

Susanna Weeks

From: LATregistrar (MAG) <LATregistrar@ontario.ca>
Sent: September 17, 2018 12:29 PM
To: LAT-AABS; ckorte@mccagueborlack.com; TorClaimsMediation@wawanesa.com
Subject: 17-005604AABS AABS Decision
Attachments: 17-005604 - AABS_Decision.pdf

Dear Parties,

**RE: Tribunal File No: 17-005604/AABS
Bonnie Dorgelo vs. Wawanesa Mutual Insurance Company**

Please see the attached AABS Decision related to your Automobile Accident Benefits Service dispute.

Providing you have any questions with regards to this file please contact the assigned case management officer or the Tribunal via phone 416-314-4260 or via email LATregistrar@ontario.ca.

Sent on behalf of Josh Grant, Case Management Officer

Sincerely,

Barbara Spiece
Case Management Officer
Safety, Licensing Appeals and Standards Tribunals Ontario
Tel: 416-327-3248

<https://slasto-tsapno.gov.on.ca/en/>



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**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**



Tribunal File Number: **17-005604/AABS**

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:

B. D.

Applicant

and

Wawanesa Mutual Insurance Company

Respondent

DECISION

ADJUDICATOR:

Anna Truong

APPEARANCES:

B.D., the Applicant

Robert Durante, Counsel for the Applicant

Erin Murray, Counsel for the Applicant

Catherine Korte, Counsel for the Respondent

Alex Amigud, Representative for the Respondent

Heard in-person on:

June 12-14, 2018

OVERVIEW

- [1] B.D. (the “Applicant”) was involved in an automobile accident on January 21, 2014, and sustained a catastrophic impairment as defined by the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the “Schedule”).
- [2] Pre-accident, the Applicant was a successful artist and jewellery maker. She owned her own art studio where she sold hand-crafted jewellery and original artwork earning a significant yearly income. She hand painted large canvasses requiring the use of a ladder. In addition to her studio, the Applicant also attended art shows to showcase and sell her art. Outside of her art, the Applicant was a strong independent woman in excellent physical and mental health and she lived in her own home in Collingwood. In her free time, she enjoyed kayaking, hiking and yoga retreats with her boyfriend.
- [3] The Applicant was 48 years old at the time of the accident. On January 21, 2014, on the way home with her boyfriend, a car veered into their lane and collided with their car head-on. The last thing the Applicant recalls before the collision is a loud bang which continues to haunt her post-accident. The Applicant was immediately transported to the hospital by ambulance and diagnosed with various serious fractures. As a result of the accident, the Applicant sought attendant care benefits. Attendant care benefits were paid by the Respondent and continue to be paid by the Respondent. However, there is a dispute over the quantum of entitlement to attendant care benefits.
- [4] As a result of this dispute, the Applicant 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.

ISSUES TO BE DECIDED

- [5] The following are the issues to be decided:
1. Is the Applicant entitled to attendant care benefits in the amount of \$6,000 per month from February 7, 2014 to date and ongoing?
 2. Is the Applicant entitled to interest on any overdue payment of benefits?

RESULT

- [6] Based on the totality of the evidence before me, I find the Applicant is entitled to attendant care benefits at a rate of \$839.29 per month from February 7, 2014 to the date of the hearing. The amount of attendant care benefits payable is limited to \$839.29, because that is the amount of economic loss sustained by her non-professional attendant care providers. If the Applicant were to hire a professional attendant care provider, she is entitled to \$5,489.14, the full amount outlined in the Assessment of Attendant Care Needs Form (Form 1) dated April 10, 2018, as long

as she continues to meet the requirements outlined by the *Schedule*. No payments are owed since the Respondent has been paying the attendant care benefits at a higher rate. Therefore, the Applicant is not entitled to any interest.

ANALYSIS

[7] The hearing took place over three days with written closing submissions submitted post-hearing. The last submissions were received on August 3, 2018. The Applicant, her boyfriend, her mother and experts testified at the hearing. I have considered all of the evidence led and I have summarized only what I find relevant to my determination below.

1. Attendant Care Benefits

[8] In order to determine the quantum of attendant care benefits, I must answer the following questions:

- (A) Does the Applicant require supervisory attendant care secondary to her psychiatric impairments?
- (B) Does the February 1, 2014 amendment to section 19 of the *Schedule* apply?
- (C) Should the attendant care expenses be deemed incurred pursuant to subsection 3(8) of the *Schedule*?
- (D) Did the non-professional attendant care providers sustain an economic loss?

(A) Does the Applicant require supervisory attendant care secondary to her psychiatric impairments?

[9] Both parties agree the Applicant requires some level of ongoing attendant care as a result of her psychiatric impairments. The main area of disagreement between the parties with respect to the Applicant's attendant care needs is whether or not the Applicant requires supervisory attendant care secondary to her psychiatric impairments. In order to determine the quantum of entitlement, I must determine whether or not the Applicant requires supervisory attendant care as a result of her psychiatric impairments.

[10] The parties agree the Applicant sustained a catastrophic impairment as a result of the accident. The parties agree the Applicant suffers from Post-Traumatic Stress Disorder, Adjustment Disorder and Somatic Symptom Disorder.

[11] The Applicant argued she requires around the clock supervisory attendant care as a result of her psychiatric impairments. Her Psychotherapist specifically recommends supervisory attendant care from 10 a.m. to 6 p.m. and overnight. The Respondent argued she does not require around the clock supervisory attendant

care as a result of her psychiatric impairments and its Psychiatrist recommends 120 minutes of supervisory attendant care.

- [12] Both parties submitted Form 1s from various OTs. The most recent Form 1s submitted are the Form 1 dated May 15, 2017, by Kathryn Blaney, in the amount of \$1,174.03, and the Form 1 dated April 10, 2018, by Allison LeGros, in the amount of \$5,489.14. These recent Form 1s are fairly consistent in their recommendations, except for the amounts of supervisory attendant care recommended. Whether or not the Applicant requires supervisory attendant care will determine which Form 1 is reasonable and necessary for ongoing entitlement. If I find the Applicant requires around the clock supervisory attendant care, Ms. LeGros' Form 1 will be reasonable and necessary. If I find the Applicant does not require around the clock supervisory attendant care, then Ms. Blaney's Form 1 will be reasonable and necessary.

Applicant's Testimony

- [13] The Applicant provided testimony at the hearing. She testified wearing large headphones that covered her ears. When queried about why she wore the headphones, the Applicant testified the headphones help "take the edge off of sound and it feels protective". In addition to her headphones, the Applicant wore sunglasses to the hearing and only took them off during her testimony after requesting the lights be turned off.
- [14] The following is a summary of the relevant points from the Applicant's testimony. Post-accident, the Applicant is easily overwhelmed by noise, bright lights and sounds. She feels vulnerable when she is outside of her home and around other people. She dreads the night time and finds it challenging and difficult, because everything intensifies at night: her anxiety, her symptoms and her pain. She wakes up multiple times at night due to nightmares and disturbing dreams which causes her to require someone to help her settle down. The Applicant feels she requires someone to be there with her in order to feel safe. Otherwise her anxiety would become so high she would be unable to sleep.

Attendant Care Provider Testimony

- [15] Both the Applicant's boyfriend, N.G., and her mother, B.B., testified at the hearing. They both testified in a forthright and consistent manner, and I found them to be credible.

N.G.'s Testimony (Boyfriend)

- [16] The following is a summary of the relevant portions of N.G.'s testimony. According to N.G., he has taken over the running of the Applicant's studio, because the Applicant is unable to run it. Due to the Applicant's accident-related impairments, the studio was moved to a more accessible location. Despite that, the Applicant is still unable to manage the studio and has only visited it a few times since the move.

- [17] N.G. spends on average 40 hours per week with the Applicant and when he is not there, B.B. is with the Applicant. The Applicant has numerous medical appointments each week and either N.G. or B.B. drives her to these appointments, because she is unable to drive herself. The Applicant suffers from passenger anxiety and must sit in the backseat of the car quietly to control her anxiety.
- [18] According to N.G. the Applicant is easily overwhelmed, so there is limited talking and no music in her home. When the Applicant is overwhelmed, she has a “meltdown” where she turns gray and panics. When things do not go as planned the Applicant reacts in a disproportional manner and has a meltdown.
- [19] N.G. described a meltdown which occurred at a family gathering during Mother’s Day. The Applicant’s brother accidentally burst a balloon and the Applicant dropped to the floor in a fetal position shaking. N.G. comforted her until she regained her composure and they went home. The Applicant explained it felt like she was reliving the accident again, because the last thing she heard before the accident was a loud bang.
- [20] Outside of the meltdowns, the Applicant experiences nightmares and panic attacks during the night, this results in her waking up in a frantic state. In order to calm the Applicant down during these episodes, N.G. comforts her quietly, makes her tea or gives her a light massage. He finds talking to the Applicant does not help during these episodes and sitting quietly with her works better.
- [21] N.G. noted the Applicant is sensitive to noise and smells, so most of her meals are cooked off-site by N.G. or B.B. The Applicant does not cook due to her sensitivity. Furthermore, N.G. recalled one occasion time on which the Applicant tried to cook– she left the stove on.
- [22] According to N.G., the Applicant is incapable of being motivated on her own due to her extreme depression and anxiety. He described the Applicant as a frail child who needed to be cared for. He explained the Applicant would not eat unless food was placed in front of her and if someone is not there with her, she will stay in bed all day and not eat.

B.B.’s Testimony (Mother)

- [23] The following is a summary of the relevant portions of B.B.’s testimony. According to B.B., the Applicant will not eat or take her medication and vitamins unless she is reminded. If she is not reminded, she will not eat. The Applicant will also not get out of bed and get to her appointments on time if she is not prompted due to her depression, pain and lack of desire to face the day. Since the Applicant is sensitive to smells, food is not usually cooked in the house. The Applicant does not cook because she is forgetful and will spill food on the stove. The Applicant is sensitive to noise and is easily disturbed by running water or the clanking of dishes. To cope with this, the Applicant puts her head set on and goes to her room.

- [24] B.B. drives the Applicant to her medical appointments and being in a car causes the Applicant anxiety. She sits in the backseat of the car and has traumatic responses to other vehicles and honking. While in the car, the Applicant is disruptive to her driver because she causes them to be on higher alert as a result of her anxiety and outbursts. B.B. described an incident where there was a near collision in a parking lot and the Applicant started crying. B.B. had to pull over and comfort her before they could continue.
- [25] B.B. described the nighttime as being very stressful for the Applicant. The Applicant usually takes two hours to fall asleep. The Applicant dreads going to bed because she has recurring nightmares and disturbing dreams which causes her to wake up with pain in her chest and arms. When this occurs, B.B. has to comfort and soothe her physically to calm her down. The Applicant wakes up 2-3 times a night and will sometimes call out for B.B. B.B. also helps support the Applicant by providing the comfort of having someone there. Sometimes the Applicant comes into B.B.'s room at night just to make sure she is there.
- [26] B.B. estimated she spends a little over 100 hours a week physically being with the Applicant and that does not include the time spent cooking meals off-site. B.B. explained the Applicant would not be able to function and she would experience high anxiety and panic and not sleep if B.B. was not with her during the night.

Medical Evidence

- [27] In support of her claim for attendant care benefits, the Applicant mainly relied on the reports of Helen Carter, Occupational Therapist, Allison LeGros, Occupational Therapist, Allan Walton, Psychotherapist, and Dr. Philip Miller, Psychologist.
- [28] In the Applicant's Attendant Care Needs Psychological Report dated October 10, 2017, Mr. Walton, and Dr. Miller explained the Applicant struggles emotionally during the day and it is worsened at night when she awakens abruptly alone in the dark. They explained attendant care overnight is essential, because it is often at night individuals are particularly vulnerable as they fall victim to nightmares and the attendant finds a patient who is frightened, extremely anxious and disoriented. Mr. Walton and Dr. Miller opined the Applicant should be provided with attendant care on a psychological basis from 10 a.m. to 6:00 p.m. and then overnight until the frequency of her nightmares diminishes or she gains greater control over them. They stressed it is important to understand the Applicant has been receiving this care and still struggles with significant symptoms. They opined the Applicant's condition would significantly deteriorate and her progress would be impeded from a psychotherapeutic standpoint, if the attendant care was stopped.
- [29] Mr. Walton testified at the hearing. He was qualified as an expert Psychotherapist. His testimony was consistent with his reports and I found him credible. Mr. Walton testified part of the current treatment plan with the Applicant is to try to have her be less reliant on her headphones, because she will not adapt to sound or noise, if she does not hear them. According to Mr. Walton, if the Applicant becomes

overwhelmed, she starts yelling and screaming. He described the same Mother's Day balloon incident as N.G. did in his testimony. Mr. Walton explained when the Applicant gets overwhelmed with anything, too much information or she is asked too many questions, she yells and screams and tries to run away and hide in her bed. Mr. Walton testified N.G. is often the recipient of the Applicant's meltdowns and yelling. N.G. told him the Applicant could be set off by a small comment and she would start shaking, yelling and screaming, fall apart then retreat to her bed.

- [30] Mr. Walton conceded if the Applicant reached a point where the frequency of her nightmares diminishes or she is able to sleep through the night, her need for overnight supervisory attendant care could be revisited. However, he opined the Applicant is not at that point yet and if this care is not provided, the Applicant would almost need to be committed, because she could not function. He noted the Applicant is still struggling even with the amount of care she is currently receiving.
- [31] The Respondent argued less weight should be placed on Mr. Walton's evidence, because he is not a Psychologist or a Psychiatrist. I do not agree. While I fully acknowledge Mr. Walton is not a Psychologist or a Psychiatrist, he is a registered Psychotherapist and he has treated trauma victims- including motor vehicle accidents, for decades. Furthermore, Mr. Walton works in partnership with Dr. Miller, who is a psychologist. Mr. Walton testified at the hearing Dr. Miller reviews his diagnoses and recommendations before they are made. That is why Mr. Walton and Dr. Miller both sign the reports.
- [32] In support of its argument, the Respondent mainly relied on the reports of Linda Cottrell, Occupational Therapist ("OT"), Kathryn Blaney, OT, and Dr. Uri Wolf, Psychiatrist.
- [33] Ms. Cottrell and Ms. Blaney both completed Form 1s for the Applicant. Ms. Cottrell's was dated January 26, 2016, and Ms. Blaney's was dated March 31, 2017. Both Ms. Cottrell and Ms. Blaney recommended 120 minutes of basic supervisory attendant care a day for the Applicant in their Form 1s. Both OTs testified at the hearing.
- [34] Ms. Cottrell, the Respondent's OT, testified at the hearing she recommended 120 minutes of supervisory attendant care, because she felt if the Applicant has a bad dream/nightmare and/or requires support, she can pick up the phone and call someone. She felt the Applicant does not require an attendant to be physically present continuously because the Applicant's needs are intermittent and might not arise on a daily basis.
- [35] In the Respondent's Attendant Care Benefit Psychiatrist's Report dated April 22, 2016, Dr. Uri Wolf, Psychiatrist, diagnosed the Applicant with: Post-Traumatic Stress Disorder, an Adjustment Disorder with Mixed Anxiety and Depressed Mood, and a Somatic Symptom Disorder. He supported the attendant care assistance as recommended by Ms. Cottrell in her Form 1, but did not explain why. Dr. Wolf authored another report dated May 12, 2017, wherein he agreed with Ms. Blaney's

recommendations for attendant care. Again, no explanation was provided as to why the recommendations were appropriate.

- [36] Dr. Wolf testified at the hearing and was qualified as an expert Psychiatrist. At the hearing, he provided an explanation as to why he agreed with Ms. Cottrell's and Ms. Blaney's recommendations for attendant care. His testimony was a bit contradictory. He testified he would not recommend supervisory attendant care to someone with the Applicant's condition, but went on to agree with Ms. Cottrell's recommendation of 120 minutes of basic supervisory attendant care. Dr. Wolf does not provide any justification as to why 120 minutes was reasonable despite his initial opinion that he would not recommend any. Dr. Wolf went on to explain more than 120 minutes per day was not reasonable, because there are no studies or evidence which show having someone sit next to you is a valid treatment for anxiety. Dr. Wolf felt it would actually do harm, as it does not allow the Applicant an opportunity to try coping strategies she has learned.
- [37] I preferred the evidence of Mr. Walton and placed more weight on it than I did on Dr. Wolf. Dr. Wolf does not adequately explain why exactly 120 minutes of supervisory attendant care may be medically required when he initially testified he would not recommend any supervisory attendant care at all. Furthermore, Dr. Wolf's reports are lacking in details: they provide the reader with the diagnoses and refer them to the OT reports for further detail.
- [38] I preferred the evidence of Mr. Walton, because he is the Applicant's treating Psychotherapist and he has been following her condition for four years. He knows her and her condition better than Dr. Wolf who only saw her twice for one hour assessments. Mr. Walton's and Dr. Philip's reports were more thorough and contained interviews from N.G. and B.B. Family interviews are a valuable source of information, especially for patients suffering from psychiatric disorders. It is even more valuable in this case, because the family members are the attendant care providers providing around the clock care. No one would know the Applicant's condition better than them. Furthermore, in addition to treating the Applicant, Mr. Walton also treated N.G., so he would get a different perspective on the Applicant's behaviour and her interactions with others.
- [39] The Applicant's testimony as well as those from her mother and boyfriend, in addition to Mr. Walton and Dr. Miller's reports, combined with the Applicant's presentation at the hearing, paints a picture of a woman with severe psychiatric impairments whose mood is unpredictable due to her anxiety and depression. The Applicant requires prompting to eat and get out of bed on a daily basis. She also requires assistance in managing and driving to her appointments on time. Her meltdowns and nightmares are disruptive and unpredictable.
- [40] While Ms. Cottrell asserts the Applicant can call someone in these situations, I cannot see how someone with the Applicant's psychiatric impairments could control herself effectively in order to call for help over the phone, especially if the Applicant wakes up in the middle of the night in a panicked state afraid she is

going to die. If the Applicant were able to control her psychiatric state so well, she would not require supervisory attendant care at all. Furthermore, N.G., B.B., Mr. Walton and even the Applicant all agree, when the Applicant experiences these episodes, speaking to her does not help. Therefore, Ms. Cottrell's idea of using the phone to call someone would not be effective during her night episodes.

[41] It is clear from the evidence the Applicant has extensive psychiatric impairments, which impact her functioning and ability to adapt to her environment. In fact, her psychological diagnoses support this. From immediately after the accident, the Applicant has been provided with around the clock attendant care by N.G. and B.B. Even with their care and support, the Applicant is still struggling. Everyone familiar with the extent of her conditions and the daily impacts of it, agree if the Applicant were not provided with around the clock supervisory attendant care, her condition would deteriorate. I agree.

[42] Weighing the evidence as a whole, I find the Applicant requires around the clock supervisory attendant care as a result of her psychiatric impairments. However, as mentioned above, in order to determine the quantum of entitlement to attendant care benefits, I must determine whether or not the February 1, 2014 amendment to section 19 of the *Schedule* applies because the Applicant's attendant care providers up to the date of the hearing have been non-professionals.

[43] With respect to ongoing entitlement, since I found the Applicant requires supervisory attendant care as a result of her psychiatric impairments, if she were to hire professional attendant care providers, she would be entitled to the full \$5,489.14 outlined in the Form 1 dated April 10, 2018 of Ms. LeGros, as long as she continues to meet the requirements outlined by the *Schedule*.

(B) Does the February 1, 2014 amendment to section 19 of the *Schedule* apply?

[44] 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]

[45] Subsection 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.

- [46] In plain language, this means professional attendant care providers fall under clause (A) and non-professional attendant care providers fall under clause (B). Non-professional attendant care providers are usually family members.
- [47] Prior to February 1, 2014, case law held once an economic loss was established, an injured person was entitled to the full amount of attendant care outlined in the Assessment of Attendant Care Needs Form (Form 1) for attendant care services provided by a non-professional attendant care provider. At this time, the amount of attendant care benefits payable was determined by the Form 1 and not the specific economic loss incurred by the provider.
- [48] The *Schedule* was amended effective February 1, 2014, to limit the amount of attendant care benefits payable for attendant care provided by non-professional attendant care providers to the amount of economic loss sustained.
- [49] Subsection 19(3)(4) states the amount of attendant care payable for non-professional attendant care providers shall not exceed the amount of the economic loss sustained by the provider during the period while, and as a result of, providing the attendant care.
- [50] In order to determine the quantum of attendant care benefits payable, I must first decide whether or not the February 1, 2014 attendant care amendment (“the amendment”) to the *Schedule* applies to the Applicant’s case.
- [51] The Applicant argued her right to attendant care benefits vested on the day of her accident and the amendment does not apply. The Applicant argued the amendment does not apply to her case, because her accident occurred on January 21, 2014, which pre-dated the amendment, and the amendment cannot be applied retroactively. The Applicant argued it is well-established law application of amendments affecting vested or substantive rights retrospectively should be limited unless there is clear language by the drafters of the legislation.
- [52] The Respondent argued the amendment does apply to this case for two main reasons. First, the legislature intended for this amendment to have an immediate and retrospective effect on all open cases and jurisprudence supports this intention. Second, the Divisional Court has held there are no vested rights under any section of the *Schedule*.
- [53] The Respondent submitted the case of *Barnes v. MVACF*¹, a Financial Commission of Ontario (“FSCO”) appeal by DD Rogers, which I found to be the most persuasive as it deals with the same issue before me. In this case, Ms. Barnes was injured in an accident on January 3, 2012, and sought payment for attendant care provided by her mother who took an unpaid leave of absence to care for her. The question on appeal was whether or not the February 2014 amendment applied to Ms. Barnes whose accident predated the amendment. The original Arbitrator found it did not.

¹ P16-00087 “*Barnes*”

- [54] The original Arbitrator based her decision on the established legal concept that retrospectivity should be limited when it affects vested or substantive rights. The Arbitrator found the amendment had a retrospective application. The Arbitrator further found Ms. Barnes had a vested right to the determination of her benefits without the amendment. Therefore, the Arbitrator concluded the amendment did not apply to Ms. Barnes' case.
- [55] On appeal, DD Rogers held the amendment did apply for several reasons. DD Rogers found the amendment did not have a retrospective application, but an immediate one. He noted the amendment was effective February 1, 2014 and only benefits payable after February 1, 2014 would be subject to the amendment. DD Rogers further found Ms. Barnes did not have a vested right. In coming to this conclusion, DD Rogers relied on an earlier appeal decision in *Gan Canada Insurance Company v. Lehman*², which was upheld at the Divisional Court. In *Lehman*, the DD held there are no vested rights under the *Schedule* because it would be in direct contradiction of section 268(1) of the *Insurance Act*³.
- [56] Section 268(1) states:
- Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the *Statutory Accident Benefits Schedule* is made or amended, shall be deemed to provide for the statutory accident benefits set out in the *Schedule* and any amendments to the *Schedule*, subject to the terms, conditions, provisions, exclusions and limits set out in that *Schedule*. [Emphasis added]
- [57] DD Rogers found "it illogical to apply the concept of vested contractual rights to a relationship in which the parties have no direct input in the terms of their relationship, and the terms may be amended from time to time without their input or consent."
- [58] While *Barnes* is not binding me, I do find it persuasive as it involves an almost identical fact pattern and it does follow the analysis from *Lehman* which is binding on me. Furthermore, *Barnes* goes through the series of conflicting decisions and reconciles them all in a logical and reasonable manner.
- [59] The Applicant submitted many cases to in support of her position. There are two cases I feel compelled to comment on: *Federico v. State Farm Mutual Automobile Insurance Co.*⁴, a FSCO appeal decision by Director's Delegate ("DD") Blackman, upheld at Divisional Court, and *Davis, by her Litigation Guardian Lush v. Wawanesa Mutual Insurance Company*⁵ an Ontario Superior Court of Justice

² P97-00064 "*Lehman*"

³ Insurance Act, R.S.O. 1990, c. I.8

⁴ P12-00022 "*Federico*"

⁵ 2015 ONSC 6624 "*Davis*"

(“ONSC”) decision by Justice Quinlan. Both cases were dealt with by DD Rogers in the *Barnes* decision and I agree with his analysis on both cases.

[60] On *Federico*, DD Rogers found, “The *Federico* approach is inconsistent with s. 268(1) and incompatible with the history of frequent amendments to the SABS, both incremental and wholesale”. He further found DD Blackman’s ruling on vested rights in *Federico* was obiter and not commented on by the Divisional Court. I agree with his analysis.

[61] I found *Davis*, while being an ONSC decision, followed the vested rights analysis from *Federico*, which is in direct conflict with *Lehman* which was upheld at Divisional Court. Furthermore, I found *Lehman* more persuasive than *Davis* being an appellate level decision.

[62] Following the approach in *Lehman* and *Barnes*, I find the Applicant does not have a vested right to attendant care benefits. I also find the amendment does not have a retrospective effect, but an immediate one. I find the February 1, 2014 amendment with respect to the definition of “incurred” does apply to the Applicant’s case. Therefore, the amount of attendant care benefits payable to the Applicant from February 1, 2014 onward shall be limited to the amount of economic loss sustained by her non-professional attendant care providers.

(C) Should the expenses be deemed incurred pursuant to subsection 3(8) of the Schedule?

[63] During closing arguments, the Applicant submitted her attendant care expenses should be “deemed incurred” pursuant to subsection 3(8) of the *Schedule*. Subsection 3(8) allows an expense to be deemed incurred if the expense was not incurred because the insurer unreasonably withheld or delayed payment of that benefit.

[64] This argument was made during closing submissions. There was no evidence led during the hearing in support of this. The only submissions the Applicant made with respect to this argument are legal arguments. There is no evidence before me the Respondent unreasonably withheld or delayed payment of attendant care benefits. In fact, the Respondent was still paying the benefit up to the date of the hearing, albeit at a lesser rate than the Applicant believes she is entitled to. Therefore, I cannot find subsection 3(8) applies and I do not deem the attendant care expenses to be incurred.

(D) Did the non-professional attendant care providers sustain an economic loss?

[65] Since the Applicant’s attendant care providers were non-professional providers consisting of mainly her mother and her boyfriend, in order for attendant care benefits to be payable, the Applicant must prove her non-professional attendant care providers sustained an economic loss in providing her attendant care.

- [66] Based on the evidence presented at the hearing, I find the Applicant's mother, B.B., sustained an economic loss as a result of providing attendant care to the Applicant. B.B. was a part-time manager of a lottery booth for the CNIB. After the accident, B.B. took an unpaid leave of absence from her job to provide full-time attendant care services to the Applicant.
- [67] There were no financial documents of Applicant's boyfriend, N.G., produced as evidence at the hearing. There is insufficient evidence before me to prove N.G. sustained an economic loss as a result of providing attendant care to the Applicant. However, as the Applicant's mother, B.B., has already established she has sustained an economic loss, it is sufficient for attendant care benefits to be payable.

Quantum of Attendant Care Benefits Payable

- [68] Since the amendment applies to the Applicant's case, the amount of attendant care benefits payable is limited to the amount of economic loss sustained by her non-professional attendant care providers.
- [69] In 2013, B.B.'s total income according to her T1 General Tax Return amounted to \$25,405.10. However, \$11,905.98 of that was from Old Age Security and CPP. BB's total employment income in 2013 was \$9,952.67 for the year. In 2014, her total employment income amounted to \$567.42. In 2015, her total employment income was \$0. Therefore, I find the B.B. has sustained an economic loss of \$9,952.67 per year, or \$839.29 per month, in providing attendant care to the Applicant. Accordingly, the amount of attendant care benefits payable is limited to \$839.29 per month from February 7, 2014 to the date of the hearing. However, no payments are owed, because the Respondent has been paying attendant care benefits at a higher rate.

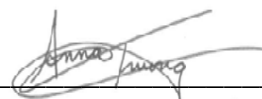
2. Interest

- [70] Since I did not find any payments owing, the Applicant is not entitled to any interest.

CONCLUSION

- [71] For the reasons outlined above, I find the Applicant is entitled to attendant care benefits at a rate of \$839.29 per month from February 1, 2014 to the date of the hearing. If the Applicant were to hire a professional attendant care provider, she is entitled to \$5,489.14, the full amount outlined in the Form 1 dated April 10, 2018, as long as she continues to meet the requirements outlined by the *Schedule*. Since I found no payments owing, the Applicant is not entitled to any interest.

Released: September 17, 2018

A handwritten signature in black ink, appearing to read "Anna Truong", is positioned above a horizontal line.

Anna Truong, Adjudicator