Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A12-006663

BETWEEN:

STEPHANIE KELLY

Applicant

and

GUARANTEE COMPANY OF NORTH AMERICA

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Arbitrator John Wilson

Heard: By written submissions received by May 21, 2014

Appearances: Maia Bent for Ms. Kelly
Rose Bilash for Guarantee Company of North America

Issues:

The Applicant, Stephanie Kelly, was seriously injured in a motor vehicle accident on April 6, 2009. There is no disagreement that she suffered catastrophic impairment arising out of a single car accident in the County of Perth near Stratford.

Immediately after the accident, Ms. Kelly was transferred to the London Health Sciences Centre Critical Care Trauma Unit, by air ambulance.

She was subsequently transferred to the St. Joseph's Health Care London, Parkwood Campus, ("Parkwood Hospital") where she was admitted to the Acquired Brain Injury Programme. She remained at Parkwood until June 11, 2009 when she was discharged to 24-hour supervision.

This dispute relates to supplementary attendant care services provided to Ms. Kelly by her parents and the Parkwood Hospital between April 6, 2009 and June 23, 2009. The supplementary attendant care services provided to Ms. Kelly by the Parkwood Hospital were invoiced by the hospital in the amount of $6,275.42, plus the supplementary care provided by her parents during the same time period.

There was no Form 1 provided by Ms. Kelly to Guarantee covering the attendant care at the time that she was in hospital and receiving the supplementary services. Given the seriousness of the situation and the complexity of the accident benefit scheme, it is not surprising that Ms. Kelly or her treating physicians did not immediately turn their minds to obtaining a Form 1. Rather, having discovered the importance of a Form 1 in indemnifying an injured person for attendant care services, on February 1, 2013 Ms. Kelly commissioned Ms. Erin Mara, an occupational therapist, to issue a retroactive Form 1 covering the period of April 6, 2009 to June 23, 2009.

Guarantee refused to pay the attendant care on the basis of the retroactive Form 1, since the Form 1 and the assessment were not, in its view, compliant with the requirements of the *Schedule*.[1] Nor did it view the claim as reasonable, given the level of services already provided by the hospital.

There were also questions as to whether Ms. Kelly had properly incurred all the expenses as claimed.

The parties were unable to resolve their disputes through mediation, and Ms. Kelly applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The preliminary issues are:

1. Is Ms. Kelly entitled to payment for the supplementary attendant care services provided by Parkwood and her family members in accordance with the retroactive Form 1?

2. Is Ms. Kelly entitled to be reimbursed for the cost of the Form 1 and Assessment of Attendant Care Needs Report in the amount of $772.92?

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

3. Is Ms. Kelly entitled to interest on the above outstanding amounts in accordance with the *Schedule* in force at the time of the motor vehicle accident?

4. Is Ms. Kelly entitled to her expenses in this matter?

Result:

1. Ms. Kelly is entitled to payment for the supplementary attendant care services, in the amount of $6,000 per month, in accordance with the Form 1 issued by Ms. Erin Mara, the occupational therapist, from April 6, 2009 to June 23, 2009.

2. Ms. Kelly is entitled to be reimbursed for the cost of the Form 1 and Assessment of Attendant Care Needs report in the amount of $772.92, inclusive of HST.

3. Ms. Kelly is entitled to interest on the above outstanding amounts in accordance with the *Schedule* in force at the time of the motor vehicle accident.

4. Ms. Kelly is entitled to her reasonable expenses in this matter.

EVIDENCE AND ANALYSIS:

This claim is about the timing of a Form 1 for attendant care and whether it may be issued retrospectively. It is also about who may be compensated as a provider of attendant care services and at what rate they may be paid.

The relevant portions of section 16 of the *Schedule*, relating to the provision of attendant care services, reads as follows:

> **16.** (1) The insurer shall pay an insured person who sustains an impairment as a result of an accident an attendant care benefit. O. Reg. 403/96, s. 16 (1).
>
> (1.1) Despite subsection (1), if the accident occurred after April 14, 2004, no attendant care benefit is payable to an insured person whose impairment is a Grade I or Grade II whiplash-associated disorder that comes within a *Pre-approved Framework Guideline*. O. Reg. 295/07, s. 3.
>
> (2) The attendant care benefit shall pay for all reasonable and necessary expenses incurred by or on behalf of the insured person as a result of the accident for,
>
> (a) services provided by an aide or attendant; or
> (b) services provided by a long-term care facility, including a nursing home, home for the aged or chronic care hospital. O. Reg. 403/96, s. 16 (2).

> (3) Subsection (2) does not apply to expenses for which payment may be obtained under clause 14 (2) (g), 15 (5) (k) or subsection 24 (1.6). O. Reg. 403/96, s. 16 (3); O. Reg. 533/06, s. 2.
>
> (4) The monthly amount payable by the attendant care benefit shall be determined in accordance with Form 1. O. Reg. 403/96, s. 16 (4).
>
> (5) The amount of the attendant care benefit payable in respect of an insured person shall not exceed the amount determined under the following rules:
> . . .
> 2. If the accident occurred on or after October 1, 2003 and the optional medical, rehabilitation and attendant care benefit referred to in section 27 has not been purchased and does not apply to the insured person, the amount of the attendant care benefit payable in respect of the insured person shall not exceed,
>
> i. $3,000 per month, if the insured person did not sustain a catastrophic impairment as a result of the accident, or
> ii. $6,000 per month, if the insured person sustained a catastrophic impairment as a result of the accident. . . .

Ms. Kelly claimed attendant care expenses under section 16 of the *Schedule* because she sustained a severe impairment following an accident and needed attendant care in the period following the accident, including the period in which she was hospitalized in Parkwood, a hospital facility in London specialized in providing rehabilitative care.

As noted above, the timing of the Form 1 is important in this matter. Implicit in the Insurer's position is the belief that in the absence of a provision specifically authorizing a retroactive Form 1, a claim for attendant care services does not crystallize until a Form 1 is provided. According to Guarantee, a Form 1 cannot deal retrospectively with services provided prior to the provision of the Form 1 but only with subsequent care services.

The Insurer also does not accept that the amounts claimed for attendant care services provided by Ms. Kelly's parents were payable since they were not "incurred" and were not reasonable in any event.

Ms. Kelly does not dispute that she had not paid for the supplementary services at the time they were provided but submits that they still meet the definition of "incurred" as it has been interpreted in the relevant jurisprudence.

Guarantee also disputed the claim for the cost of the retroactive Form 1 and expressed the view that even if found compensable it could only be in the context of an arbitration expense and subject to those limitations.

I disagree with Guarantee's narrow approach to the attendant care provisions of the *Schedule*. As the Court of Appeal noted in *Monk*s[2], insurance coverage provisions are to be interpreted broadly, while coverage exclusions or restrictions are to be construed narrowly in favour of the insured.

Indeed, if one follows that the interpretative approach endorsed by the Supreme Court in *Rizzo & Rizzo Shoes*[3], the interpretation of the attendant care provisions must be made in the context of the entire scheme of the Act and not in isolation.

It has long been established that the accident benefit scheme or "no fault" has a social policy aspect that goes beyond the parties to the insurance policy.

The *Statutory Accident Benefits Schedule*, which underpins the "no fault" system of insurance compensation in Ontario, is aimed at providing prompt and timely financial assistance to those in need after an accident. It is intended to deal with those items enumerated under the *Schedule,* including income replacement benefits, medical expenses, and the one at issue in this arbitration: attendant care expenses.

The Courts have identified a common theme in approaching the statutory accident benefits scheme − that it is meant to address the challenges of an injured insured person in a timely and interim basis − to address the immediate *sequelae* of an accident and assist the victim to obtain redress without concern for either fault or causation. As Lane J. noted in *Belair Insurance Co. v. McMichael*[4], citing *Kennelly v. Wawanesa Mutual Insurance Co.,* "the statutory goal of prompt payment for necessary services."

[2] *Monks v. ING Insurance Co. of Canada* [2008] O.J. No. 1371

[3] *Rizzo & Rizzo Shoes Ltd. (Re*) [1998] 1 S.C.R. 27 "Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized."

[4] [2007] O.J. No. 1972

Since the decision of the Court of Appeal in *Daly*[5], it has been clear that a valid Form 1 is a prerequisite for payment of attendant care expenses. It is also clear that the levels of attendant care and the hourly amounts payable for such levels of service cannot be varied from the levels fixed by the Commission. The Court in *Daly*, however, did not deal with the issue of whether a Form 1 may be issued retroactively.

While a Form 1 may be a pre-condition to payment of attendant care expenses[6], I do not accept that requiring an injured person in every circumstance to complete all the paperwork including a Form 1 before incurring any attendant care expenses is congruent with the scheme of the *SABS* as we know it. Indeed, Ms. Kelly's case demonstrates the folly of such an approach.

A Form 1 has now been issued. Ms. Kelly's claim is not frivolous. Her injuries were serious and life-threatening. It would appear that the calculation of the amounts claimed for attendant care has been made in accordance to the necessary formula. Why should these amounts not be payable?

It goes without saying that in an emergency situation, all attention is focused on treating the patient in danger and addressing the immediate care concerns of the injured person. As will be evident from the excerpts of the integrated discharge summary which follows, Ms. Kelly had some serious and life threatening injuries which were slow to resolve.

Indeed, having reviewed the medical records submitted in support of this claim, the question must come to mind as to whether any patient suffering from the immediate repercussions of a severe accident, as was Ms. Kelly, would have been either physically or even legally capable of instructing an occupational therapist to initiate a Form 1 examination during the initial period covered by this claim.[7] Nevertheless, Guarantee maintains that a contemporary Form 1 is a pre-condition to any payment being made.

[5] *Daly v. ING Halifax Insurance Co*. 85 O.R. (3d) 70, J.L. MacFarland J.A.
[6] *Daly (ibid)*
[7] See *Bannon v. Thunder Bay (City)* [2002] 1 S.C.R. 716

A summary of Ms. Kelly's medical condition at Parkwood gives a sense of her condition. She was found to have suffered:[8]

Head injury
Diffuse Axonal Injury
Traumatic Subarachnoid Hemorrhage (SAH)
Subdural hematoma
Basal skull fracture extending to the occipital condyles with CSF leak and
Pneumocephalus and ventricle effacement
Complex comminuted temporal bone fracture
Disruption of Malleolus and Incus in left ear
Left sphenoid bone fractures with medial displacement
Left cranial nerves dysfunction
Left medial and superior orbital wall fractures
Fixed, dilated left pupil
Left T2 Transverse Process Fracture
Retrosternal hematoma
Manubrial Fracture
Left Ribs 1, 5, 6, fractures
Bilateral Pulmonary Contusions
Grade IV Splenic Laceration
Soft tissue abrasions (numerous)

As can be seen, Ms. Kelly's needs were great following the accident and, not surprisingly, only slow progress was made in restoring her autonomy. It is not surprising that neither Ms. Kelly nor her family turned their mind to hiring an occupational therapist to issue a Form 1 at this critical time.

As noted earlier, subsection 16(4) of the *Schedule* provides specifically that "The monthly amount payable by the [attendant care] benefit shall be determined in accordance with Form 1."

[8] Integrated Discharge Summary of Parkwood Hospital, dated June 11, 2009

It is of note that the requirement merely states that the payment be determined in accordance with the Form 1, and does not set a timeline for the Form 1 to be issued.

Section 39(3) of the *Schedule* obliquely raises the timing issue by stating "an insurer may, but is not required to, pay an expense incurred before an assessment of attendant care needs that complies with subsection (1) is submitted to the insurer." At the very least this provision suggests that the absence of a Form 1 is not an absolute bar to a subsequent claim for attendant care services.

There is no dispute that there now has been a Form 1 filed on behalf of Ms. Kelly relating to the services which make up this claim.

This Form 1, issued by Erin Mara, a registered occupational therapist, although "retrospective", was thorough. Ms. Mara reviewed all the available acute care, treatment and rehabilitation records, from the initial air ambulance report to the notes and records of treating physicians.

A **CD-ROM** of all the relevant documents was provided in conjunction with the Form 1 and supporting O.T. report.

It is important to again underline that Ms. Kelly suffered extremely serious injuries arising from the accident and was unconscious upon her arrival at LHSC, Victoria Hospital, with a GCS between 6 and 7.

More importantly, the medical reports disclose that Ms. Kelly continued to have problems of confusion, and a difficulty comprehending instructions. As late as April 12, 2009 her GCS fluctuated on a daily basis.

In addition mobility remained limited. Ms. Kelly was able to transfer to a chair by April 12, 2009 and, by April 14th, was able to initiate walking with the assistance of two people. Her inability to utilize a walker was ascribed to her difficulty understanding instructions and her upper extremity weakness.

She also had difficulty swallowing and was at risk of aspiration of any liquids taken by mouth as well as any buildup of secretions.

Upon admission to Parkwood, on April 23, 2009, it was noted that Ms. Kelly had significant issues with impulsivity, poor memory, agitation and perseveration. The hospital recommended one-on-one supervision. A system of restraints was used.

Ms. Mara summarized in her report:

> Initially upon admission to Parkwood Ms. Kelly required 1:1 supervision for the completion of all functional tasks, due to her impulsivity and high risk for falls. Client was assisted with ambulation on the unit due to decreased balance and visual deficits and supervised during the completion of bathing tasks. Client utilized a bath bench for safety while in the tub. Client remained intermittently confused such that she did not recall the reason she could not eat/drink and as such supervision was required to ensure her safety. Notes indicate that the client perseverated on the desire to drink regularly each day. The use of restraints continued to be required when client at rest. Client's vision continued to be limited peripherally on her left side, which combined with poor balance and impulsivity made for a high risk for falls, due to limited awareness of obstacles on her left side.

I accept that the above summarizes fairly Ms. Kelly's condition during the early stages of her stay in Parkwood.

Ms. Kelly was ultimately discharged from Parkwood on June 11, 2009. In the interim, although her physical skills and independent participation had improved, she continued to require supervision "for management of her cognitive deficits to ensure that she remembered to follow any medical precautions…and to assist with decision-making skills during the completion of functional tasks."[9] Ms. Kelly was ultimately discharged to home with an order for 24 hour supervision for safety and management of her medical care.

There is no question raised by the Insurer as to the actual provision of services provided between April 6, 2009 and June 23, 2009. No-one questions that the hospital provided supplementary services and that Ms. Kelly's parents attended to her during her stay in Parkwood.

[9] P.6 report of Erin Mara O.T.

Both the Form 1 and the supporting materials particularize the time spent by the parents in assisting Ms. Kelly. Given the gravity of Ms. Kelly's impairments and the close support offered by her family, the time outlined is credible.

This is not one of those abusive cases where an unscrupulous insured attempts to maximise accident benefits with a dubious attendant care claim.

What the Insurer questions, however, is whether it is obliged to pay for such services as were provided prior to the provision of a Form 1 and whether indeed it is obliged to pay at all for services at a time when Ms. Kelly was a full-time, in-patient in Parkwood. It also questions whether Ms. Kelly actually "incurred" the attendant care amounts claimed.

No-one doubts the gravity of Ms. Kelly's injuries and the long-term sequelae of her injuries. Indeed, Guarantee has accepted that Ms. Kelly meets the threshold for catastrophic impairment.

This claim is for attendant care services in the initial months following the accident when her health was precarious and her needs greatest. It would seem strange that the failure to issue a form in a time of crisis should block an insured from ever claiming indemnity for any attendant care services that were found to be reasonable and necessary.

Despite the Insurer's position in this matter, the question of a retroactive Form 1 is not novel. Arbitrator Bayefsky in *T.N.* addressed this specific issue. After examining the legislative requirement of a Form 1 and the surrounding jurisprudence, the arbitrator found:

> This does not, in my view, mean that an insured forfeits their right to attendant care benefits, or that an insurer is released of any obligation to pay attendant care benefits, prior to the Form 1 being submitted. In my view, significantly stronger statutory language would be required to effect this purpose. The section as it now reads simply ensures the orderly determination of a person's need for attendant care (in accordance with a proper attendant care needs assessment), and protects an insurer from having to determine what it should pay in the absence of a specific and legitimate attendant care needs assessment.

I agree with Arbitrator Bayefsky's approach to the attendant care provisions of the *Schedule*.

In Arbitrator Bayefsky's analysis the question (once a retroactive Form 1 is filed) becomes simply "whether the evidence prior to the receipt of the Form 1 reflects the assessment contained in the Form 1."[10]

While the Insurer has not accepted the validity of the Form 1, it has not undertaken its own assessment and has not provided its own Form 1 or even a report to contradict Ms. Mara's findings. Thus, the only evidence I have before me as to the attendant care requirements is the report issued by Ms. Mara, supported by the plethora of documentary evidence that Ms. Mara considered in making her report.

Having reviewed the medical documentation supplied in this matter, and which formed the basis of Ms. Mara's report, I find both the Form 1 and its supporting report credible, as well as uncontradicted.

The question of whether an insured can claim for attendant care services provided by family members has long been decided in the affirmative.[11] Indeed, as the Court of Appeal noted in *Henry*:[12] "to the extent that the word 'incurred' restricts coverage available to the insured, it must be assigned a narrow meaning." Incurred under that definition could encompass services provided by family and friends without concurrent payment for the services rendered as long as there was an understanding that the services might be compensated at some time in the future once an insured was in a position to pay.

It has also been found to be incurred where no advice was given to an insured by the insurer of the availability of attendant care services under the no-fault provisions, thus effectively precluding the provision of paid services.

I have no hesitation in finding that the supplementary attendant care services provided by both the hospital and the family were not only provided as claimed, but were also incurred as required by subsection (1). As noted in the jurisprudence since *Stargratt* and *McMichael*, "incurred"

[10] *T.N. and Personal Insurance Company of Canada* **(**FSCO A06-000399, July 26, 2012)

[11] *Stargratt and Zurich North America* (FSCO A99-000521, October 4, 2001, upheld on Appeal P01-00045, March 31, 2003)

[12] *Henry v. Gore Mutual Insurance Company* 116 O.R. (3d) 701

remained undefined in the *Schedule* and its use does not oblige an insured to formally hire and actually pay for a service provider before the claim becomes payable.

I find that the attendant care services provided to Ms. Kelly during her stay in Parkwood, including those provided by her parents, were incurred as that term was understood in *McMichael*. They were not mere recommendations but services demonstrably provided by parties who, under the 1996 *Schedule* approach, were entitled to claim compensation.

It is only with the legislative response to the *Henry* decision that this issue has resurfaced in the context of accident benefits. There is no question however in this matter that the new legislative provisions do not apply to Ms. Kelly's claim because of both the date of the accident and the issuance of the policy in force at the time of the accident.

Rather, the issue in this arbitration is whether the family-provided services were reasonable **and** necessary in the context of Ms. Kelly's lengthy hospitalization and rehabilitation.

Firstly, the same analysis applies to the supplementary family services as to the supplementary institutional attendant care services provided to Ms. Kelly. Having found that the institutional claim was not barred by the failure to file a timely Form 1 for the services, I find that the same rationale applied to the family care which was part and parcel of Ms. Kelly's care continuum.

I find therefore that the pre-conditions of the Form 1 have been met with regard to the family-provided care notwithstanding that the analysis was retrospective.

However, as Arbitrator Bayefsky suggested, this is not the end of the analysis. The question remains as to whether the recommendations made in the Form 1 are reasonable and appropriate under the circumstances.

The Form 1 recommended a total monthly attendant care amount of $7,061.83, which consisted of care provided at the appropriate three statutory attendant care levels by both professional staff and family members, reduced to the statutory maximum of $6,000 per month for catastrophically impaired insureds.

As already mentioned, the Form 1 issued by Ms. Mara appears on its face to be thorough and to respect the levels of care mandated for the use in the context of a Form 1. Her report and the documents submitted in support of her report make it clear that she reviewed in depth all of the documents available including the full gamut of institutional records including nursing sign-in sheets.

It is clear from the hospital records that Ms. Kelly continued to require significant assistance and supervision to prevent situations that could have serious if not fatal consequences. Anyone with any awareness of hospitals and the Ontario medical system recognizes that hospitals of all sorts have been subject to budgetary restraints and that resources, including staff resources, are limited and rationed. The Form 1 recognizes this unfortunate reality in providing for further, necessary care and supervision for Ms. Kelly.

Ms. Mara in her report confirms that: "(At) Parkwood, the ratio of staff to patients was such that Ms. Kelly's safety could not be managed without the support of additional 1:1 staff."

She continued:

> While Ms. Kelly's physical skills improved over time at the Parkwood Inpatient ABI program, she continued to require supervision of her cognitive deficits to ensure that she remembered to follow any medical precautions (i.e. no water) and to assist with decision-making skills during the completion of functional tasks. (i.e. tub transfer.)

It is noteworthy that when Ms. Kelly was discharged from the hospital, she was still prescribed twenty-four hour supervision "for safety and management of her medical care."

I note parenthetically that the provision of supplementary attendant care services in a hospital setting is not novel. Once again, Ms. Mara's evidence is uncontradicted as to this need.[13]

The amounts actually claimed do not exceed the limits provided in the *Schedule* and appear to make sense in the light of the range of support and supervision required by Ms. Kelly in this discrete period.

[13] See *Bellavia and Allianz Insurance Company of Canada / ING* (FSCO A05-000807, February 21, 2006)

On the face of the Form 1 and the supporting evidence, there is no reason to find that the amounts claimed are not payable. In fact, given its thorough nature it is *prima facie* evidence of entitlement.

Guarantee had access to the same raw data, including the medical records, for Ms. Kelly that Ms. Mara relied upon in issuing her Form 1 and her report, but did not provide that information nor Ms. Mara's report to its own experts to obtain an expert opinion as to reasonableness of the services. Certainly no responding report was filed in this arbitration. While submissions suggesting alternative approaches were made, submissions are not evidence.

The failure of Guarantee to lead any expert evidence to the contrary suggests to me that, notwithstanding Guarantee's submissions, the approach of Ms. Mara, the occupational therapist, is correct and in line with both the underlying factual situation and the Form 1 approach to attendant care analysis.

I find therefore that Ms. Kelly has met the evidentiary burden of substantiating her need for the attendant care outlined in the Form 1 prepared by Ms. Mara.

With regard to the cost of the Form 1, while it might be claimed as an arbitration expense, as is suggested by Guarantee, its prime purpose is to trigger payment of necessary attendant care expenses, and it should therefore be reimbursed to the degree possible under the *Schedule*.

I note that while the Insurer could have waived the Form 1 requirement in accordance with section 39(3) of the *Schedule*, it insisted that no payment would be made without a Form 1. Since it insisted on a Form 1 in a case where both the need and the *bona fides* of the claimant were evident, it is reasonable that it should pay for it and I so order.

EXPENSES:

Ms. Kelly claims her expenses in preparing and presenting this claim for attendant care services. Given her success in this matter, and the regrettable position taken by the Insurer on this issue, I see no reason to deviate from the traditional notion that costs follow the cause.

Therefore, I exercise my discretion to award Ms. Kelly her reasonable expenses incurred in this preliminary issue hearing.

If the parties are unable to agree as to the amount of the expenses, I may receive brief written submissions as to quantum.

	August 7, 2014
John Wilson Arbitrator	Date

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A12-006663

BETWEEN:

STEPHANIE KELLY

Applicant

and

GUARANTEE COMPANY OF NORTH AMERICA

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Guarantee shall pay to Ms. Kelly $6,000 per month from April 6, 2009 to June 23, 2009 as an attendant care benefit.

2. Guarantee shall pay to Ms. Kelly the amount of $772.92 including HST as the cost of the Form 1 and Assessment of Attendant Care Needs Report.

3. Ms. Kelly is entitled to interest on the above outstanding amounts in accordance with the *Schedule* in force at the time of the motor vehicle accident (O. Reg 403/96).

4. Ms. Kelly is entitled to her expenses in this matter. If the parties are unable to agree on an amount I may be spoken to on that issue.

August 7, 2014

John Wilson
Arbitrator

Date