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

Ontario

2018 CanLII 95555 (ON LAT)

Date: 2018-04-03
Tribunal File Number: 17-002592/AABS
Case Name: 17-002592 v CUMIS General Insurance

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:

Applicant

Applicant

and

CUMIS General Insurance

Respondent

DECISION

ADJUDICATOR: **Christopher A. Ferguson**

APPEARANCES:

Counsel for the applicant: **William A.G. Simpson**

Counsel for the respondent: **Peter A.B. Durant**

HEARD in Writing: March 5, 2018

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OVERVIEW

[1] [The Applicant] was injured in an automobile accident on October 10, 2014, and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] (the "*Schedule*").

[2] The applicant applied for benefits from the respondent, and then applied to the Licence Appeal Tribunal (the "Tribunal") when the disputed benefits were denied.

[3] The parties filed an agreed statement of facts, which include:

i. The applicant is a minor. She was catastrophically (CAT) impaired as a result of the accident.

ii. The applicant requires 24-hour daily attendant care services (ACS) and accessible housing suitable for a person confined to a wheelchair.

iii. The applicant's most recent Occupational Therapy (OT) Progress Report confirmed that she continues to require vigilant, consistent and intensive care with supervisory and physical assistance needs.

iv. A Home Accessibility Report was completed on February 5, 2015 and it identified the applicant's current home as the most suitable for her and her family, for a number of agreed-upon reasons.

v. The applicant's mother was also CAT impaired as a result of the accident. She cannot provide ACS to the applicant.

vi. The applicant's father lives in the home to provide attendant care support to the applicant. The applicant's parents no longer have a marital relationship.

vii. Prior to the accident, the applicant and her mother lived with the mother's fiancé, ML, who paid for their rent. ML died as a result of the accident.

[4] The parties agree on the cost of rent and average monthly utilities for the applicant's home. The applicant's current home is described as a three-bedroom bungalow with a basement. Her previous home was a two-bedroom apartment.

[5] The parties also agree that:

i. Despite best efforts, the amount of monthly rent paid for either of the previous apartments rented by the applicant's parents is unknown.

ii. The Ontario Ministry of Housing has determined that the average market rent, for the years 2016 and 2017, in the applicant's community for a 2-

[1] O.Reg. 34/10

bedroom apartment was $965.00 per month. It is unknown if this includes utilities.

iii. The Canada Mortgage and Housing Corporation (CMHC) has determined that the average rent, for the year 2015, in the applicant's community, Ontario, for a private 2-bedroom apartment was $912.00 per month. It is unknown if this includes utilities.

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DISPUTED BENEFITS

[6] The issues before me are:

1. What is the monthly amount of the rehabilitation benefit to which the applicant is entitled from February 1, 2015 to April 1, 2015 and from May 1, 2015 to date and ongoing for the cost of rental housing?

2. Is the applicant entitled to interest on any overdue payment of benefits?

FINDINGS

[7] The applicant is entitled to a rehabilitation benefit in the amounts determined by subtracting the average rent for a two bedroom apartment in her community from the actual rent of her current home and then adding 50% of the actual expenses for utilities in her current home.

(Rent for Current House - Average Monthly Rent 2 Bedroom Apt.)

+ 50% of monthly utilities

= Monthly Benefit Payable

[8] The applicant is entitled to interest on overdue benefit payments at the prescribed rate.

REASONS

[9] The parties agree that the sole issue to be determined in this matter is what portion of the rental cost of the home and utilities the respondent is required to pay pursuant to the Schedule - 2010, 0. Reg. 34/10, s 16, as a rehabilitation benefit.

[10] Section 16 of the Schedule defines the bases for determining whether claimed expenses are payable as rehabilitation benefits. It specifies a number of goods, services and expenses payable as rehabilitation expenses, including housing-related expenses.

[11] The parties agree that the applicant is entitled to some portion of the cost of renting her current home under s.16. The only disagreement is the amount payable.

[12] The applicant argues that she is entitled to the full cost of rent, plus utilities, for her current home. In support of her contention, she argues:

i. The cost of renting her home falls within the scope of rehabilitation benefits prescribed in s. 16(3)(i) of the Schedule, which includes home modifications or the purchase of a new home. She asserts that housing accommodations payable by increased rent are also "goods and services" under s.16(3(l) of the Schedule.[2]

ii. The overall cost of renting her home is reasonable. As it has been identified as the only option available on the rental market for meeting her accessibility and rehabilitation needs by her OT and nurse case manager, it is also necessary.

I note that the respondent flatly states that the applicant's house is not the only suitable home available, but offers no evidence to support its statement.

iii. The rental cost of the home is reasonable and efficient because its space allows her father, as ACS provider, to live in and avoid the additional cost of hiring additional support workers to fulfil his caregiver role. It reduces the cost of ACS for the applicant.

iv. The applicant's father should not be paying rent for the home because he has moved in for the sole purpose of providing ACS.

v. Sufficient living space and additional bathrooms, bedrooms and storage accommodations for family members providing ACS are considered "goods and services" under s. 16(3)(l) of the Schedule and are payable as a rehabilitation benefit.[3]

vi. The applicant's mother's pre-accident rent should be calculated as $0 for deduction purposes because at the time of the accident she lived with her late fiancé, who paid the rent. As a CAT impaired single mother of young children, the applicant's mother cannot afford to rent MM's home.

[13] The applicant urges me to apply a broad and liberal interpretation of the Schedule in determining this matter. She submits that s. 16(3)(l) is a "catch-all" provision intended to ensure that in "unique circumstances", such as this case, "unorthodox solutions are advanced and accepted." She notes that the Tribunal has affirmed

[2] The applicant cites *MacMaster v. Dominion of Canada General Insurance Company*, [1994] FSCO A-006025, 1994 CarswellOnt 4976, at para.61 in support of her assertion.

[3] The applicant cites *MacMaster*, ibid. at para.62 in support of her contention.

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that the inclusion of s. 16(3)(l) "demonstrates the Legislature's intention that rehabilitation expenses be construed as broadly as the needs of the claimant for rehabilitation require."[4]

[14] She also asserts that the courts have "repeatedly held" that "insurance coverage provisions should be construed broadly and exclusion clauses narrowly" as the result of the Supreme Court's guidance in Smith v. Cooperators[5] – which defines a primary objective of automobile insurance law as "consumer protection".

[15] The applicant argues in the alternative that if she is not entitled to the full rent, then the deduction for pre-accident housing costs should be for an amount determined by the average cost of a two bedroom apartment in her community.[6] Her position is that this approximates the rent paid by her fiancé for their pre-accident home. She also argues that the respondent should pay utilities as part of the benefit.

[16] The respondent contends that the applicant is entitled to the cost of rent for her current home minus the estimated cost of a three-bedroom apartment in her community[7], and exclusive of utilities, because:

i. Sections 14 and 15 of the *Schedule* only require the insurer to pay for reasonable and necessary medical/rehabilitation benefits or for expenses incurred by an insured person **as the result of an accident**, and s.16 links payment of rehabilitation expenses, including home modification or a new home, to **disability resulting from impairment**. Therefore, the respondent argues there is no obligation for it to cover the full cost of housing for any insured person.

ii. The applicant and her family had housing costs before the accident and would continue to have such costs had the accident never happened. The housing costs resulting from the applicant's accident-caused impairments are only those that are above the costs that she and her parents would have been paying had the accident not occurred.

iii. There is no evidence of a difference in pre-accident versus post-accident utilities needs or costs for the applicant or her family. It is plausible in fact that the costs of utilities for two homes – given that the applicant's parents had separate residences pre-accident – were actually higher than the costs for their single home. Therefore, the respondent argues, the applicant's utilities expenses do not stem from the accident and are not payable.

iv. The purpose of the *Schedule* and related insurance law is to return the applicant to her pre-accident level of function. The respondent submits that the partial coverage of rent that it proposes achieves that purpose. The

[4] She quotes *16-001811 v Wawanesa Mutual Insurance Company*, 2017 CanLII 44824 (ON LAT).
[5] *Smith v. Cooperators General Insurance Company,* [2002] 2 S.C.R. 129, 2002 SCC 30
[6] As reported by the Ontario Ministry of Housing for all relevant periods
[7] As reported by *Canada Rental Housing Corporation Reports* for all relevant periods

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applicant is not entitled to a windfall as the result of the accident: coverage of the full rental cost plus utilities would represent such a windfall.

[17] My determination of this issue is guided by my reading of the following principles set out in *MacMaster*[8], a decision referenced by both parties and one in which the arbitrator noted that she was following precedents set by a number of other arbitration decisions:

i. The purpose of the *Schedule* and related insurance law is to return the applicant to her pre-accident level of function, to the extent that is reasonably possible.

ii. "If, **as the result of the accident,"** the applicant requires a different and more expensive type of housing than she had before the accident, the necessary expenses fall squarely within s.16 of the *Schedule*.

iii. An applicant claimant "is not required to accept accommodation which would have been unacceptable to him before the accident."

iv. An "applicant is not entitled to a 'windfall' as the result of his accident. She "must be reasonable in working with the Insurer [*sic*] to reach a solution which, while it may not be ideal, is workable and reasonable."

v. The applicant's ordinary (i.e. pre-accident) accommodation expenses should be recognized in calculating the benefit to be paid for providing post-accident accommodations.

vi. In *MacMaster*, which like this case dealt with an applicant moving from an apartment to a house, it was found that:

a. Additional bedrooms and bathrooms for family members providing ACS were determined to be **accident related** costs.

b. Two bedrooms were considered to be ordinary and costs that were unrelated to the accident ("unrelated costs"), because before the accident, the applicant and his brother in that case had lived in a two-bedroom dwelling.

c. "Unrelated costs" was defined as "the rent that the applicant would pay for a two-bedroom apartment had the accident not occurred."

[18] In this case, I find that the respondent is liable to pay an amount toward rent for the applicant's current home to be determined by subtracting the average rent of a two bedroom apartment in the applicant's community from the rent being charged for the applicant's current home.

[8] *MacMaster v. Dominion of Canada General Insurance Company*, [1994] FSCO A-006025, 1994 CarswellOnt 4976, referenced by both parties.

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[19] Applying the principles in *MacMaster*, the reasons for my determination are as follows:

i. There is no statutory/regulatory basis or precedent in the submissions for failing to account for the applicant's pre-accident housing expenses, nor was I provided with a precedent for finding that the full cost of housing and utilities is payable as a rehabilitation benefit. I find that I should recognize the applicant's ordinary (i.e. pre-accident) accommodation expenses in determining the benefit to be paid for providing post-accident accommodations.

ii. I do not share the applicant's position that I should impose the full cost of rent and utilities on the respondent, and in effect free the applicant's biological father from contributing to the cost of renting the applicant's home from his ACB income, because he moved in to provide ACS to his daughter. There is no legal basis offered to support this position. ACBs in this case replace lost income, and an ordinary use of income is to pay rent and utilities for oneself and for minor offspring.

iii. The applicant and her mother lived in a two bedroom apartment before the accident. I find it reasonable and logical to assert that their ordinary, pre-accident housing benchmark and cost was a "two bedroom apartment". As in *MacMaster*, the two bedroom apartment is the portion of housing costs unrelated to the accident, and not compensable by the respondent.

iv. The applicant offers no evidence or legal precedent for calculating her pre-accident housing expenses as "zero" on the basis that they were paid by her mother's deceased fiancé.

v. The applicant's evidence is that she, her mother and her mother's fiancé occupied the pre-accident dwelling for "a few days" prior to the accident. I find that this very brief period of time is too short to make her assertion of zero pre-accident housing expenses credible or fair as a benchmark for determining pre-accident housing costs in this case.

vi. I find that reducing the respondent's proposal of deducting the rent for a three bedroom apartment to a deduction for a two bedroom apartment is a fair way to account for the applicant's entitlement to benefits to cover the cost of an extra room to be used by a family member providing ACS. The respondent failed to address this entitlement in its submissions and proposal.

vii. I agree that requiring full coverage of the home rental cost and utilities would represent a "windfall" for the applicant within the meaning of *MacMaster*, to which she is not entitled.

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viii. I find that setting the average rent for a two bedroom apartment as the benchmark for pre-accident housing costs, while it may not be ideal from the applicant's perspective, is workable and reasonable.

[20] I have decided that the respondent also is liable to pay half of the costs of utilities for the applicant's current home. I have decided that this is a fair and reasonable determination because:

i. There is no evidence that the utility expenses of the applicant and her family have been affected by the accident: they are ordinary, unaffected expenses. I agree with the respondent that there is no basis for imposing the full costs of utilities on the respondent.

ii. The parties agree that the average rents reported by the CMHC and the Ministry of Housing Ontario (MHO) "may or may not include some or all utilities" according to those sources. I agree with the applicant that using these sources may inadvertently lead to an inflation of the deductible housing costs, which is unfair.

iii. In the absence of better evidence, splitting the risk and cost appears to me to be the simplest and fairest way to resolve this part of the issue with a solution that is reasonable and necessary.

[21] The parties have used different but credible sources of information to establish average local rents for apartments. Neither has questioned the validity of the other party's figures for average rents.

[22] I find that the deduction to be made from the rent payable by the respondent should be the lower of the rates found in the CMHC or MHO sources as of the date of this decision. This is consistent with the "liberal interpretation" principles set out by the courts and argued by the applicant in this matter.

[23] The respondent is liable to pay the applicant a benefit sufficient to cover her monthly rent expenses using the historical and current rates for each period in dispute, according to the following formula:

(Rent for Current House - Average Monthly Rent 2 Bedroom Apt.)

+ 50% of monthly utilities

= Monthly Benefit Payable

"Average monthly rate" means the **lower** of the rates found in the CMHC or MHO sources as of the date of this decision.

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Interest

[24] Section 51 of the *Schedule* sets out the criteria for assessing and awarding interest on overdue payments.

[25] The evidence indicates that the respondent has not been paying benefits to cover rent or utilities for the applicant's housing. Accordingly, there are overdue payments on which the respondent is liable to pay interest at the prescribed rate.

CONCLUSIONS

[26] The respondent is liable to pay the applicant a benefit sufficient to cover her monthly rent expenses using the historical and current rates according to the following formula:

(Rent for Current House - Average Monthly Rent 2 Bedroom Apt.)

+ 50% of monthly utilities

= Monthly Benefit Payable

"Average monthly rate" means the lower of the rates found in the CMHC or MHO sources as of the date of this decision.

[27] As noted, there is interest payable by the respondent on any overdue payments to the applicant, at the prescribed rate.

Released: **April 3, 2018**

Christopher A. Ferguson
Adjudicator

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