Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A14-007429

BETWEEN:

ROSARIO UNGARO

Applicant

and

AVIVA CANADA INC.

Insurer

REASONS FOR DECISION

Before: Arbitrator Jeff Musson

Heard: In person at ADR Chambers on February 9 and 10, 2016 and by written submissions completed May 9, 2016

Appearances: Mr. David Burton for Mr. Rosario Ungaro
Mr. Jason Frost for Aviva Canada Inc.

Issues:

The Applicant, Mr. Rosario Ungaro, was injured in an accident on December 4, 2013 and sought accident benefits from Aviva Canada Inc. ("Aviva"), payable under the *Schedule*.[1] The parties were unable to resolve their disputes through mediation, and Mr. Ungaro, through his representative, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

[1] *The Statutory Accident Benefits Schedule - Accidents on or after September 1, 2010*, Ontario Regulation 34/10, as amended.

The issues in this Hearing are:

1. Is Mr. Ungaro entitled to Attendant Care Benefits from January 5, 2014 and ongoing until the limits are exhausted?
2. Is Mr. Ungaro entitled to interest for the overdue payment of benefits?
3. Is either party liable to pay expenses in respect of the Arbitration Hearing?

Result:

1. Mr. Ungaro is not entitled to Attendant Care Benefits from January 5, 2014 and ongoing.
2. Mr. Ungaro is not entitled to interest for the overdue payment of benefits.
3. Aviva is entitled to its expenses in respect of the Arbitration Hearing. If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

EVIDENCE AND ANALYSIS:

BACKGROUND

The Applicant was born on November 17, 1959, and has been married for 27 years. He has 3 children. He is employed at his own contracting company, Benchmark Building. The accident occurred on Highway 401 near Victoria Park Ave on December 4, 2013. The Applicant was driving his van, and his son, Antonio, was the passenger. Upon impact, the Applicant was ejected from his vehicle and landed 20 ft from the van. He was transported from the scene to Sunnybrook Hospital and remained there until December 12, 2013. He was then transferred to St. John's Rehab – Sunnybrook Hospital where he stayed until December 24, 2013, when he was then discharged to go home. On December 29, 2013, the Applicant was admitted to St. Michael's Hospital for surgery to his left knee, medial meniscectomy, as well as repair of his lateral ligament complex and avulsion of the fibular head. He was discharged from St. Mike's

on January 13, 2014. The Applicant filed an Application for Arbitration on September 17, 2014.[2] The only benefit in dispute is attendant care, beginning from January 5, 2014, several days prior to his discharge from St. Mike's. The quantum of the Attendant Care Benefit is not in dispute. The entitlement of Attendant Care Benefits for the Applicant is what is in dispute.

ATTENDANT CARE BENEFITS

In order to qualify for Attendant Care Benefits in section 19 of the *Schedule*, one must also establish that the services were "incurred", which involves 3 components that must be addressed, as set forth in section 3(7)(e) of the *Schedule*. They are: (1) the Applicant must have received the disputed benefit; (2) there must be a promise to pay the service provider(s) for work completed; and (3) if the service provider is a "lay person", they must have sustained an economic loss as a result of providing attendant care services, or if not a lay person, the provider of attendant care services must be providing these services in the course of their regular profession.

Prior to the Hearing, the parties submitted an agreed joint statement of facts, establishing agreement on the following dollar amounts for Attendant Care Benefits: The Insurer paid the Applicant $3,000.00 in Attendant Care Benefits for the period from approximately December 11, 2013 until January 4, 2014. The Applicant is claiming the following in Attendant Care Benefits:

- $3,000.00 per month from January 5, 2014 until April 7, 2014;
- $2,400.27 per month from April 8, 2014 until August 26, 2014; and
- $1,180.02 from August 27, 2014 until the non-catastrophic limit is exhausted.

The Applicant is claiming in his submissions that he had 2 attendant care providers: his son, Antonio Ungaro, and his wife, Maria Ungaro.

The Insurer claims that both service providers have not provided proof as to services rendered

[2] Exhibit 1, Tab 3.

on behalf of the Applicant, and have not suffered economic losses as a result of their attendant care duties. As stated in *Fernandez and Certas Direct*, a Form 1 identifies attendant care needs, but does not constitute evidence that expenses have been incurred.[3]

The parties agree that there was only 1 OCF-6 expense claim form submitted to the Insurer. It was for the time period of December 2013 to January 2014. After January 30, 2014, there were no further expenses submitted to Aviva. The onus is on the Applicant to prove his entitlement to Attendant Care Benefits. Defining the attendant care needs of the Applicant is the purpose of the Form 1, but it is the OCF-6 which triggers payment.

The Applicant

The Applicant testified on his own behalf. In his testimony, the Applicant was asked questions regarding the attendant care services provided by Antonio and Maria, and he was asked about details surrounding the economic loss that both his service providers would have had to demonstrate in order to successfully claim Attendant Care Benefits.

The Applicant confirmed that the Insurer paid only $3,000.00 for the month of December 2013 towards his attendant care claim, and he also confirmed that there was only one OCF-6 filed in the amount of $12,000.00 in attendant care expenses. The Applicant preferred family members to be his attendant care providers instead of a personal support worker. He testified that during his recovery, he needed help with dressing and undressing, toenail clipping, going to the bathroom and shaving. In the early stages of his recovery, he required a wheelchair but eventually began using crutches. The Applicant testified that he returned to driving on a limited basis in 2014. He also testified that he knew that he could have used transportation provided by the Insurer, but chose not to on most occasions. When asked, he testified that he never advised the Insurer that Antonio and Maria used their own vehicles to drive him to some of his appointments; however, he confirmed that parking receipts were reimbursed by Aviva. The Applicant could not identify which parking receipts were from trips he made in his own

[3] Exhibit 6, Tab 20, *Fernandez and Certas Direct Insurance Company* (FSCO P06-00030, February 14, 2008).

car versus parking receipts from trips that were made by Antonio and Maria in their own vehicles.

The Applicant confirmed that no further attendant care expenses were submitted after January 31, 2014; however, he testified that he received a letter, dated December 17, 2013, describing what is required in order to submit an attendant care claim.[4] The Applicant confirmed that in the letter, Aviva requested specific details about his attendant care claim, but those details were never submitted. In addition, he also confirmed that detailed documentation had not been submitted to Aviva showing that either Maria or Antonio suffered an economic loss while providing attendant care services during his recovery. I note that the Ontario Court of Appeal in *Henry v. Gore Mutual* confirmed that only attendant care services actually provided are payable if an economic loss is sustained.[5]

Service Provider – Antonio Ungaro

I found Antonio to be an honest witness. At the time of the accident, he was 23 years old and he is the only son of Rosario and Maria Ungaro. Prior to the motor vehicle accident of December 4, 2013, Antonio worked for the Applicant as a labourer at Benchmark Building. Unfortunately, Antonio was involved in the same accident as the Applicant and he too was subsequently injured. Antonio claimed Income Replacement Benefits ("IRBs") from his insurance provider (Belair) as a result of not being able to work. For Antonio's IRB claim, which was accepted by his insurance company, he stated his last day of work was December 11, 2013 and he began to receive IRBs. In September 2015, Antonio began working full time at Ozz-Electric as a pre-apprentice. He testified that when he was at work doing his apprentice shift, he did not know who helped the Applicant with his attendant care needs.

In April 2015, Antonio had shoulder surgery which left his arm in a sling as part of his recovery until it healed. When asked, Antonio could not explain how he was able to assist with the Applicant's attendant care while only having the use of one arm. In addition, Antonio

[4] Exhibit 2, Tab 22, pg. 93.
[5] Exhibit 6, Tab 22, *Henry v. Gore Mutual Insurance Company*, 2013 ONCA 480.

himself required attendant care as a result of this surgery.

In terms of expenses, Antonio testified that he did not personally receive the $3,000.00 that Aviva paid in Attendant Care Benefits to the Applicant. He also testified that Aviva paid for parking fees that were incurred taking the Applicant to his various appointments, and that Aviva was willing to provide transportation for the Applicant to travel to his appointments. In addition, he also said that the pharmacy where the Applicant's medication was dispensed provided delivery services if required.

The Insurer submits that Antonio failed to provide Attendant Care Benefit details in addition to details of his economic loss that was incurred while caring for the Applicant. In this regard, Antonio testified that as far as he knew, there was only 1 OCF-6 submitted to the Insurer.[6] The attendant care expenses claimed by the Applicant were in the amount of $12,000.00 for the months of December 2013 and January 2014. There were no records submitted with the OCF-6 form. When asked by the Insurer how he arrived at the $12,000.00 amount, Antonio said he didn't know. He also testified that he had no idea why expenses for attendant care were not submitted to Aviva after January 2014. Ultimately, Antonio confirmed in his testimony that he stopped working as a result of his injuries in addition to not having a job available. This contradicts the narrative that the Applicant is putting forward, namely that Antonio had suffered an economic loss based solely on providing attendant care services.

In my opinion, based on the evidence, I agree that Antonio did not incur an economic loss as a result of providing attendant care services to the Applicant. Antonio was off of work and collecting IRBs while at the same time claiming that he had could not work because he was taking care of the Applicant. As an attendant care provider, Antonio had a choice to either claim his own IRBs or receive compensation for providing attendant care services. He ought to have chosen one or the other and ultimately he chose IRBs. Further, Antonio did not keep a diary or calendar entries as to when and how often he provided attendant care services. He didn't provide details as to what services were provided. He didn't substantiate an economic

[6] Exhibit 1, Tab 4.

loss despite details of this loss being requested by the Insurer multiple times.

Based on the evidence, Antonio did not meet the test of economic loss in providing attendant care services to the Applicant.

Service Provider – Maria Ungaro

Maria is employed at CIBC bank and is the wife of the Applicant. I found Maria to be an honest witness as well. As part of her providing attendant care services to the Applicant, a claim was submitted for Attendant Care Benefits. Maria was able to show proof that she incurred an economic loss at the beginning of the Applicant's recovery and as a result, the Insurer paid $3,000.00 for services rendered.

However, she testified that there was only one OCF-6 expense form submitted to Aviva for Attendant Care Benefits. When asked, she could not answer as to how she arrived at the $12,000.00 figure for Attendant Care Benefits for December 2013 and January 2014 in the OCF-6 form that was dated February 19, 2014.[7] She also testified that no other expense forms were submitted after this. In her testimony, she confirmed that the Insurer had requested documents to prove that she incurred an economic loss after January 2014. She also confirmed that the Insurer requested documents describing the services and details of the claim as the Applicant's attendant care provider. Maria stated that she didn't keep a diary or calendar of what tasks were completed on what days. She confirmed she didn't use all of her available sick/vacation days in 2013 or 2014 either. In her testimony, she confirmed that the Applicant was provided transportation services by the Insurer to his appointments if requested, and also confirmed that the pharmacy which provided the Applicant's medication had delivery services if requested. Maria reported her income from CIBC during the period in which she was the Applicant's service provider and the numbers that she provided did not substantiate an economic loss.

[7] *Ibid*.

Based on the evidence, Maria did not meet the test of economic loss in providing attendant care services to the Applicant.

CONCLUSION

As stated earlier, the onus is on the Applicant to prove his case. Moreover, as stated above, the *Schedule* requires a threshold must be attained in order to prove entitlement to Attendant Care Benefits. Based on the evidence provided, this did not occur. Both attendant care service providers (Antonio and Maria) did not substantiate an economic loss as required per Sections 3(7)(e) and 19 of the *Schedule*. In addition, there was only one OCF-6 expense form submitted, and a reduced amount was paid in the amount of $3,000.00. No further OCF-6s were submitted. For these reasons, the claim for Attendant Care Benefits is denied.

EXPENSES:

Aviva is entitled to its expenses in respect of the Arbitration Hearing. If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

July 18, 2016

Jeff Musson
Arbitrator

Date

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A14-007429

BETWEEN:

ROSARIO UNGARO

Applicant

and

AVIVA CANADA INC.

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. Mr. Ungaro is not entitled to Attendant Care Benefits from January 5, 2014 and ongoing.
2. Mr. Ungaro is not entitled to interest for the overdue payment of benefits
3. Aviva is entitled to its expenses in respect of the Arbitration Hearing. If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Jeff Musson
Arbitrator

July 18, 2016
Date