

**LICENCE APPEAL  
TRIBUNAL**

**Safety, Licensing Appeals and  
Standards Tribunals Ontario**

**TRIBUNAL D'APPEL EN MATIÈRE  
DE PERMIS**

**Tribunaux de la sécurité, des appels en  
matière de permis et des normes Ontario**



**Date: 2018-06-29**

**Tribunal File Number: 17-006651/AABS**

**Case Name: 17-006651 v Aviva Insurance Company**

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:

**R.K.**

**Applicant**

And

**Aviva Insurance Company**

**Respondent**

**DECISION**

**ADJUDICATOR:**

**S. F. Mather**

**APPEARANCES:**

Julia Abd Elseed, Counsel for the Applicant

M. Baura, Counsel for the Respondent

**Heard in writing:**

**May 7, 2018**

## Overview

- [1] R.K. (the “applicant”) was involved in a motor vehicle collision on October 29, 2015 and sought various benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010*<sup>1</sup> (the “*Schedule*”) from Aviva Insurance Company (the “respondent”).
- [2] The only benefit claim that remains unresolved is a claim for attendant care benefits (ACBs) for the period of 104 weeks following the accident.
- [3] Following a case conference on February 7, 2018 parties were unable to resolve their dispute and by an Order dated February 9, 2018 the dispute was scheduled for a written hearing.

## ISSUES

- [4] The issues before me are:
  1. Is the applicant entitled to attendant care benefits in the amount of \$723.20 per month for the period October 29, 2015 to date and ongoing?<sup>2</sup>
  2. Is the applicant entitled to interest for the overdue payment of benefits?
  3. Is the applicant entitled to an award for any unreasonably withheld or delayed payments pursuant to Section 10 of the R.R.O. 1990, Reg. 664?
  4. Is the applicant entitled to costs?<sup>3</sup>

## Result

- [5] I find that:
  1. The applicant is entitled to attendant care benefits in the amount of \$9,755.20 for the period November 1, 2015 to December 31, 2016.
  2. The applicant is entitled to interest on the overdue payment of benefits.
  3. The applicant is not entitled to an award under Regulation 664.
  4. The applicant is not entitled to costs.

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<sup>1</sup> O. Reg. 34/10

<sup>2</sup> The Order made at the case conference clarifies that the issue to be decided is whether or not the attendant care benefits have been incurred per s. 19 of the *Schedule* for the period October 29, 2015 to date and ongoing.

<sup>3</sup> A claim for costs is made on the final page of the Submissions of the Applicant.

## Motion Between Case Conference and Hearing

- [6] Upon receipt of the applicant's evidence for this hearing the respondent brought a motion to exclude the affidavit evidence filed by the applicant. Following a written motion hearing the Tribunal ruled<sup>4</sup> that the affidavits of R.K, the applicant and A.R., a director of Attendant's With Care Inc. (AWCI) were admissible.

## Entitlement to Attendant Care Benefits

- [7] An insurer is required to pay attendant care benefits to or on behalf of an insured person who sustains an impairment as a result of an accident if the impairment is not a minor injury and the insured meets the requirements set out in Section 19 of the *Schedule*.<sup>5</sup>
- [8] Section 19(1) provides that attendant care benefits shall pay for all reasonable and necessary expenses that are incurred<sup>6</sup> by or on behalf of the insured person as a result of the accident for services provided by an aide or attendant or a long-term care facility or a chronic pain hospital.
- [9] There is no dispute about the applicant's entitlement to an ACB. As of the date of the case conference the respondent no longer takes the position that the applicant's impairment is a minor injury and does not dispute that the attendant care services are reasonable and necessary.
- [10] The respondent refuses to pay any ACB expenses because it is not satisfied that the applicant has shown that any expenses were incurred. In the alternative the respondent argues that the expenses claimed are not within the Guidelines<sup>7</sup> and that the benefits claimed are not properly supported by the invoices or timesheets submitted by the applicant.

## Did the applicant incur expenses for ACBs?

- [11] In order to find that the applicant incurred expenses for ACBs I must be satisfied on the balance of probabilities that<sup>8</sup> :
- i. the applicant received the goods and services to which the expense relates,
  - ii. the applicant has paid the expense, has promised to pay the expense or is otherwise legally obligated to pay the expense, and
  - iii. the person who provided the goods or services,

<sup>4</sup> Order of Vice-Chair T. Hunter made on April 18, 2018, Tribunal Record

<sup>5</sup> S. 14 O. Reg. 34/10

<sup>6</sup> S. 19(1)(a) O. Reg. 34/10

<sup>7</sup> Attendant Care Hourly Rate Guideline – October 2015, Tab 9, Submissions of Aviva Insurance

<sup>8</sup> S. 3(7) e, O.Reg. 34/10

(A) did so in the course of employment, or occupation or profession in which him or he would ordinarily have been engaged, but for the accident, or

(B) sustained an economic loss as a result of providing the goods or services to the applicant

[12] The *Schedule*<sup>9</sup> also gives me discretion to deem that ACB expenses were incurred if I find that the respondent unreasonably withheld or delayed payment the benefit.

[13] The applicant argues that he is entitled to ACBs in the amount of \$17,356.80 for the 24 months following the accident<sup>10</sup> regardless of whether the definition of incurred has been met. He submits that because the respondent “*conceded to entitlement and concedes that the amount of the Form 1 is reasonable and necessary*”<sup>11</sup> more than two years after the accident he does not have to prove that the expenses were incurred. He asks me to deem that the expenses were incurred regardless of whether the assistance was provided.

[14] In the alternative the applicant asks me to order that the respondent pay the invoices of Attendants With Care Inc. (AWCI) for 14 months of ACBs in the amount of \$11,600<sup>12</sup> based upon the invoices and timesheets dating from November 1, 2015 to December 31, 2016<sup>13</sup> and to deem the expenses to have been incurred for the period January 1, 2017 to October 25, 2017.

**Should I exercise my discretion and deem the ACB expenses have been incurred?**

[15] The applicant argues that the respondent acted unreasonably in maintaining its position that his injuries fell within the *Minor Injury Guideline* and withholding payment of an ACB. He asks me to exercise my discretion under s. 3(8) of the *Schedule* and order the respondent to pay ACBs based on the Form 1 for 104 weeks following the accident. The applicant relies on the following evidence to establish his claim that the respondent unreasonably withheld or delayed payment of ACBs:

1. He submitted a Form 1<sup>14</sup> dated December 18, 2015 which recommends attendant care assistance for the applicant and assesses the total monthly attendant care benefit at \$723.20.

<sup>9</sup> S. 3(8), O. Reg. 34/10

<sup>10</sup> Page 1, paragraph 2 of the Applicant's Submissions

<sup>11</sup> Page 2, Applicant's Submissions

<sup>12</sup> The applicant's submissions seek payment for 13 months, however, both the applicant and respondent have provided the same invoices of 14 months.

<sup>13</sup> Tab 3, Applicant's Exhibit Book

<sup>14</sup> Tab 2, Applicant's Exhibit Book

2. He provided the respondent with invoices for attendant care services on August 19, 2016 for the period November 2015 to June 2016.
3. He provided medical reports and medical information to the respondent throughout 2016 and 2017.<sup>15</sup>
4. The respondent did not remove him from the *Minor Injury Guideline* until the time of the case conference even though there was no new medical evidence provided immediately before the case conference.
5. The respondent accepts that the ACB expenses claimed are reasonable and necessary.

[16] I am not satisfied on the balance on probabilities that the respondent unreasonably withheld or delayed payment of ACBs for the following reasons:

- a. An ACB is not payable if an applicant sustains only minor injuries that fall within the *Minor Injury Guideline*. ACBs did not become payable until the case conference when the *Minor Injury Guideline* issue was resolved. The minor injury issue is not before me. The fact that the applicant sent medical records to the respondent in 2016 and 2017 is not evidence that the respondent unreasonably delayed in determining that the *Minor Injury Guideline* does not apply. I have not been provided by the applicant with medical reports or any details of the applicant's injuries in the accident that would allow me to reach the conclusion that the *Minor Injury Guideline* decision was unreasonably delayed.
- b. While the applicant argues that the respondent asked for an "exorbitant" amount of productions which he provided, he does not reconcile the correspondence from the respondent requesting documents<sup>16</sup> and his correspondence forwarding documentation<sup>17</sup>. The letter from the respondent to the applicant dated October 27, 2017 encloses a Productions Chart which indicates that there were outstanding requests for information as of that date. I am unable to conclude from this evidence that the respondent unreasonably delayed or withheld payment of an ACB by keeping the applicant in the MIG.

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<sup>15</sup> Tab 5, Applicant's Exhibit Book

<sup>16</sup> Tab 11, Applicant's Exhibit Book

<sup>17</sup> Exhibit 5, Applicant's Exhibit Book

- c. The applicant does not refute the respondent's evidence<sup>18</sup> that he did not attend an insurer's examination (IE) that was scheduled for April 28, 2016 to determine if the Form I submitted by the applicant was reasonable and necessary.<sup>19</sup> The *Schedule*<sup>20</sup> permits an insurer to refuse to pay ACBs relating to the period after the person refused to comply with the request for an IE and before the insured person submits to the examination. I have no evidence that the applicant ever attended at an IE for attendant care benefits.
- d. The respondent has provided evidence that the applicant was not fully co-operative with the respondent with respect to providing information regarding his claim for ACBs. The transcript<sup>21</sup> from the July 28, 2016 Examination Under Oath (EUO) of the applicant confirms that the applicant refused to answer questions relating to whether attendant care services were being received and the names of the persons providing attendant care. The applicant's counsel took the position that the EUO questions are restricted to questions concerning the applicant's entitlement to benefits and that questions relating to whether attendant care services were being received or the name of the persons providing the services were not proper questions.

The Ontario Court of Appeal in the case of *Aviva Insurance Company of Canada v McKeown et. Al.*<sup>22</sup> looked at the question of whether the Notice of an EUO has to provide the reasons for the EUO. The Court of Appeal found that the *Schedule* is intended to provide a non-adversarial cost effective approach to settling accident claims. I agree with the respondent that the questions with respect to whether or not the applicant was receiving attendant care and who was providing the care were reasonable questions. The question of entitlement to benefit to ACBs is not limited to the "reasonable and necessary" but extends to the question of whether benefits are payable.

In my view it is understandable that the respondent proceeded with caution following the refusal of the applicant to answer questions regarding the ACB application at the EUO.

- e. The Financial Services Commission of Ontario case law<sup>23</sup> submitted by the applicant establishes that an insurer must take reasonable steps in adjusting a claim similar to those that a

<sup>18</sup> Tab 13, Respondent's documents

<sup>19</sup> Tab B, Respondent's Arbitration Brief

<sup>20</sup> S. 42(9) O. Reg. 34/10

<sup>21</sup> Tab 5 Submissions of RBC General Insurance Company (now Aviva Insurance Company)

<sup>22</sup> 2017 O.C.A 563

<sup>23</sup> *Cowans and Motor Insurance Corporation*, FSCO A09-003237, October 15, 2010

reasonable and prudent insurance adjuster would take. A finding of unreasonable withholding or delay in payment of benefits does not require that an adjuster act in bad faith or commit an actionable wrong, all that is required is an unreasonable withholding of payments. In this case the applicant has not provided any evidence to show the steps that the respondent took in adjusting the claims to support his contention that the respondent's steps in his accident benefits claims were not reasonable. The only evidence I have been referred to with respect to the adjustment of the ACB claim is the transcript of the EUO and the evidence that the applicant did not attend the 2016 IE assessments.

- [17] I do not find that the respondent unreasonably withheld or delayed payments of ACBs and for that reason there is no basis for me to exercise my discretion.

**Did the Applicant incur expenses for ACBS?**

- [18] The applicant submits that he incurred attendant care expenses for services provided by a personal support worker employed by AWCI over the fourteen month period between November 1, 2015 and December 31, 2016 in the amount of \$10,750.00.
- [19] He relies on the monthly invoices from AWCI and the monthly timesheets with the initials A.C. as evidence that he received attendant care services.
- [20] There is no evidence that the applicant has paid for any attendant care services. He relies on the invoices and timesheets as evidence that he promised to pay for the services or is otherwise legally obligated to pay for the services.
- [21] The respondent questions whether the applicant received the attendant care services covered by the invoices and takes issue with authenticity of both the invoices and the timesheets. The respondent also submits that there is no evidence that the applicant promised to pay the invoices or is legally obligated to pay the expenses.
- [22] I am satisfied on the balance of probabilities that the applicant incurred expenses for attendant care services and that he is entitled to be paid his expenses in accordance with the *Guidelines*. I have determined the amount of attendant care benefit payable below.
- [23] Firstly, I am satisfied on the balance of probabilities that the applicant received the attendant care services to which the invoices and time sheets relate. The respondent asks me to find that the applicant did not receive the services covered by the invoices because the applicant refused to answer questions on his August examination under oath (EUO) with respect to whether he was receiving services and who was providing the services.

- [24] The applicant's explanation for his refusal to answer the questions is that EUOs are for the purpose of determining entitlement to a benefit and questions with respect to whether expenses are incurred are not appropriate for an EUO.
- [25] The applicant submits his own affidavit<sup>24</sup> and the affidavit<sup>25</sup> of A.C. which state that the applicant received attendant care services from S.T., a personal support worker provided by AWCI. I recognize that the respondent has not had the opportunity to cross-examine either the applicant or A.C. on their affidavits. I am satisfied, however, on the balance of probabilities that the applicant received attendant care services based on the fact that the applicant provided the invoices for services shortly after the EUO and provided further invoices once he was removed from the *Minor Injury* Guideline.
- [26] The *Schedule*<sup>26</sup> provides the respondent with mechanisms to obtain information with respect to invoices in order to determine if they are payable. In preparation for this hearing, the respondent asked for copies of the timesheets to support the invoices which were provided. I have no evidence that the respondent sought any other information from the applicant or the service provider with respect to the services.
- [27] Secondly, I am satisfied on the balance of probabilities that the applicant has promised to pay and/or is legally obligated to pay for the services that he received. While the invoices do not provide any terms or payment or include a promise to pay they do clearly invoice the applicant for attendant care services and each monthly invoice is supported by a time sheet. The applicant confirms in his affidavit that he knows he is obligated to pay AWCI for the services provided. Again, the *Schedule* allows an insurer to request information about invoices. The applicant provided the insurer with the information it requested at the case conference. The respondent has had invoices from AWC since July 2016 – over 18 months and took no steps to determine if the invoices were payable.
- [28] Thirdly, the applicant has provided a copy of the diploma for the personal services worker S.T. who he submits provided the services. This diploma satisfies me on the balance of probabilities that S.T. provided the services in the course of her employment with AWCI.
- [29] Being satisfied that ACBs are payable for the period from November 1, 2015 to December 31, 2016 I must determine the amount of benefits that are payable.

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<sup>24</sup> Tab 9, Applicant's Exhibit Book

<sup>25</sup> Tab 8, Applicant's Exhibit Book

<sup>26</sup> S. 46.2 and s. 46.3 O.Reg 34/10



### Amount of Benefit Payable

- [30] The respondent submits, and I agree, that hourly rates claimed in the invoices relied on by the applicant are beyond the maximum hourly rates provided for in the *Guideline*. The *Guideline* rates are used in the Form 1 to determine the applicant's monthly entitlement to ACBs and I do not have the authority to increase the hourly rates used to calculate the monthly ACB beyond these rates.
- [31] The respondent also submits that it is not liable to pay for any attendant care expenses that were incurred prior to the submission of the Form I on December 18, 2015. I will rely on the Order made on consent at the case conference which states that the issue is whether the applicant is entitled to ACBs from October 29, 2015 and ongoing.
- [32] The hourly rates provided for in the *Guideline* effective for accident occurring after October 1, 2015 and before October 1, 2016 are set out in the table below. AWCi has billed all services at \$25.00 per hour.

### Attendant Care Hourly Rate Guideline

Attendant Care Costs	Maximum Hourly Rate
<b>Part 1: Hourly Rate A</b> Level 1 Attendant Care is for routine personal care.	<b>\$13.19</b>
<b>Part 2: Hourly Rate B</b> Level 2 Attendant Care is for basic supervisory functions.	<b>\$11.25</b>
<b>Part 3: Hourly Rate C</b> Level 3 Attendant Care is for complex health/care and hygiene functions.	<b>\$19.35</b>

- [33] The respondent argues that I do not have enough evidence to modify the invoices of the applicant to reflect the allowable hourly rates as was done by my colleague L. Marzinotto in the case of *A.H. V. Belair Direct*.<sup>27</sup> In my view I do not have to modify the invoices. While the timesheets and invoices do not allocate the hours worked between the three levels of care provide for in the *Guideline* and the Form I, I am of the view that it is reasonable to approve payment of incurred monthly attendant care expenses up to the monthly amount determined on the Form 1. I have reviewed the *Guideline* and I do not find anything in the *Guideline* to prevent me from taking this approach.
- [34] The monthly benefits assessed on the Form 1 are set out below:

Level	Attendant Care	Hours	Rate/hour	Total
Level 1	Personal Care	28.67	\$13.19	\$378.11
Level 2	Supervisory Functions	18.92	\$11.25	\$193.93
Level 3	Complex and Hygiene	7.81	\$19.35	\$151.18
		<b>55.4</b>		<b>\$723.20</b>

- [35] I approve payment of the incurred attendant care expenses in the amount of \$9,755.20. The amount payable per month is set out in the Appendix. I do not approve payment of the benefit beyond December 31, 2016 because I am not satisfied that the benefit was incurred beyond that date and for the reasons provided above I am not prepared to deem the benefit to have been incurred.
- [36] For the reasons provided above I find that attendant care expenses in the amount of \$9,755.20 are payable to the applicant.

### Interest

- [37] The applicant is entitled to interest on the benefits I have found payable in accordance with the *Schedule*. The *Schedule*<sup>28</sup> sets out how interest is to be calculated where there is a dispute as to entitlement to a benefit or the amount of benefit.
- [38] If the parties are unable to agree on the interest payable they may contact Tribunal to obtain a date to argue the interest calculation before me.

<sup>27</sup> Tribunal File 16-001063

<sup>28</sup> S. 51(4) O. Reg. 34/10

### Award under Regulation 664<sup>29</sup>

- [39] The applicant asks me to make an award under Regulation 664.
- [40] This regulation allows me to award an additional amount of money to the applicant if I find that the respondent unreasonably withheld or delayed payment of benefits. Section 10 allows me to award an extra lump sum payment of up to 50% of the amount to which the applicant is entitled to together with interest on all amount owing to the insured (including unpaid interest) at the rate of 2 per cent per month compounded monthly, from the time the benefit first became payable.
- [41] Having already found that the respondent did not unreasonably withhold or delay payment of the attendant care benefits I am unable to consider awarding an additional amount of money to the applicant and his claim for an additional amount of money is dismissed.

### Costs

- [42] The applicant's request for costs is denied for the reasons provided below.
- [43] The Licence Appeal Tribunal (LAT) Rules of Practice and Procedure<sup>30</sup> (the Rules) allows a party who believes that another party in a proceeding has acted unreasonably, frivolously, vexatiously, or in bad faith to make a request to the Tribunal for costs.
- [44] The cost provisions in the Rules refer to the behaviour of a party that takes place in the proceedings before the Tribunal and not to behaviour that occurs before the application to the Tribunal is made. The Rules require<sup>31</sup> cost submissions to set out the particulars of the other party's conduct that are alleged to be unreasonable, frivolous, vexatious or in bad faith.
- [45] The applicant submits that the respondent's failure to pay the ACB claim once it received particulars of the ACB claim following the case conference is behaviour entitling him to a cost order. I do not agree.
- [46] Delivery of the remaining invoices, all of the timesheets and a copy of the diploma of the person who provided the attendant care services did not resolve the outstanding issues. The respondent is entitled to challenge the credibility and sufficiency of the evidence as well as the fact that the amount claimed by the applicant is not within the *Guideline*. The applicant has not demonstrated any basis for a cost order.

<sup>29</sup> S. 10, O. Reg. 644 made under S. 280 of the *Insurance Act*, R.S.O. 1990, c. I.8

<sup>30</sup> Version 1 (April 1, 2016), S. 19

<sup>31</sup> S. 19.1 LAT Rules

[47] For the reasons provided above I **Order** that:

1. The respondent shall pay attendance care benefits to the applicant in the amount of \$9,755.20
2. For the period October 29, 2015 to December 31, 2016
3. The respondent shall pay interest on the attendant care benefits in accordance with the *Schedule*.
4. The applicant's claim for an award under Regulation 664 is dismissed.
5. The applicant's request for costs is denied.

**Released: June 29, 2018**

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**Susan Mather, Vice-Chair**

### Appendix to 17-006651

The maximum attendant care benefit payable per month is \$723.20.

Month	ACB Benefit Claimed	ACB Benefit Payable
November 2015	\$1000.00	\$723.20
December 2015	\$1000.00	\$723.20
January 2016	\$1000.00	\$723.20
February 2016	\$1000.00	\$723.20
March 2016	\$850.00	\$723.20
April 2016	\$850.00	\$723.20
May 2016	\$850.00	\$723.20
June 2016	\$850.00	\$723.20
July 2016	\$800.00	\$723.20
August 2016	\$800.00	\$723.20
September 2016	\$800.00	\$723.20
October 2016	\$600.00	\$600.00
November 2016	\$600.00	\$600.00
December 2016	\$600.00	\$600.00
<b>TOTAL</b>	<b>\$11,600.00</b>	<b>\$9755.20</b>