall pay (my emphasis) the following expenses incurred by or on behalf of an insured person...

Then we are taken to subsection (4) as to the particular expense in question:

Reasonable fees charged for preparing an application under Section 45 for a determination of whether the insured person has sustained a catastrophic impairment including any assessment or examination necessary for that purpose.

In my view, the statute cannot be any clearer as to its intent and application. There is no room for ambiguity – the insurer shall pay the expenses of a CAT Assessment.

Limit of Assessment Costs

The remaining item in this decision relates to the Respondent’s submission on the cost of the assessment. If Wawanesa has to pay for the assessment, the cost of the assessment is subject to a \$2,000 limit in total. Again, we must look at the provisions of section 25 of the *SABS*.

Subsection (5)(a) sets the limit at no more than \$2,000. However, the section goes on to make it clear the limit is to be applied to each assessment report set out in the OCF-18: An insurer shall not pay:

more than a total of \$2,000 in respect of fees and expenses for conducting any one [my emphases] assessment or examination and for preparing reports in connection with it, whether it is conducted at the instance of the insured person or the insurer.

Returning to the *Cook* case above, in Delegate Blackman’s view that “if multidisciplinary assessments or examinations are conducted, each separate assessment or examination or the preparation of a report in connection with same would have a \$2,000 cap”.

As there are four assessors identified on the OCF-18 filed on behalf of the Applicant, then each assessor can charge up to \$2,000 for their respective reports.

CONCLUSION

From the medical information provided, Ms. Henderson has a reasonable chance of being determined as catastrophically impaired. The cost of the CAT Assessment, as requested in the OCF-18 of October 26, 2013, is to be provided by Wawanesa and is not subject to the limitation in section 18 of the *SABS*. I have no issue with the number of assessors stated on the Form or the expertise required to carry out the CAT Assessment. They appear consistent with the continuing symptoms of the Applicant. The expense and expertise of each of the assessors listed on the OCF-18 to carry out the CAT Assessment has not been challenged by the Insurer.

Entitlement

As provided for in section 25 of the *SABS*, the Insurer shall pay the expenses of the CAT Assessment in the amount of \$9,492.

Interest

The Applicant is not entitled to interest. No benefit has been denied or withheld by the Insurer.

EXPENSES:

The Applicant is entitled to her expenses in relation to this Hearing.

As provided for by Rule 79.2 in the *Dispute Resolution Practice Code*, if the parties are unable to agree on the legal expenses of this Hearing, an expense Hearing shall be requested within 30 days from the date of this decision. The request shall be accompanied by a Bill of Costs as well as written submissions regarding entitlement to and/or the quantum of legal expenses as are in dispute.

Patrick N. Bowles
Arbitrator

July 9, 2015
Date



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BETWEEN:

LEE-ANNE HENDERSON

Applicant

and

WAWANESA MUTUAL INSURANCE COMPANY

Insurer

ARBITRATION ORDER

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

1. Ms. Henderson is entitled to examination expenses for the funding of a Catastrophic Impairment Assessment.
2. Ms. Henderson is not entitled to interest on all overdue payments.
3. Ms. Henderson is entitled to her expenses of this Preliminary Issue Hearing.
4. Wawanesa is not entitled to its expenses of this Preliminary Issue Hearing.

Patrick N. Bowles
Arbitrator

July 9, 2015
Date