Financial Services Commission of Ontario

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Date: May 1, 2017

PLEASE DELIVER THIS DOCUMENT TO:
S.V.P. FAIRE PARVENIR CE DOCUMENT A:

NAME/Nom:	**Mr. Joseph Campisi Jr.** **Campisi LLP Personal Injury Lawyers**
FAX/Télécopieur:	**(416) 203-7775**
REFERENCE/Objet:	**Mr. Anthony Cowdrey and/et Motor Vehicle Accident Claims Fund**

SENT BY/Expédié par:

NAME/Nom:	**Charlene Lobo** (*for Arbitrator Mervin*)
TELEPHONE/Téléphone:	**(416) 590–7060**
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REFERENCE/Objet:	**A14-002444**

NUMBER OF PAGES TO FOLLOW/Nombre de pages B suivre:

46

Message: Reasons for Decision
(*Copy to follow via regular mail*)

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May 1, 2017

Sent via facsimile transmittal to counsel

Mr. Joseph Campisi Jr.
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Mr. Robert Kerkmann
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703-85 Richmond Street West
Toronto ON M5H 2C9

Dear Mr. Campisi Jr. and Mr. Kerkmann:

Re: Mr. Anthony Cowdrey and Motor Vehicle Accident Claims Fund
MVA: September 15, 2013
Commission File №: A14-002444-ANSY
File №: 13-0656 (Applicant)
Claim №: 307903

We enclose the decision of the Arbitrator in this matter.

If there is a typographical, computational or other minor error in the decision, please contact Angelina Syengkun, Case Administrator, at (416) 590–7972 by **Monday, May 8, 2017.**

Yours truly,

John Lobo, Project Director, Auto Services
Automobile Insurance Division

Copies to:

Mr. Anthony Cowdrey
42-533 Rathburn Road
Etobicoke ON M9C 3T2

Mr. Javier Aramayo
ADR Coordinator
Motor Vehicle Accident Claims Fund
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-Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

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FSCO A14-002444

BETWEEN:

ANTHONY COWDREY

Applicant

and

MOTOR VEHICLE ACCIDENT CLAIMS FUND

Insurer

REASONS FOR DECISION

Before: Alan Mervin

Heard: December 7, 8, 9, 10, 11, 2015, and February 3, 2016

Appearances: Joseph Campisi Jr. for Mr. Cowdrey
Robert Kerkmann for Motor Vehicle Accident Claims Fund

The Applicant, Mr. Anthony Cowdrey, was injured in a motor vehicle accident on September 15, 2013. He applied for and received statutory accident benefits from the Motor Vehicle Accident Claims Fund ("the Fund"), payable under the *Schedule*.[1] Disputes arose regarding Mr. Cowdrey's claims for attendant care and other benefits, and the parties were unable to resolve their disputes through mediation.

Mr. Cowdrey then applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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[1] *The Statutory Accident Benefits Schedule — Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

Issues:

The issues in this arbitration, as stated in the pre-hearing report, are as follows:

1. Is Mr. Cowdrey entitled to attendant care benefits at the rate of $6,000.00 per month from the date of loss to date and ongoing, less amounts paid?

In closing submissions, Mr. Cowdrey re-stated the issues in this arbitration as follows:

1. What level of attendant care is reasonable and necessary to ensure Mr. Cowdrey's safety?

2. Is Ms. Kramm entitled to $54,717.00 payment for attendant care services provided to Mr. Cowdrey between March 15, 2014 and June 2015?

3. Is Ms. Partyka entitled to $13,797 payment for attendant care services provided to Mr. Cowdrey between April 2015 and September, 2015?

The Fund also has raised the following sub-issue in its written submissions:

1. Does s. 19(3)4 of the *Schedule*, which was in force on February 1, 2014, apply to the determination of Mr. Cowdrey's entitlement to attendant care benefits, in respect of attendant care services provided after February 1, 2014?[2]

Result:

1. Mr. Cowdrey requires 24 hour attendant care services in order to ensure his safety.

2. Mr. Cowdrey is entitled to up to $6,000.00 per month for incurred attendant care.

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[2]Written Submissions of the Respondent Regarding Ontario Regulation 347/13 and the February 1, 2014 amendment to the Attendant Care Benefit, January 8, 2015

3. Ms. Kramm is entitled to payment for attendant care services provided between March 15, 2014 and June, 2015 in the amount of $41,025.50.

4. Ms. Partyka is entitled to payment of $13,797.00 plus interest for attendant care services provided to Mr. Cowdrey between April 2015 and September 2015.

5. Mr. Cowdrey's claim for attendant care did not vest at the time of the accident.

6. Section 19(3)4 of the *Schedule*, which was in force on February 1, 2014, applies to the determination of Mr. Cowdrey's entitlement to attendant care benefits, in respect of attendant care services provided after February 1, 2014.

7. Mr. Cowdrey is entitled to his expenses

Background

Mr. Anthony Cowdrey was involved in a serious single vehicle motorcycle accident on September 15, 2013, at approximately 12.38 a.m. He was riding alone on St. John's Rd, in Innisfil, when he struck a pothole and was thrown off his motorcycle. He lost control, and hit a sign pole. He was 34 years of age at the time of the accident, and had one son, Tyler, age 3 who resided with his former partner, Szylvia Kramm. Ms. Kramm was employed as a full time registered pediatric nurse at Mount Sinai Hospital.

As a result of the accident, Mr. Cowdrey suffered multiple injuries, some of which were life-threatening, including fractures of his skull, face and jaw, damage to his eyes, contusions, lacerations and abrasions, soft tissue injuries and broken ribs and bones.

First responders at the scene found him to be non-verbal, and covered with blood. His Glasgow Coma Score was noted as 7/15. His helmet was found on the ground some distance away and was found to contain brain tissue.

He was initially taken by ambulance to Royal Victoria Hospital in Barrie, then immobilized and airlifted by ORNGE air ambulance to Sunnybrook Hospital in Toronto. At Sunnybrook, his Glasgow Coma Score was noted as 8/15.

He was put into a medically induced coma for two weeks, until October 1, 2013 and while in hospital, he underwent several surgical procedures to repair his injuries. He has no memory of the accident.

He remained in hospital for an additional 2 weeks after he regained consciousness, and was then discharged to the home and care of Sylvia Kramm, on October 16, 2013.

At the time of the accident, Mr. Cowdrey and Ms. Kramm had ended their relationship and had been separated for about a year. Although they were no longer living together as a couple, they remained friends and shared parenting of their son.

Ms. Kramm became his primary caregiver upon his discharge, and he resided with her until July 2014, when he moved to his own residence. The Fund had accepted, albeit on a provisional basis, that Mr. Cowdrey was catastrophically impaired, and paid Attendant Care services, from October 16, 2013, at the maximum rate of $6,000.00 monthly. The Fund relied on a Form 1 submitted by Ms. Katie Denby, Mr. Cowdrey's Occupational Therapist (OT), until March 2014, when the Fund stopped payments. Ms. Denby's Form 1 and report opined that Mr. Cowdrey required 24-hour attendant care because of his numerous impairments, primarily for safety reasons.

Ms. Kramm continued to provide attendant care services without remuneration and remained his primary caregiver until July 2014 when Ms. Terry Partyka, a qualified Personal Services Worker (PSW), was hired. From July 2014 to March 2015, Ms. Kramm and Ms. Partyka shared attendant care duties.

In March, 2015, Mr. Cowdrey was assessed at the request of the Fund by Angela Fleming, OT. Ms. Fleming assessed the quantum of Attendant Care required at $854.79 monthly, and the Fund relied on her Form 1. Ms. Fleming opined that Mr. Cowdrey did not require 24 hour Attendant

Care, as aids such as a shaker bed alarm and cueing, could ensure Mr. Cowdrey's safety at night. Her Form 1 allotted 60.25 hours for Level 2 Attendant Care.[3]

On March 15, 2014, the Fund stopped payments to Ms. Kramm, following new amendments to section 3(7) of the *Schedule* which came into force on February 1, 2014 and added additional entitlement requirements. The Fund took the position that she was not eligible for payment under the amended section, as she did not qualify as a professional attendant, and had not provided proof that she sustained an economic loss at least equal to invoiced amounts as would be required from a non-professional service provider.[4]

Ms. Terry Partyka, a Personal Services Worker, was hired to provide attendant care services to Mr. Cowdrey on an ongoing basis, and from July 20, 2014 to March 2015, Ms. Partyka and Ms. Kramm shared attendant care services.

Although the Fund accepted from the outset that Ms. Partyka met the criteria in s.3(7)(e)iii)(A),[5] the Fund stopped all further payments to Ms. Partyka from April 15, 2015 onwards, when the Fund discovered that Ms. Partyka had invoiced for several days on which she did not provide service. Going forward, the Fund doubted the veracity of all of her invoices. The amounts, if any that may be owing to Ms. Kramm and/or Ms. Partyka are therefore in dispute, as well as the rate at which the services are paid going forward.

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[3]Form 1 and Assessment of Attendant Care Needs by Angela Fleming, OT, dated March 24, 2015, Joint Medical Brief, Volume II, Exhibit 4, Tab 26

[4]See discussion regarding section 3(7)(e)(iii) which created two classes of attendants, with different requirements for entitlement.

[5]Fund Written Submissions, Page 5, Paragraph 15

THE LAW:

Admissibility of Surveillance:

The Fund had obtained surveillance prior to the hearing regarding Ms. Partyka, and sought to introduce the surveillance into evidence. The surveillance evidence consisted of video surveillance and accompanying documents.

The Applicant objected to its admissibility as the evidence was served just over a week before the hearing, only a few days prior to the hearing, and well within the 30 day rule as set out in s.40 of the *Dispute Resolution Practice Code* (the "*Code*").[6]

While an arbitrator has a discretion to waive this time limit if there are cogent reasons to depart from the Rule, after hearing submissions from both parties, the Fund did not advance any reasons for the delay in service that might convince me to waive the 30 day requirement. I found the surveillance evidence to be inadmissible.

Entitlement to Attendant Care:

Prior to coming into force of the new *Schedule* on September 1, 2010, the test for entitlement to attendant care was whether the claim was reasonable and necessary.

Section 19(1) of the *Schedule* stated that an insurer shall pay an attendant care benefit for all reasonable and necessary expenses incurred by or on behalf of an insured person as a result of the accident for services provided by an aide or attendant.

Section 19(2) of the *Schedule* states that the monthly amount payable for non-catastrophic injuries shall be determined in accordance with a completed Form 1, "Assessment of Attendant Care Needs".

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[6] *Dispute Resolution Practice Code*, section 40

Section 19 of the *Schedule* added the additional requirement that the expense must also be incurred in accordance with the definition provided under paragraph 3(7)(e).

The amount of the benefit payable under the *Schedule* is capped at $3,000 per month, up to 104 weeks post-accident in non-catastrophic cases. Where the Applicant is found to have sustained a catastrophic impairment, the limit is $6,000.00 monthly (up to $1,000,000.00), and the 104 week time limit does not apply.[7]

EVIDENCE AND ANALYSIS

The Effect of Ontario Regulation 347/13, February 1, 2014, on Attendant Care Claims

The *Schedule* was amended, effective February 1, 2014. Prior to the amendment, a non-professional service provider could successfully claim all costs of the services which were provided, as long as the service provider could show that any economic loss, no matter the amount, was sustained.

The amendment limited recovery for services provided by non-professional service providers to the amount of the economic loss the service provider sustains as a result of providing the services.

In *Henry v Gore Mutual Insurance Company*,[8] which was decided prior to the amendment, the Applicant's mother was the service provider, and the issue was whether she was required to show economic loss equivalent to the amount invoiced for services.

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[7]s. 20 of the *Schedule*

[8]Respondent Book of Authorities, Tab 19 [2012] O.J. No. 2928

The Court found that proof of any economic loss was a threshold requirement only, and was sufficient to trigger entitlement to the benefit. The Ontario Court of Appeal[9] affirmed the decision, reasoning that, had the legislature intended to limit the amount of the benefit to the amount of the economic loss, it would have done so.

In December 2013, perhaps at least partly because of the decision in *Henry*, the government brought forward Ontario Regulation 347/13 (O. Reg. 347/13) which came into force on February 1, 2014, limiting the amount of economic loss of non-professional service providers, such as friends or family, to the amount of economic loss sustained by the service provider.

The *Summary of Decision*[10] regarding the passage of Regulation 347/13 cited by the Fund, states that the amendments will help reduce costs and uncertainty in the system by continuing to crack down on abuse and fraud.[11]

Did Mr. Cowdrey acquire a vested right to Attendant Care Benefits prior to the enactment of Ontario Regulation 347/14 on February 1, 2014?

Mr. Cowdrey has argued that the claim for attendant care had vested at the time of the accident. The accident was prior to the amendment, and the amendment therefore, would not apply when determining entitlement to attendant care benefits in his case.

In support of his position, Mr. Cowdrey relies on the decision in *Federico v. State Farm Mutual Insurance Company*,[12] which held that an accident benefits claim becomes sufficiently concrete for a substantive right to materialize on the date of the accident. In that case, Director's Delegate Blackman held that the provision in the new *Schedule* effective September 1, 2010, which

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[9][2013] O.J. No. 3792

[10]Amendments to the Statutory Accidents Benefits Schedule, Ontario. Regulation 34/10, Respondent's Book of Authorities, Tab 5

[11]Fund Written Submissions, Page 7, Paragraph 6

[12](FSCO A08-001138, March 23, 2012); upheld on appeal (FSCO P12-00022, March 25, 2013); application for judicial review dismissed (2014), 236 A.C.W.S. (3d) 202; 2014 ONSC 109 (Div. Ct.).

reduced entitlement to interest on overdue benefits, did not apply to the insured as the insured had acquired a vested right.

Mr. Cowdrey further submits that this proposition has been cited in at least two other reported cases, citing the decisions in *Zaya v. State Farm Mutual Automobile Insurance Company*,[13] and *Kulavereerasingam v. State Farm Mutual Automobile Insurance Company*.[14]

The Fund argues that the amendment applies to Mr. Cowdrey's case.

In its written submission, the Fund stated that "the circumstances that entitled him to an attendant care benefit after February 1, 2014, were not sufficiently constituted, concrete or materialized prior to the amendment. There were substantial conditions to be met before he could establish a valid claim to attendant care benefits after February 1, 2014 - he must be alive, have ongoing impairment, have a need, receive services, and incur an expense."[15]

The Fund argues that need for attendant care is constantly changing, and varies depending on the circumstances of the Applicant at the time of the assessment. Entitlement to a benefit for any period of time is therefore dependent on these conditions being met.

The Fund has submitted that Mr. Cowdrey's claim to the attendant care benefit had not yet crystallized at the time of the accident, nor had it crystallized when he made his attendant care claim which was after the amendment came into force.

Should I find that Mr. Cowdrey had somehow acquired a vested right to attendant care prior to the amendments, the Fund submits that its secondary position is that the right was displaced, as it

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[13](FSCO A12-005753, November 28, 2014)

[14](FSCO A12-004423, February 2, 2015)

[15]Written Submissions of the Respondent Regarding Ontario Regulation 347/13 and the February 1, 2014 amendment to the Attendant Care Benefit, January 8, 2015, Page 12, Paragraph 31

is apparent from all the circumstances that the legislature intended the new legislation to be applied retroactively.

The issue of when an interest or expectation achieves the status of a vested or accrued right was addressed by the Supreme Court of Canada in *Dikranian. v. Quebec (Attorney General)*[16], which quoted from the analysis found in *The Interpretation of Legislation in Canada by Pierre-Andre Côté* in its judgement:[17]

> "Côté maintains that an individual must meet two criteria to have a vested right: (1) the individual legal [juridical] situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's commencement."

The Court agreed with the Côté analysis that this analysis is the correct test to determine if and when a right has vested.

In the very recent appeal of *Motor Vehicle Accident Claims Fund and Barnes*[18], decided post hearing, and which the parties have recently asked me to consider, the issue of when a right vests was discussed at length by Director's Delegate Rogers.

In that decision, the Director's Delegate disagreed with the decision of the Arbitrator, who found that the claimant had acquired a vested right, based on a concession by the Fund that the amendment affected Ms. Barnes' substantive right to attendant care benefits. Based on this concession, the Arbitrator then ruled that the amendment did not apply, and ruled that Ms. Barnes had acquired a vested right.

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[16]*Dikranian. v. Quebec (Attorney General)* [2005] 3 S.C.R. 530, for a discussion as to when rights vest.

[17](2011) 4th Côté, p160

[18](FSCO P16-00087, April 6, 2017)

In his decision, he stated that the issue of the applicability of amendments to earlier accidents is not new. He commented that in *Barnes*, the arbitrator in making her determination referred to the rules regarding temporal application of legislation, as established by the Supreme Court in *R v. Dinley.*[19] Those rules are as follows:

(i) Cases in which legislation has retrospective effect must be exceptional;

(ii) Where legislative provisions affect either vested or substantive rights, retrospectivity has been found to be undesirable;

(iii)New legislation that affects substantive rights will be presumed to have only prospective effect unless it is possible to discern a clear legislative intent that it is to apply retrospectively;

(iv)New procedural legislation designed to govern only the manner in which rights are asserted or enforced does not affect the substance of those rights and is presumed to apply immediately to both pending and future cases;

(v) The key task in determining the issue lies not in labelling the provision "procedural" or "substantive", but in discerning whether they affect substantive rights; and

(vi)The fact that new legislation has an effect on the content or existence of a right is an indication that substantive rights are affected.

In *Barnes*, the Fund conceded that the amendment affected Ms. Barnes' substantive right to attendant care benefits. The Arbitrator ruled that, based upon that concession alone, the amendment could not apply to Ms. Barnes, so she did not have to also show that she had a vested right to the benefits in dispute.

[19][2012] 3 S.C.R. 272

The Arbitrator relied on the second rule above where the Court states that retrospectivity is undesirable, where provisions affect either vested or substantive rights, and referred to *Federico and State Farm Mutual Automobile Insurance Company, supra*, in which Delegate Blackman held that the provision in the new *Schedule*, which reduced entitlement to interest on overdue benefits from 2% to 1%, did not apply to the insured person. He found that the insured person had acquired a vested right to the higher interest rate. He agreed with the Arbitrator, who also relied on the decision of the Superior Court in *Davis, by her Litigation Guardian Lush v. Wawanesa Mutual Insurance Company*[20] which held that the amendment at issue in that case did not apply to accidents that occurred before February 1, 2014.

Delegate Rogers disagreed. He stated that:

> the Arbitrator declined to follow the logic of other appeal decisions that conflict with *Federico* and confirm the ability of the Legislature to change insurance policies from time to time under s. 268(1) of the *Insurance Act*. The Arbitrator distinguished the other decisions on the grounds that the accidents in those cases occurred after the amendments. She noted that the language of s. 268(1) is very general and she preferred *Federico* because the Delegate's decision was upheld on appeal to the Divisional Court.

I prefer Delegate Rogers' analysis, and agree, as he noted, that the Legislature has the ability to change insurance policies from time to time. However, whether the accident occurred after the amendments or not should not make a difference if it is found that the right to the benefit has vested in the insured.

I do not agree with the Applicant's submission that the claim for attendant care benefits had vested at the time of the accident, despite a finding to the contrary in *Federico,* which can be distinguished on its facts. I find that the claim did not vest at the time of the accident, and is therefore subject to the requirements of the February 1, 2014 amendments for the following reasons:

[20] 2015 ONSC 6624

1. The claim had not crystallized sufficiently at the time of the accident for it to have vested. At that time, it would be virtually impossible to determine if attendant care would be required after hospital release because the severity of the injuries, the degree and pace of recovery, and other factors are constantly changing, and cannot be determined with any degree of certainty at the time of the accident.

2. Although the Applicant has cited several cases (supra) where it has been found that the right to a particular benefit had vested at the time of the accident, (ie, *Federico, supra*) those cases can be distinguished on their facts.

3. The new regulation contained no transitional provisions in situations such as this, where an accident occurred prior to the amendment, but the claim is made after the amendment comes into force. These type of situations could have been anticipated, and exceptions could have been set out in the new sections, had the government intended that the amendments did not apply to certain situations. However, the legislation was silent in this regard.

4. Although it has been said that the government does not intend to interfere with vested rights, if that was the case, the legislation would have spoken to exceptions in the regulation. The legislation was silent in this regard. The regulation, on a plain reading, was intended to apply to all claims after February 1, 2014.

I therefore find that Mr. Cowdrey's right to attendant care had not vested at the time of the accident, and, as of February 1, 2014, his claim for attendant care benefits is subject to the new amendments going forward.

Is the Fund an "Insurer"?

The Fund argued alternatively that Section 19 of the *Schedule* refers to payments to an "insured person", and therefore, as the Fund is a statutory creation, there is no contractual relationship entered into between the parties. There is no policy of insurance between the parties defining the

rights and conditions of the respective parties, as the rights to benefits are created and specifically defined in the statute.

In many other sections of the *Schedule*, the use of the words "insurer" and "insured" are used as preambles to the requirements of the section.

Clearly, the Legislature created the Fund so as to be available to those unlucky enough to be involved in accidents where there was no insurance company against which to advance a claim for accident benefits.

Accident benefit legislation has often been described as being consumer oriented. Should the Fund not stand in the place of an insurance company, it would be most unfair to accident victims, who required treatment, and, in my view, would defeat the purpose of the Fund.

The Applicant has submitted that the Fund stands in place of an Insurer, and I agree. An injured person is entitled to the benefits as defined in the statute, as an "insured", despite the absence of an insurance policy.

Does Ms. Kramm meet the entitlement requirements of section s3 (7) (e) (iii) (A) or (B) to be paid for her services after March, 2014?

Mr. Cowdrey argues that the training and duties of a full time Registered Nurse, together with her past experience as a home care nurse, encompasses and exceeds all of the duties of a PSW.

In its written submissions, the Applicant stated that, among other things, she was qualified to maintain a prosthesis, shave another person, trim fingernails and toenails, provide assistance with eating and assist with walking, and generally performing patient care[21] and did not have to prove that she sustained an economic loss.

[21]See Applicant's written submission, Page 25 at Paragraph 89, listing all of Ms. Kramm's qualifications and duties as an R.N, and again at paragraph 105 duties as a home care nurse.

The Fund submitted that her work at Mount Sinai Hospital did not meet the test for entitlement to payment as a professional service provider. The Fund argues that, although she was a registered nurse at the time of the accident, as a pediatric nurse, she was not a person who provided the services in the course of the employment, occupation or profession in which he or she would ordinarily have been engaged.

The Fund further submits that, had Ms. Kramm provided nursing services to Mr. Cowdrey at the hospital, or alternatively, if she held a second job outside the hospital that involved providing attendant care services immediately prior to the accident, she would then be eligible as a professional service provider.

The Fund submitted that she would therefore fall into the non-professional service provider category. According to the Fund, she was a family member, and would therefore be required to prove she sustained an economic loss, as required by Section 3(7)(e)(iii)(B).

The cases cited in support of the Fund's position are, in my view, distinguishable on the facts.

The Fund cited the decision in *Josey and Primmum Insurance Company*,[22] in support of its position. In that case, the services were provided by the Applicant's spouse, who was a stay at home, full time unpaid caregiver to their three children prior to the accident. Arbitrator Fadel found that this did not amount to employment, occupation or profession because she was not remunerated for her services.

In *Shawnoo v. Certas Direct Insurance Company*,[23] care was provided by the Applicant's mother, who, although a trained PSW, was not working outside the home for remuneration as a PSW or health care aide prior to the accident. The Court found that because of this, she must be excluded from receiving benefits under the *Schedule,* as she did not show that she had sustained an economic loss.

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[22](FSCO A13-005768, October 31, 2014)

[23][2014] O.J. 6213

In both *Josey* and *Shawnoo*, the service providers in those cases, were family members, living in the home.

In my view, Ms. Kramm was not a family member, at least so far as contemplated by the legislation. She was an experienced registered nurse, employed as such, at the time of the accident, and her qualifications and training met or exceeded those of a PSW.

More realistically, she was in a similar position to that of an ex-spouse after a divorce or separation, or an ex-common law spouse. The legislation was put in place with a view to prevent windfalls to people, such as a wife or mother of an applicant, who would otherwise be in the home in any event and provide care to an injured family member.

Mr. Cowdrey trusted her, and the allowed him to stay with her after his discharge during his recovery in order that she could provide care. To discharge her and force him to hire a PSW instead, is in my view untenable.

Although Ms. Kramm was examined as to her training and duties in the past, she was not questioned in any detail specifically as to a pediatric nurse's duties in the hospital, and how they would differ from adult patient care, aside from any additional duties that might be required in caring for children.

Indeed, a similar argument could be made to exclude geriatric nurses, maternity ward nurses, emergency nurses and others. A working nurse in a hospital setting must surely provide some if not all, of the services that a nurse on another ward would provide.

In the recent case of *Walsh and Echelon General Insurance Company*,[24] which was submitted for my consideration post-hearing, the service provider was the wife of the claimant and a qualified PSW, providing 72 hours of live-in attendant care over a 4 day period weekly. She resided at home with her husband the rest of the time and attended to him, but stopped her outside work in

[24](FSCO A15-007448, August 31, 2016)

2014 because of health issues. She was found not to be a professional service provider, ordinarily engaged in her occupation but for the accident and the Arbitrator found that she would have provided care in any event, had she not been paid. This case, in my view, is distinguishable as Ms. Kramm and Mr. Cowdrey had not been in a spousal relationship for some 2 years prior to the accident and they would have not been living together but for the accident.

In my view, Ms. Kramm's training, experience and duties as a Registered Nurse qualify her as a professional service provider as set out in the amended section 3(7)(e)(iii), and I find that Ms. Kramm is therefore not required to prove an economic loss in order to receive payment for her services.

I therefore find it unnecessary to determine whether Ms. Kramm has sustained an economical loss.

EVIDENCE:

For Mr. Cowdrey:

Mr. Anthony Cowdrey testified at the hearing. He had no recall of the accident, remembering only that he was riding a motorcycle and waking up in hospital, unable to see or speak. He said he was in hospital for about a month.

He described himself as a happy-go-lucky, sociable, upbeat person, who enjoyed going to clubs, playing poker, going to ball games, and spending time with his son before the accident. For 5 years prior to the accident, he worked seasonally, for a window and eavestrough company.

He had been in a romantic relationship with Szylvia Kramm, who he had met in 2006, but their romantic relationship had ended 2 years prior to the accident, and they no longer resided together. They had a son, Tyler, who was five years old at the time of the hearing.

Mr. Cowdrey was living in a basement apartment, at the time of the accident. He spent Friday evenings and weekends with his son. In the off season, Mr. Cowdrey would spend more time with him.

He was discharged from hospital a month after the accident, and moved in with Ms. Kramm, because, as she was a nurse, she thought it would be best for his care and for his son that he reside with her during his recovery.

When asked about his injuries, he described them as follows: "shattered face, first two ribs broken, broken left scapula, lost left eye, and nine cracked teeth."

He testified that, in the months following the accident, he was "a mess, scared, and confused, and in rough shape", and after his release, required help in all areas of personal care, as he didn't know "what or where or how" to do things. He stayed with Ms. Kramm for over a year, but he said that she was upset with his behaviour and couldn't do it anymore, as he sometimes became aggressive toward her, so she left until he found an apartment. She also could not afford to spend the time with him, as she was not getting paid and had to find supplementary work.

He testified that he still requires help with his care, especially with removal and cleaning of his prosthetic eye, but because of no funding, while he said he could use daily care, he only gets help from time to time from Ms. Partyka and Ms. Kramm when they had time for him. Alone in the apartment, he said he just "sits there and has weird thoughts. He said he doesn't want to go out at night, and doesn't want to go out in bad weather, as he fears it is dangerous for him because of his visual issues related to glare and lack of depth perception. He has lost his sense of smell, and requires help with tasting food. He testified that the doctor told him he will never be able to drive again.

He described his personality currently as very reserved. He said he felt insecure and was depressed a lot of the time. He did not want to do much or talk to his old friends. He developed unhealthy ways to cope with his depressed mood, such as going to the casino and splurging. He said he lost $40,000.00 of his work savings, and he used drugs to cope.

Because of his loss of smell and taste, he feared that he might eat something that had gone bad and become ill.

He was a deep sleeper. He testified that his mother had told him that he had slept through a fire alarm nearby. He was afraid that, should there be a gas leak or a carbon monoxide issue, he would not be able to detect the threat. He said he has left the stove on several times, and only became aware of the danger upon entering the kitchen and feeling the heat.

On community outings such as a trip to the store or to a mall, he said he was anxious, nervous, and claustrophobic, often bumping into people, newspaper boxes and tripping on objects or children that he could see because of what he described as "tunnel vision".

I found Mr. Cowdrey's testimony believable, especially with respect to his fears and exposure to danger. His testimony regarding all of the issues he experienced in his day-to-day life, including personal care and safety issues both inside and outside of the home, were consistent with his injuries and the findings of his assessors who opined that he is in need of full time care, both from a physical and emotional perspective. When alone, he lacks initiative, and objects that one would find in any home, such as cupboards, furniture or items left on the floor, present safety issues to Mr. Cowdrey. He has an ongoing need for assistance with personal care, and his inability to drive would require him to venture out using public transport to attend at medical and other appointments. More importantly, because of the permanent nature of his impairments, particularly with respect to his vision issues, this is not likely to change. His need for care is ongoing.

Katie Denby

Ms. Katie Denby is a registered Occupational Therapist and was Mr. Cowdrey's treating Occupational Therapist since shortly after the accident. She first met with him at Sunnybrook Health and Sciences Centre on October 15, 2013 to obtain his consent for the assessment, and, after his discharge on October 16, 2013, met with him again at his home with his parents and Ms. Kramm in attendance for the assessment.

She had seen him on many occasions, and had an opportunity to observe his level of functioning, both while in hospital and in the community.

Her initial Assessment of Attendant Care Needs and Form 1,[25] dated November 5, 2013, recommended 24 hour attendant care for a total of $7,928.89 monthly, with the majority of hours (640.95 hours) allotted to Level 2 attendant care, (basic supervisory needs). She opined that two safety reasons, he could not be left alone, especially at night. It was her opinion that, should an emergency situation arise, because of the cumulative effects of his physical and psychological deficits and impairments, she believed that he would be at risk and would be unable to assess the situation, or, if he did assess the situation, he would not be able to respond appropriately.

In her second Form 1 and assessment, dated December 31, 2014,[26] Ms. Denby commented that he was at risk for environmental dangers, and had begun to show serious neuropsychological symptoms, including acts of physical aggression, property damage and inability to relax and feel safe. Her report noted that he suffered fatigue, required naps during the day, and, on one occasion, he did not wake up when a fire alarm sounded nearby. Apparently, although there had not been a fire in his unit or on his floor, he has slept through alarms and sirens which sounded on at least two occasions.

She also opined that he was suffering from apathy syndrome, and administered the Rivermead Post Concussion Symptoms Questionnaire.[27]

The test results demonstrated that Mr. Cowdrey suffered from noise sensitivity (the most severe problem), and less severe problems, including, but not limited to, headaches, irritability,

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[25]Joint Medical Brief, Volume 1, Exhibit 4, Tab 2

[26]Joint Medical Brief, Volume 1, Exhibit 4, Tab 7

[27]The Rivermead is a test administered to persons who have sustained a concussion or brain injury to measure severity of symptoms.

frustration and anger, slowed thought processes and light sensitivity. Her report indicated that Mr. Cowdrey told her that he felt in a constant state of danger.[28]

Ms. Denby also prepared a rebuttal report dated May 20, 2015,[29] to Angela Fleming's Form 1 and report dated March 30, 2015, which opined that 24-hour attendant care was not necessary. Ms. Fleming recommended a much lower amount of attendant care. In her rebuttal, Ms. Denby disagreed with Ms. Fleming, maintaining that 24-hour care was necessary for Mr. Cowdrey, and it was her opinion that Ms. Fleming's assessment and report did not adequately address Mr. Cowdrey's emotional function as it impacted his performance of activities of daily living.

Ms. Denby had observed Mr. Cowdrey over a long period of time in different environments, whereas Ms. Fleming had only met with Mr. Cowdrey for a few hours at his home for her assessment.

Courtney Porter

Ms. Courtney Porter is a registered Occupational Therapist, who served as Mr. Cowdrey's Case Manager since December 2013, with the exception of a maternity leave taken between August 2014 and February, 2015, when she was temporarily replaced by Heather Lyons, OT.

Ms. Porter testified at the hearing, and submitted a Form 1 and Assessment of Attendant Care Needs in November 2015,[30] for which she stated that she had reviewed Ms. Denby's earlier report in her preparation, in addition to numerous medical records which were listed in her report.

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[28]See footnote 25, *supra.*

[29]Occupational Therapy Rebuttal to Independent Medical Examination: Assessment of Attendant Care of Katie Denby (Occupational Therapist) from J. Fisher and Associates, dated May 20, 2015,Joint Medical Brief, Volume 1, Tab 8.

[30]Updated Attendant Care Assessment Report of Courtney Porter, dated November 2, 2015, Joint Medical Brief, Volume 1, Tab 15, Exhibit 4.

She testified that she had consulted with Ms. Denby and Mr. Peter Glazer, Mr. Cowdrey's rehabilitation worker, who had been seeing Mr. Cowdrey on a weekly basis, and forwarded progress reports to the team. She said that they had observed that Mr. Cowdrey had experienced difficulty in some environments. He would bump into people and objects because of his vision difficulties. Mr. Glazer had described specific incidents of Mr. Cowdrey bumping into people at malls. Ms. Porter testified that Mr. Glazer had told her that on one occasion, Mr. Cowdrey had attempted to lean against a post, but misjudged the distance and almost fell.

She also spoke to Dr. Hiten Lad, a neuropsychologist who had assessed Mr. Cowdrey in order to clarify some items in his neuropsychological report.

She had spent considerable time with Mr. Cowdrey. She stated that in the two weeks prior to the hearing, she met with Dr. Unarket at Mr. Cowdrey's apartment, and prior to her maternity leave, she had walked significant distances with him in the community, as well as walking with him both inside and outside the hospital.

Her consultations with Mr. Glazer and Ms. Denby confirmed that Mr. Cowdrey had ongoing problems when out in busy environments. He had difficulty in being careful and constantly scanning his environment, which is vital for people with vision in one eye. He had difficulties in navigating, judging depth perception and he worried about walking in the community alone.

She testified that Dr. Lad had opined that Mr. Cowdrey had no efficient sponetaneous planning ability, and therefore, if he had to plan a day, such as an outing with his son, he would not be able to work out ideas, timing, or cope with any roadblocks that might unexpectedly arise. She also stated that Mr. Cowdrey doesn't always report these incidents.

After Mr. Cowdrey's relationship with Ms. Kramm ended, she said that Mr. Cowdrey had developed levels of depressive symptomology, which she described as most severe in July 2014, and that he had developed coping mechanisms of gambling and drug use. As a result of his depressed mood, Mr. Cowdrey was at high risk of social isolation. He needed external motivation in order to get him to leave his apartment and attempt to socialize.

Her consultation with Dr. Lad confirmed her opinion that if Mr. Cowdrey is tasked with having to create a plan without any structure, he will not be able to do so properly, nor handle any unexpected obstacles.

She testified that, in her experience, people with head injuries suffer greater mental fatigue. Taken together with his physical limitations, his mental fatigue hindered his ability to walk longer distances.

Ms. Porter's Form 1 assessed Mr. Cowdrey's attendant care needs at $8,620.00 monthly, well over the statutory maximum of $6,000.00 monthly.

With respect to Ms. Fleming's suggestion that the Canadian National Institute for the Blind was an option to take over Mr. Cowdrey's case management, she stated that Mr. Cowdrey had sought assistance from the CNIB, and had in fact been visited at his apartment by Mr. Timothy Chung of CNIB. Mr. Chung advised that the CNIB could not be a specialist in his case because Mr. Cowdrey suffered multiple impairments, such as his depressive symptomology, apathy, fatigue and cognitive fluctuations, which the CNIB could not address.

She testified that, in reaching the conclusion that Mr. Cowdrey required 24-hour attendant care, Mr. Cowdrey's numerous limitations make it difficult for him to scan and gather the information that he needs in order to deal with his environment. She was mainly concerned that his monocular vision and limited scanning abilities, compounded by his lack of sense of smell, could put him in danger, and noted that he had slept through a fire alarm. She concluded that cueing strategies were insufficient, as Mr. Cowdrey, lacks the ability to be self-sufficient in case of emergency, and requires an attendant at times to ensure safety.

I found her evidence to be of key importance, in that her conclusions were reached over a considerable period of time, and she recognized that both physical and mental/emotional impairments both contributed to Mr. Cowdrey's reduced abilities. I prefer her opinion over that of Ms. Fleming.

Dr. Milan Unarket

Dr. Milan Unarket is a physiatrist, specializing in physical medicine and rehabilitation, whose C.V. states that his clinical work involves "the assessment and treatment of patients with various neurological and musculoskeletal injuries".[31] He has followed Mr. Cowdrey for issues relating Mr. Cowdrey's traumatic brain injury.

His reports were submitted in evidence, and he testified at the hearing, after being qualified as an expert in the assessment and care of patients with traumatic brain injuries. He assessed Mr. Cowdrey on 2 occasions. In his initial report, dated September 30, 2015, he commented on Mr. Cowdrey's physical impairments and also noted that there was evidence of cognitive and emotional sequalae related to his brain injury, including low mood and decreased frustration.[32] In his report dated November 6, 2015, he was asked to comment on the level of attendant care Mr. Cowdrey required. After listing Mr. Cowdrey's impairments, including his emotional dysfunction, apathy, and low vision, it was Dr. Unarket's medical opinion that Mr. Cowdrey required 24-hour supervision.[33]

His report stated that he had read the reports of Ms. Denby as well as OT reports of Amanda Westbrook and that of the Insurer Examination Report of Angela Fleming.

In cross examination, he said he had no concerns about Ms. Porter's assessment given that she knows Mr. Cowdrey quite well and has had significant interactions with him.

He stated that it was not possible to isolate one aspect of impairment, and that the person must be considered as a whole. All of the impairments and injuries should be taken into context to understand the totality of assistance required, so that while Mr. Cowdrey may be able to walk on his own, because of his apathy, he requires the initiation to walk in the first place.

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[31]Report of Dr. Unarket, October 5, 2015, Joint Medical Brief, Volume 1, Exhibit 4, Tab 12, page 1

[32]Report of Dr. Unarket, October 5, 2015, Joint Medical Brief, Volume 1, Exhibit 4, Tab 12, page 12

[33]Report of Dr. Unarket, November 6, 2015, Joint Medical Brief, Volume 1, Exhibit 4, Tab 16, Page 1 and 2.

He expressed concern as to whether Mr. Cowdrey would be able to react in an emergency situation, his primary concern being the loss of sense of smell. In case of a fire, he was concerned that Mr. Cowdrey might not smell the smoke, and react appropriately. He also stated that Mr. Cowdrey sleeps so deeply that one could not predict whether he would wake up, and if he did wake up, whether he would act appropriately.

He also testified that, while Mr. Cowdrey may have given the correct answers as to how he would react in an emergency, there is no guarantee as to how he would actually react in a real life emergency.

Dr. Unarket testified that Mr. Cowdrey reported having a low mood, and was sad and emotional, with a decrease in initiation, drive and interest. He also testified that Mr. Cowdrey had reported having difficulties with memory, multitasking, attention and concentration. He had observed that Mr. Cowdrey had decreased motivation and was apathetic. He found these observations of importance because they required Mr. Cowdrey to rely on external factors to cue his initiation of the task.

Dr. Unarket testified that Mr. Cowdrey had described a few episodes of incontinence. These episodes were important because they indicated that he must have slept so deeply that he slept through the signals that the brain sends when the bladder is full. Ms. Fleming's report, while stating that she had seen nothing in the earlier medical reports with respect to Mr. Cowdrey's incontinence until just before the hearing, did not refer to why this was of importance. Her recommendation with respect to incontinence was to allot additional time for extra laundry, as she noted that Mr. Cowdrey was capable of doing his own laundry.

I have attributed significant weight to Dr. Unarket's report and testimony. He had the opportunity to spend time on 2 occasions to assess Mr. Cowdrey, and consult with other members of his team. I found the factors on which he based his conclusions as to why Mr. Cowdrey required full time attendant care, particularly in case of emergency, to be persuasive, and note that some if not all of these factors were lacking in the report of Ms. Fleming.

Dr. Jordan Cheskes

Dr. Cheskes is a practicing vitreoretinal surgeon and former Chief of Opthamology at the Rouge Valley Health System.

He did not testify at the hearing, but prepared a report dated October 26, 2015, after assessing Mr. Cowdrey, and reviewing the medical documents given to him and listed in his report. [34] He reported that Mr. Cowdrey suffered a significant loss to his visual system, leaving him permanently completely blind in his left eye, in which he wears a prosthesis. Dr. Cheskes also found significant damage to Mr. Cowdrey's right eye, which causes Mr. Cowdrey great difficulty in looking upward or laterally. Dr. Cheskes reported that Mr. Cowdrey has suffered permanent loss of functional peripheral vision in that eye.

Dr. Cheskes reported that Mr. Cowdrey's inability to drive because of his limited vision would make his prospects of independence more limited, as he would rely upon public transportation for appointments, shopping and activities of daily living which would be a great expense to Mr. Cowdrey and would limit his ability to attend school or seek job training without incurring significant expense for transportation costs. Dr. Cheskes concluded that Mr. Cowdrey suffered a profound loss of vision. He has no prospects of regaining his lost vision, and any attempts to surgically correct his remaining eye entails risk of complete lack of vision. Mr. Cowdrey would require close monitoring of his right eye for the rest of his life to prevent further vision loss.

Dr. Cheskes concluded that Mr. Cowdrey's ability to walk and drive is permanently limited, due to his vision difficulties and inability to move his right eye laterally or upwards. I found this evidence of permanent damage and loss of vision extremely significant, as Mr. Cowdrey's visual impairments will not improve significantly, and will have a permanent impact on his life.

[34] Report of Dr. Cheskes dated October 26, 2015, Joint Medical Brief, Volume 1, Tab 14.

Dr. Hiten Lad

Dr. Hiten Lad, a neuropsychologist, assessed Mr. Cowdrey on April 29, 2014 and May 9, 2014. Dr. Lad was asked to assess Mr. Cowdrey's pattern of cognitive and psychological functioning, as well as to assist with his rehabilitation efforts, and diagnosed Mr. Cowdrey with Cognitive Disorder Not Otherwise Specified, and Query Personality Changes Due to Severe Traumatic Brain Injury –Apathy type. Dr. Lad did not testify, but his report, dated July 21, 2014, was entered into evidence and referred to by Mr. Cowdrey's witnesses.[35]

Information for this report came from interviewing Mr. Cowdrey and Szylvia Kramm, a review of available medical documents, as well as the results of both cognitive and psychological testing. The list of documents reviewed are contained in Dr. Lad's report,

Dr. Lad conducted a further assessment on September 24 and 25, 2015, and reported that Mr. Cowdrey had increased irritability and a reduced mental filter, finding that he had now developed an adjustment disorder with depressed mood over time, resulting from increasing frustration that his recovery was not progressing as he had expected.[36] He noted that these changes may result in some difficulties in Mr. Cowdrey's interpersonal interactions.

Dr. Lad concluded that the cumulative effect of Mr. Cowdrey's cognitive difficulties and psychological and physical impairments have been significant in his life, and have reduced his daily functioning in many areas.

Szylvia Kramm

Ms. Kramm testified at the hearing on Mr. Cowdrey's behalf. She was a Registered Nurse, licensed in 2003, with over ten years of nursing experience, and was employed full-time at Mount Sinai Hospital as a pediatric nurse. Ms. Kramm and Mr. Cowdrey had formerly been in a

[35]Neuropsychological Evaluation of Dr Hiten Lad, dated July 21, 2014, Joint Medical Brief, Exhibit 4, Tab 4

[36]Neuropsychological Evaluation of Dr. Hiten Lad, dated October 19, 2015, Joint Medical Brief, Exhibit 4, Tab 13.

relationship, and had resided together with their son. The relationship ended a year prior to the accident, and, while their son remained living with Ms. Kramm, Mr. Cowdrey obtained his own residence. Upon his discharge from hospital after the accident, Mr. Cowdrey moved in with Ms. Kramm as she was to be his primary caregiver.

While assisting Mr. Cowdrey, in order to make time to care for him, she worked longer shifts, and used banked vacation days instead of taking payment, and had the opportunity to assist and observe Mr. Cowdrey over a significant period of time as his primary caregiver. She provided attendant care services from the time of his release, in October 2013, up to March 15 2014, when the Fund stopped payments. She testified with respect to the detail of her duties as a nurse at the hospital, and testified in detail as to her observations of Mr. Cowdrey both in the home and in the community. She testified that she stopped providing care in June 2015, although according to the Fund, she submitted no further expense sheets to the Fund after April 3, 2015.[37]

She testified that, while she included housekeeping services in her expense sheets up to August 31, 2014, when she was told by Mr. Cowdrey's lawyer that she could not claim these services she stopped submitting housekeeping expense sheets after September 2014.

While continuing to assist Mr. Cowdrey when she could after June, 2015, she testified that she could no longer afford to continue to care for him as a primary caregiver, without remuneration. She shared attendant care duties with Ms. Partyka after she was hired.

Terry Partyka

Ms. Partyka testified that she commenced providing attendant care services in July 2014. She was a trained PSW and assisted Mr. Cowdrey with cooking, cleaning laundry, replacing his prosthesis and generally performed all of the services that a PSW is trained to do to assist in home care. She spent significant time both inside the home and outside in the community, and had ample opportunity to observe Mr. Cowdrey on a day to day basis.

[37]Fund Written Submissions, Page 28, Paragraph 89

As the Fund had no issue with her qualifications, the main thrust of her evidence dealt with errors she had made in calculating the hours that she had invoiced the Fund for services provided between June 28, 2016, to June 30, 2016 and for services on August 9 and 10, 2016. She in fact did not provide services on any of these 4 days, explaining that the error in June occurred because domestic violence issues arose at home between her and her partner and as a result, she left home for five days and stayed with a friend. However, she had previously diarized these days as days she was scheduled to provide service, and used the entries to prepare her time sheets.

Her explanation with respect to the August error also involved a domestic issue with her partner, because although she had scheduled herself to work for Mr. Cowdrey on those days, because of the problems she was experiencing at home, her plans suddenly changed and she did not provide services on these dates. She testified that when she was advised of the mistake in December by Mr. Cowdrey's lawyers, she reviewed her records and realized her error. However, this error was reported only after she was advised that there had been surveillance on those days.

THE EVIDENCE FOR THE FUND

Angela Fleming

Angela Fleming is a registered Occupational Therapist, and conducted an assessment of Mr. Cowdrey. She prepared a Form 1 and Assessment of Attendant Care Needs, dated March 30, 2015, at the request of the Fund, which was submitted in evidence.[38]

Ms. Fleming was the only witness for the Fund. Ms. Fleming had access to the various medical reports which had been obtained, and listed those she relied upon in her report.

Her OT assessment of Mr. Cowdrey took place on two separate occasions, March 3, 2015 and March 24, 2015 at Mr. Cowdrey's home. She testified that she determined midway through the

[38]See footnote 3, *supra*

assessment that it would be appropriate to adjourn the rest of the assessment until another day, as she noted it appeared Mr. Cowdrey was tiring and inclement weather was approaching.

Ms. Fleming testified that she spent a total of 7 hours with Mr. Cowdrey, including one hour walking with him in the community.

She did not have an opportunity to personally observe his performance on his own without supervision when out in the community.

Ms. Fleming opined that Mr. Cowdrey possessed sufficient physical and cognitive ability to respond appropriately in an emergency. It was her opinion that aids such as a shaker bed alarm, and training would be sufficient to compensate for some of his deficits.

She disagreed with Ms. Denby's assertion that Mr. Cowdrey might not be able to be aroused if necessary in an emergency, noting that she had seen no objective evidence that he could not be aroused. She believed that Mr. Cowdrey was capable of getting out of the building on his own should there be an emergency, as from a physical perspective, he could move freely and independently in his unit, and had the ability to navigate stairs.

However, she stated that should there be a real fire, her main concern would be his ability to get safely to the stairwell, where he could then wait for assistance, as he had been advised by the Fire Marshall that the staircase landing is a safe place of refuge for a person who was unable to use the stairs.

She stated that, while there were no references with respect to urinary incontinence in the medical reports provided to her, she did acknowledge in cross-examination, that patients with traumatic brain injuries often underreported their situation to assessors.

She did note that Dr. Unarket commented Mr. Cowdrey's urinary incontinence in his 2015 report, as did Ms. Porter in her 2015 report, both of which were issued shortly before the hearing.

Dr. Unarket had also testified that Mr. Cowdrey would not awaken despite urinating himself and concluded that this was an indication that Mr. Cowdrey was a deep sleeper.

Ms. Fleming testified that Mr. Cowdrey did not show signs often exhibited by visually impaired people. He did not use a white cane, or put out his hands when walking, and he was not concerned with staying on level ground. Based on her own observations, she stated that he was able to walk in the community, and that what she saw was someone who could navigate around obstacles and was able to handle outings in the community. She disagreed with Ms. Porter's concerns with regard to Mr. Cowdrey's inability to scan and evaluate his surroundings.

On cross-examination, Ms. Fleming agreed that treating healthcare professionals get a more complete view of a person's true level of function than an assessor, who only sees a person for a few hours, and this should be considered when forming opinions.

She also agreed that the assessor must consider collateral information, particularly in cases of brain injuries, where patients often either over report or under report. This would include evidence from others, and Ms. Fleming agreed that this is important because this information comes from people who spend more time with Mr. Cowdrey.

Analysis

Mr. Cowdrey's experts opined that he requires 24-hour attendant care, primarily at night in the case of an emergency.

The effect of his cumulative impairments, including his permanent loss of eyesight, his balance issues, and loss of his senses of smell and taste have resulted in Mr. Cowdrey's experts to opine that in case of an emergency, he might not respond appropriately.

The Fund's only witness, OT Angela Fleming, opined that he did not require 24 hour attendant care.

Her total time spent with Mr. Cowdrey was seven hours over two days. The assessment was adjourned on the first day because of approaching inclement weather, and Mr. Cowdrey appeared to be tiring. She decided to finish the assessment on a second day about two weeks later. Although she spent an hour with him walking in the community, she never had a chance to observe him in the community without supervision, as she was with him the whole time.

I found it significant that her assessment was divided into two sessions on different days. Had the assessment been completed in one session, his performance may well have declined, and yielded a more realistic picture of his abilities. In my view, the assessment was flawed by this interruption and cast doubt on the accuracy of the assessment.

In her opinion, cueing and aids such as a shaker bed, were sufficient to ensure safety in case of an emergency.

While I acknowledge that Ms. Fleming was an experienced OT, she spent a limited amount of time with Mr. Cowdrey. In contrast, Mr. Cowdrey's "team" had spent many hours in observing Mr. Cowdrey function in and out of the community. Ms. Fleming's assessment and observations were in a controlled environment, and she only spent a few hours with Mr. Cowdrey. She never had an opportunity to observe Mr. Cowdrey going about his business in the community without supervision because of the limited time she spent with him.

She had, at one point testified that CNIB might be considered to take over Mr. Cowdrey's case management, apparently unaware that CNIB had already seen him and advised that they could not do so because of his multiple impairments which were not vision-related.

In my view, Ms. Fleming did not fully take into account Mr. Cowdrey's cognitive impairments, and emotional difficulties with respect to apathy and inability to initiate action without cueing or other assistance. Her testimony and reports focussed primarily on her observations on Mr. Cowdrey's physical abilities when asked to do a task.

While it was suggested by Mr. Cowdrey that Ms. Fleming was a biased and difficult witness, and provided authority[39] where a similar finding was made, I did not find that her evidence was biased. She was no different from any witness in a case where the opinions of the assessors clashed. While I found that she was somewhat guarded in her answers, I found her evidence to be credible overall, but limited in its scope. I place no weight on the *Graves* decision.

I prefer the testimony and opinions of Mr. Cowdrey's experts, Courtney Porter and Dr. Unarket, over that of Ms. Fleming where they differ with respect to the quantum of attendant care Mr. Cowdrey requires. Mr. Cowdrey's experts had the opportunity to observe him in different situations, and/or could rely on the reports of his caregivers. Ms. Denby, for example had weekly reports from Peter Glazer who saw him on a weekly basis and reported regularly to her.

However, I found Ms. Fleming's suggestion as to what Mr. Cowdrey should do when alone, and without an attendant, in case of an actual fire, particularly disturbing.

It was her opinion that Mr. Cowdrey, either on his own or with his 3 year old son in tow, had the ability to successfully make his way to a stairwell if a fire broke out, and then stand there, waiting and hoping to be rescued. I find this difficult to accept. While he might very well be physically able to take these steps, (although that is doubtful), the risk of his inability to initiate and take appropriate action on his own in a real emergency is, in my view, too high to leave to chance. His reaction to real danger to himself, and especially his son in the event of a real emergency, simply cannot be anticipated with any degree of certainty.

Granted, the use of a shaker bed and any other cueing or mobility aids might minimize the risk, but considering the extent of Mr. Cowdrey's limitations I cannot accept this as a realistic suggestion, even though she stated that this was in accord with directives from the Fire Marshall.

More specifically, and in summary, I prefer the evidence of Mr. Cowdrey's experts, particularly that of Ms. Porter, over the evidence of Ms. Fleming where it differs for the following reasons:

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[39] *Graves and Royal and Sun Alliance Insurance Co. of Canada* (FSCO A12-006916, March 26, 2015)

1. Ms. Fleming's time and experience with Mr. Cowdrey was very limited, having spent only seven hours in total over two days. Mr. Cowdrey's witnesses, especially Ms. Porter, Ms. Denby and his caregivers, all had the opportunity to observe him over long periods of time, and Ms. Kramm was able to comment on his pre-accident abilities and comment on how his limitations had changed his life post-accident. I found their observations and insights particularly helpful in providing a realistic picture of his functioning, while Ms. Fleming's observations and comments were basically, a "snapshot" of a moment in time.

2. The evidence from Mr. Cowdrey's witnesses was comprehensive, and took into account multiple observations and consultations with various sources over a long period of time, while Ms. Fleming's opportunities in that regard were limited.

3. I found Ms. Fleming's methodology was suspect, with respect to her decision to split her assessment into two sessions on different days. The fact that Mr. Cowdrey appeared to be tiring could indicate that, has the assessment continued, his level of functioning may have deteriorated. Starting fresh on a different day may not have accurately reflected the level of Mr. Cowdrey's functioning.

4. Her opinions were primarily based on Mr. Cowdrey's physical limitations, and as such, she gave little or no consideration with respect to Dr. Unarket's remarks regarding the emotional effects of the brain injury, or Dr. Lad's statements with regard to the effect of Mr. Cowdrey's apathy on his functioning. She did not adequately take into account how his emotional and cognitive impairments contributed to his functional variability, which would make it difficult and speculative to predict his level of function at a point in time because of his changing emotional state.

5. She relied upon Mr. Cowdrey to accurately report his functional abilities although the Applicant's cognitive and emotional impairments, including lack of insight, made him an unreliable source of information. She agreed with the suggestion that patients with traumatic brain injuries often underreported their situation to assessors.

6. Her observations of Mr. Cowdrey in the community were limited, and she did not have the benefit of observing him function in and out of the home over a period of time in real life situations. In my view, she did not give adequate weight to the observations and conclusions of those who had regular or daily contact with him, and did not sufficiently address the fact that he may have underreported at times.

7. Ms. Fleming accepted, based upon the Mr. Cowdrey's oral responses to questions about hypothetical emergency situations that he would actually and reliably respond appropriately in a real emergency situation.

8. Despite all of the other available reports and assessments, including but not limited to those of Katie Denby, Courtney Porter, Case Manager, and Dr. Unarket, all of whom have opined that 24 hour care is needed to ensure Mr. Cowdrey's safety, and despite her limited time spent with him under circumstances which, in my view, did not realistically reflect his functioning in the community or when left alone, Ms. Fleming concluded nonetheless, that, eight hours of basic daytime supervision (custodial care) would be reasonable as a result of changes in the Applicant's behaviour and abilities due to his impairments.

I have assigned substantial weight to the testimony of Ms. Kramm. She knew him for a long period prior to his accident, and was in the best position to remark on how his abilities and personality had changed post-accident.

Ms. Partyka's evidence, according to the Fund, was suspect and not credible. She invoiced for days on which she did not provide service, only reporting the error after she was made aware that that there had been surveillance on those days, and the Fund submitted it would be an incredible coincidence if the only days she misreported were the days when surveillance was performed.

The Fund submitted that Ms. Partyka's request for $12,590.00, which was the balance requested for her services to the end of October 2015 after subtracting the amount invoiced for the missing days in her original invoice, should not be paid at all.

However, I found her explanation for the errors to be reasonable, and the Fund did not challenge her explanation on cross-examination in an effort to shake her credibility.

I found no major credibility issues with the evidence of Ms. Kramm and Ms. Partyka.

CONCLUSION

The Fund submitted that Ms. Partyka's request for $12,590.00, which was the balance requested for her services to the end of October 2015, (after subtracting the amount invoiced for the missing days in her original invoice) should not be paid at all. As I have found her explanation to be credible, I find that $12,590.00, is owing to her services to the end of October, 2015.

Ms. Kramm was unpaid for any services she provided after March 14, 2014, as I have found that she is eligible for payment as a professional service provider. Because the invoices she submitted lacked detail, and included ineligible housekeeping expenses, the Fund submitted that a deduction of 25%, should be deducted from the $54,717.00 requested for the period of March 15, 2014 to June, 2015. As the exact ratio of housekeeping to attendant care services could not be calculated from the invoices submitted, I find this to be reasonable. After deducting 25% of $54,000, I find that $41,025.00 is the balance owing to Ms. Kramm for that period.

Mr. Cowdrey has requested an ongoing order for $6,000.00 monthly, while the Fund has asked me to award any attendant care owing and ongoing based on $869.16, the amount Ms. Fleming calculated in her Form 1, on an incurred services basis.

For the reasons given, I prefer the evidence and opinions of Mr. Cowdrey's assessors, over that of Ms. Fleming, and find that for reasons given, I accept that Mr. Cowdrey requires ongoing 24 hour attendant care. I give little weight to Ms. Fleming's Form 1. I find that ongoing attendant care payments for incurred services should be $6,000.00 monthly, based on the assessments of Ms. Denby and Ms. Porter, both of which were well in excess of the maximum allowed by the *Schedule*. Proof of the amount of incurred attendant care services must therefore be submitted on a monthly basis.

EXPENSES:

Because expense decisions are now to be included in the arbitration decision, the parties have submitted their written submissions for expenses prior to knowing the outcome. It is therefore difficult for the parties to make submissions on the degree of success, which is one of the criteria set out in subsection 12(2) of Ontario Regulation 664 (the Expense Regulation), and which I am required to consider in making my decision. However, having decided mainly in the Applicant's favour, I have decided to award expenses to the Applicant. The issue is therefore quantum. There were initially additional claims set out at the pre-hearing, most of which the parties resolved within the month prior to the hearing, resulting in a shorter hearing.

Mr. Cowdrey's claims for medical benefits were withdrawn on the morning of the hearing, while the claims for caregiver benefits were abandoned about a week prior to the hearing, and the claim for a special award was withdrawn shortly before the hearing commenced. This reduced the claims in the arbitration to attendant care, and expenses.

As the Fund had accepted that Mr. Cowdrey was catastrophically impaired, on a provisional basis on March 24, 2015, and permanently as of October 2014, this issue was not argued at the arbitration.

Factors to be considered in awarding expenses:

Arbitrator Nastasi in *Salva and Paramananthan and Allstate Insurance Company of Canada*[40] wrote that:

> The overriding consideration in fixing arbitration expenses is reasonableness. Rather than a line by line review of expenses claimed, arbitrators have preferred a global assessment of expenses as being more appropriate.

[40](FSCO A05-002958 and A06-000004, July 30, 2007)

In *Ragulan and Security National Insurance Co./Monnex Insurance Management Inc.*, the general approach with respect to fees was to take a "pragmatic, broad-strokes approach, with a view to fixing an amount that is reasonable."[41]

Rule 78.1 of the *Code* provides that the maximum amount that may be awarded for legal fees is an amount calculated using the hourly rates established under the Legal Aid Services Act, 1998 but permits an adjudicator, where satisfied that a higher amount for legal fees to an insured person is justified, to award an hourly rate up to $150.00.

Pursuant to subsection 12(2) of Ontario Regulation 664 (the *Expense Regulation*), an arbitrator shall consider only the following criteria for the purposes of awarding all or part of the expenses incurred in respect of an arbitration proceeding:

(a) each party's degree of success in the outcome of the proceeding;

(b) any written offers to settle made in accordance with subsection (3);

(c) whether novel issues are raised in the proceeding;

(d) the conduct of a party or party's representative that tended to prolong, obstruct or hinder the proceeding, including a failure to comply with undertakings and orders;

(e) whether any aspect of the proceeding was improper, vexatious or unnecessary; and,

(f) the applicant's failure to attend examinations; and,

(g) whether the insured person refused or failed to submit to an examination or provide material as required under section 44 of the *Schedule*.

Of these criteria, the only real substantive issue remaining to decide (beside expenses) was the claim for attendant care. Of the factors to consider in this case, I do not consider any of the factors, other than degree of success of the parties, to be applicable, and I take into account that that the parties had to make their submissions blindly on this point without knowing the

[41](FSCO A05-002940, July 16, 2008) See also, *Henri and Allstate Insurance Company of Canada* (OIC A-007954, August 8, 1997) and *West and Aviva Canada Inc.*, (FSCO A08-000170, March 15, 2010)

outcome.

ANALYSIS

In its submission, the Fund suggests the relevant criteria for consideration in this matter are whether novel issues are raised in the proceeding, offers to settle, and whether any aspect of the proceeding was unnecessary.

The Fund further submitted that the Applicant failed to provide its witness lists 90 days prior to the hearing, in accordance with an undertaking given at the pre-hearing. Instead the lists were provided 31 days prior, suggesting that this added to the preparation time required for this hearing, and I take this into consideration to the hearing in my decision, but I do not find this to be of particular import. The Fund ultimately complied with the Rules, and this resulted in little or no prejudice.

The Applicant has submitted that in this case, the applicable criteria are:

- Degree of success
- Written Rule 76 offers
- Conduct of a party or party's representative that tended to prolong, obstruct or hinder the proceeding, including a failure to comply with undertakings and orders.

I note that the Applicant did not submit a bill of costs with its written submissions, but only put forward the total account, without a detailed breakdown of the hours spend by each individual at their respective rates.

There was no indication as to what portion of the fees claimed were for disbursements, nor was there a breakdown of the disbursements.

I have also considered the non-acceptance by the Fund, of the Applicants' Rule 76 offer dated November 13, 2015. That offer was substantially different from the actual outcome, in that it included caregiver payments and medical payments which were ultimately withdrawn or abandoned, and requested an ongoing payment of $6,000.00 per month, regardless of whether incurred or not. Even if the Applicant was completely successful on the remaining issues at the arbitration, had it accepted this offer, it would have required the Fund to pay a substantially greater amount than what was ultimately ordered, and is therefore of little import.

With respect to whether novel issues were raised, the Fund has suggested that the issue of whether Ms. Kramm met the s.3(7)(e)(iii)(A) incurred criteria may be seen as a novel issue. This issue was complicated, and took time to argue and explain, but I do not consider it to be a novel argument, having seen this argument in other cases where a similar argument has been made post-amendment.

The Fund was successful on this argument, and, as I have decided that the amendments apply, this will reduce the Fund's liability for a payment of $6,000.00 per month to that of expenses incurred for attendant care, up to $6,000.00 per month.

Although this lengthened the hearing somewhat, it was an essential part of the hearing and resulted in some degree of success for the Fund, and therefore, I did not consider it relevant to either consideration: (d) whether either parties' conduct prolonged the hearing, or (e) whether any aspect of the proceeding was improper, vexatious or unnecessary. I had no issue with the conduct of either party and found nothing that unnecessarily prolonged the hearing.

Issues (f) and (g) regarding attendance at examinations, were not relevant considerations in this case.

Of these criteria, I consider the degree of success to be the most important criterion in deciding the issue of expenses in this case.

While the Applicant was, for the most part successful with respect to the outcome, the Fund achieved a limited degree of success with respect to its argument regarding s.3(7)(e)(iii) in limiting its liability somewhat. While the Fund has asked for its expenses to be paid, as I have found the Applicant to be primarily successful, I am awarding the expenses to the Applicant. However, in deciding the quantum, I take into account the partial success of the Fund in deciding the quantum that the Applicant is awarded.

The general approach with respect to fees is to take a pragmatic, broad-strokes approach, with a view to fixing an amount that is reasonable.[42] This includes taking into account the length of the proceeding and the complexity of the issues, and frequently involves applying a ratio of pre-hearing preparation time to hearing time in the range of 1:1 to 4:1.[43]

Fees

The Applicant has requested an order for fees and disbursements, including increased hourly rates, and full disbursements in the amount of $88,621.00, which includes fees for Joseph Campisi Jr. and Ryan Breedan, lawyers, each with over 10 years of experience and Jenna Zorik, a licensed paralegal.

However, there is nothing in the Applicant's submission breaking down the contributions of each and hours involved, nor is there a breakdown of disbursements.

I find the claim for expenses excessive relative to the issues in dispute. The hearing itself took 5 days, (December 7, 8, 9 and 10, 2015), with written submissions to follow. The Fund has submitted that the hearing was not so complex as to require two counsel and a paralegal. As there is no evidence before me of either the breakdown of fees and disbursements of any of the representatives, I am only prepared to award costs for one lawyer.

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[42] *Ragulan and Security National Insurance Co./Monnex Insurance Management Inc.*, (FSCO A05-0002940, July 16, 2008); See also, *Henri and Allstate Insurance Company of Canada*, (OIC A-007954, August 8, 1997)

[43] for example, *Soobrian and Belair Insurance Company Inc.*, (FSCO A04-000422, February 7, 2006)

I find a ratio of 3:1 (of preparatory to hearing time) is appropriate in this case.

Given that the average hearing day lasted 8 hours, I find that a reasonable number of total hours for this case would be 120. I am also prepared to increase the fees to $150.00 for the Applicant's counsel, taking into account the over 10 years of experience of counsel, and awarding the Applicant an additional 10 hours of preparation for its post hearing written submissions and written expense submissions, for an additional $1,500.00, or a total of $19,500.00.
Because the Fund was partially successful with respect to an important issue, I am taking this into account and reducing the Applicant's fee by $4,500.00 to reflect this. This is approximately a 25% reduction. I therefore fix the fees for counsel at $15,000.00, plus HST.

Disbursements

Mr. Cowdrey claims disbursements in an unspecified amount, as part of the total figure put forward in the order requested.

With respect to experts, the maximum amounts that may be claimed under the *Expense Regulation* are: $1,500.00 for preparation of a report; $200.00 per hour for attendance at a hearing (up to $1,600.00 per day); and $500.00 for preparation for a hearing at which the expert actually testifies.

The Applicant called two experts, Dr. Unarket and Courtney Porter, OT.

Dr. Unarket attended the hearing and testified. I am awarding 4 hours for his attendance, at $200.00 per hour, and $1,500.00 for preparation of his report, and $500.00 for preparation at a hearing in accordance with the Expense Regulation, for a total of $2,800.00, plus applicable HST.

Courtney Porter also testified and prepared a report and Form 1, which was also entered as an exhibit. I also award Ms. Porter the same amounts as Dr. Unarket, for a total of $2,800.00 plus applicable HST.

The total allowed for experts is $5,600.00, plus applicable HST.

Because the disbursements were not better clarified, I have taken a global approach and have fixed an amount for disbursements that I find is appropriate in the circumstances.

This case involved voluminous productions, and many volumes of materials were submitted by both sides. This involved faxing, photocopying, courier and other miscellaneous expenses. Without a bill of costs, I must assess what I consider as a reasonable amount for a case of this type and duration, and I therefore find that an appropriate amount for disbursements is $3,000.00, plus applicable HST.

While I have no evidence of the number of hours spent by Ms. Zoric, a paralegal, the Applicant has requested that her time be considered. The amount of paperwork in this case suggests that many hours were spent, but as to how many, without a bill of costs, is not known. However, under the circumstances, I am awarding a modest amount of $500.00 to reflect that she participated in the preparation of this case.

I therefore find that the total fees and disbursements awarded to the Applicant are ($15,500.00 +$5,800.00 + $5,000.00) = $25,800.00.

Alan Mervin
Arbitrator

May 1, 2017
Date

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A14-002444

BETWEEN:

ANTHONY COWDREY

Applicant

and

MOTOR VEHICLE ACCIDENT CLAIMS FUND

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. The Motor Vehicle Accident Claims Fund shall pay to up to $6,000.00 per month, together with accrued interest, to or on behalf of Mr. Cowdrey, for incurred attendant care services to or on behalf of Mr. Cowdrey, provided from September 15, 2015 to the date of this order.

2. The Motor Vehicle Accident Claims Fund shall also pay to up to $6,000.00 per month for incurred attendant care to or on behalf of Mr. Cowdrey, from the date of this Order, onwards.

3. Szylvia Kramm is entitled to payment and the Motor Vehicle Accident Claims Fund shall pay, the sum of $41,025.50 and interest for incurred attendant care services, provided to Mr. Cowdrey between March 15, 2014 and June 2015.

4. Terri Partyka is entitled to payment, and the Motor Vehicle Accident Claims Fund shall pay the sum of $13,797.00, and interest for attendant care services provided to Mr. Cowdrey between April 2015 and September 2015.

5. Service providers who provide attendant care services to Mr. Cowdrey from the date of this Order going forward must submit proof that the payment requested is for services incurred.

6. The Fund shall pay $25,800, plus HST, for fees and disbursements to the Applicant.

Alan Mervin
Arbitrator

May 1, 2017
Date