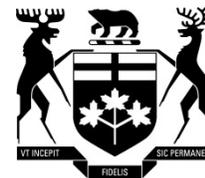


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**Tribunal File Number: 16-000216/AABS**

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:

**M.R.**

**Applicant**

And

**Aviva Insurance Company of Canada**

**Respondent**

**DECISION**

**ADJUDICATOR: Joseph Nemet**

**APPEARANCES:**

For the Applicant: Kristy Kerwin, counsel

For the Respondent: Jason Frost, counsel

**HEARD: Oral Hearing held by teleconference on December 7, 2016**

**OVERVIEW:**

1. The applicant was involved in a motor vehicle accident on December 6, 2013, and sought benefits from her insurer pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the “Schedule”).
2. The applicant applied to the Licence Appeal Tribunal (“Tribunal”) on May 6, 2016, claiming attendant care benefits for the period from December 7, 2013 to December 7, 2015.

### **Preliminary Procedural Issue**

3. The respondent brought a motion heard at the start of this hearing to exclude certain documents. I granted that motion.
4. The respondent requested that the supplementary reports of Dr. El-Hage dated November 29, 2016 and the affidavit of Ms. Tanja Jakovljevic sworn November 29, 2016 be excluded from the hearing. These reports were included for the first time in the applicant’s reply submissions. T
5. The Case Conference Order dated July 20, 2016 limited the applicant's reply submissions to five pages, and Rule 10.3 of the LAT Rules of Practice & Procedure, April 1, 2016 (“Rules”) prevent the applicant from filing any additional expert evidence not already served at least 30 days in advance of the hearing or in compliance with a Tribunal order.
6. The applicant's reply material consisted of over seven pages of submissions along with the additional evidence noted above.
7. After hearing the submissions of counsel and after having considered the authority referred to by the respondent,<sup>1</sup> I ruled that the material would be excluded from the hearing.
8. The material from Dr. El-Hage and Ms. Tanja Jakovljevic was written less than 30 days before the hearing. It was also clear that the material had been generated to address the evidence and reports in the respondent's material and to address evidentiary gaps and deficiencies in the applicant’s case as set out in the respondent’s submissions.
9. As neither of these experts was being called by the applicant, the respondent would have had no opportunity to cross-examine the authors of the supplementary reports.
10. In addition, an Order dated October 25, 2016 limited the parties to relying upon documents that had been filed at the case conference.

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<sup>1</sup> *Springer v. Aird Berlis* (2009 Canlii 10401).

11. Lastly, the applicant provided no compelling reason or circumstance in favour of exercising my discretion to allow these reports to go into the record.
12. I thus grant the respondent's motion and exclude the requested documents.

#### **ISSUES TO BE DECIDED:**

13. Is the applicant entitled to attendant care benefits at the rate of \$2,183.08 per month from December 7, 2013 to December 7, 2015?<sup>2</sup>
14. Do the applicant's impairments fall within the Minor Injury Guideline (MIG)?<sup>3</sup>

#### **EVIDENCE AND ANALYSIS<sup>4</sup>**

15. The applicant was involved in a motor vehicle accident on December 6, 2013. She argues that the resulting injuries she sustained exacerbated her pre-existing back pain and headaches caused by an earlier motor vehicle accident in September 2011 which, until the December 2013 accident, had been largely resolved.
16. As a result of the December 2013 accident, the applicant suffered injuries to her left thigh and neck, and sprained and strained her lumbar spine. She states that she developed severe headaches, lower back pain and muscle stiffness. In the time since the accident, she gained 45 pounds.
17. In addition to more frequent and severe headaches, the applicant also states she suffers from back pain, social withdrawal, mood swings, depression, frustration, helplessness, isolation, anxiety, feeling of worthlessness and widespread chronic body pain.
18. At the time of the accident, the applicant was employed as a security guard travelling from location to location. As part of those duties she had to carry a lock box with keys in them in and out of her vehicle. According to the applicant, the box weighed approximately 40 to 50 pounds.

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<sup>2</sup> While the initial amount of attendant care claimed was \$3,000.00 per month, at the hearing evidence was lead limiting the amount to \$2,183.03 per month as per the Form 1 filed.

<sup>3</sup> This issue was added by Order dated October 25, 2016.

<sup>4</sup> In addition to the applicant, the following witnesses were cross-examined on either affidavits or reports filed: a. ER, mother of the applicant; b. EmR, sister of the applicant; c. Dr. Neetan Alikan, physician, for the respondent; d. Dr. Howard Waiser, psychologist, for the respondent.

19. At the time of the accident, the applicant lived with her parents and her children in her parents' basement. She was a single parent. She worked long hours (6:00 a.m. to 6:00 p.m.) and required her mother and other members of her family to look after her young children when getting up, getting dressed and going to school. When the children returned from school, her mother and/or sisters would look after them until the applicant came home.
20. The applicant returned to work four days after the accident and did not lose much work time thereafter as a result of the accident. The applicant continued to work after the accident but with increasing difficulty because of back pain and her lethargy. The applicant's grandmother came to Canada to help look after her. She finally ceased working as a security guard in January 2015, when she sustained a non-accident related Deep Vein Thrombosis ("DVT"). The applicant's susceptibility to a DVT had been discovered in 2007 as a result of a stroke.
21. The applicant's mother and sister testified as to the applicant's depressed mood and her increasing reliance on pain killers, her lethargy, and sleeplessness after the accident.
22. The applicant remarried in September 2014 to a man who came from Greece. Unfortunately, the marriage broke down in the summer of 2016 which the applicant attributes to her depressed mood and general lack of interest in life as a result of the accident.
23. On November 7, 2016, the applicant attended a psychological assessment by Dr. Howard Waiser as arranged by the respondent. During that assessment, she was asked if she was working. She answered no.
24. On cross-examination, the applicant admitted that she recently commenced a job working as a probationary employee at a cosmetics company doing custodial tasks such as wiping down the walls, changing toilet paper, and wiping off counters. The heaviest tool she uses is a broom or mop. She said that her co-workers assist her with the water for the mop if they see her having a hard time. The applicant said that she took the job because she just needed to get out of the house.
25. The respondent introduced into evidence five video clips from surveillance it had conducted on November 6, 2016. These were viewed during the hearing.
26. One of the clips shows the applicant carrying a vacuum, and helping to load and unload a mattress onto a truck. Another clip shows her lifting a surround system out of a shopping cart and placing in a truck.
27. The applicant acknowledged that the video clips were of her and agreed they showed her engaging in the activities noted above.

28. The applicant's evidence is that she requires more than 45 hours per week of attendant care assistance. In the July 11, 2016 report of Tanja Jakovljevic, Registered Nurse, Ms. Jakovljevic states that based on the applicant's restrictions and barriers, attendant care assistance is reasonable and necessary in the amount of 45.25 hours per week or \$2,183.08 per month. The specific assistance required is for dressing and undressing, shaving legs, make-up application, hair care, meal preparation, bathroom cleaning, bed making, linen changes and custodial care. Further, it is noted that the applicant requires attendant care as she has difficulties initiating and following through with tasks and remembering things. Ms. Jakovljevic notes that the assistance in providing cues and reminders does not have to be hands-on and can be performed from a distance totalling four hours per day due to her physical, cognitive and emotional limitations.
29. The applicant said that attendant care services were provided by her grandmother (when in Canada), sister and husband and this is reflected in the receipts. The applicant submitted handwritten receipts from her to her husband, to her grandmother and to her sister, EmR. There are 24 receipts starting from December 7, 2013 and ending November 7, 2015. Each of the 24 receipts is in the amount of \$2,183.08, which is the amount set out in the Form 1 prepared by Ms. Jakovljevic.
30. The applicant argues that ten of the receipts reflect the months that the husband provided attendant care; three receipts for months that her grandmother provided care; and the balance of eleven are for the months that her sister alleges to have provided the attendant care.
31. The first receipt (December 2013) is in the name of the applicant's husband. The second receipt (January 2014) is in the name of the applicant's grandmother who lives in Greece. On cross-examination, the applicant, her mother and sister acknowledged that both the husband and the grandmother were not in Canada during the period shown on the receipts and therefore could not have been providing attendant care for those months.
32. The applicant acknowledges that she signed each and every receipt but that the other handwriting setting out the name of the person providing the services and the amount had been prepared by someone at her counsel's law firm sometime over the past summer. The receipts name the person who the applicant maintains provided attendant care for the period indicated on the receipt.
33. In her affidavit, the applicant lists the various tasks each did. Tasks included doing dishes, vacuuming, laundry, dusting, taking kids to school, picking kids up from school, setting table, grocery shopping. In addition, the applicant states that she would pay her sister in money, coffees and cigarettes for all of her help when her sister asked for it. No details in respect of amounts or dates are set out in the affidavit.

34. In the affidavit of EmR at paragraph 42, she states that she sometimes assists with the applicant's hair care and make up. In paragraph 43, she states that some days the applicant requires assistance to dress.
35. Pursuant to s. 3(7)(e) of the *Schedule*, when a person provides attendant care that is not in the course of his or her employment, he or she must have sustained an economic loss as a result of providing that care in order for that care to have been "incurred" (*i.e.*, recoverable). In terms of the issue of economic loss, EmR asserts in paragraph 61 of her affidavit that assisting her sister prevented her from searching for employment and attending interviews. No further particulars were provided.
36. In paragraph 63, EmR states that she previously worked providing personal care to an intellectually disabled person. No further particulars were provided.
37. No evidence of economic loss was put forward with respect to the applicant's husband.
38. With respect to the grandmother, an invoice for the cost of a return airfare from Greece to Toronto in the amount of \$1,395.95 was put forward. The flight into Canada was on April 9, 2015 and the return on May 3, 2016.
39. On cross-examination, the applicant stated that her father paid the airfare for her grandmother and that she had promised to repay him.
40. The applicant's sister, EmR, in her cross-examination testified that the applicant promised her verbally a "long time ago" that she would pay her. It was not to be based upon an hourly rate but what was "right".
41. The Form 1 is dated March 12, 2016. When asked why she did not file a Form 1 within 104 weeks of the accident, the applicant responded that she did not know why.
42. I have reviewed all of the evidence and submissions in making my decision.

### **Minor Injury Guideline**

43. The respondent attacked the credibility of the applicant for her failure to disclose to Dr. Waiser that she was working and the surveillance videos. On their own they may have had an impact on my assessment of her credibility but for the testimony of the family.
44. On the issue of the video clips, they are not determinative in my view of the applicant's impairment. The activities engaged in by the applicant are

unremarkable and are not inconsistent with the evidence put forward by her sister and mother.

45. I find that the testimony of the mother and the sister to be very credible in describing the symptoms and the problems experienced by the applicant throughout the period of her recovery from the accident. Their responses to the questions put to them were calm, responsive to the questions and answered without hesitation. Both mother and daughter without hesitation confirmed that the second husband and the grandmother were not in Canada as the first receipts were dated.
46. In order to be eligible to receive attendant care benefits, the applicant's injuries must fall outside of the MIG. (See section 14 of the *Schedule*). The respondent takes the position that the applicant is within the MIG and, therefore, not entitled to attendant care benefits.
47. The applicant relies on the medical opinions of Dr. Stephen Brown (chronic pain assessment dated August 23, 2016) and Dr. M.C. El Hage (psychological assessment dated October 13, 2016).
48. In Dr. Brown's report, he opines that the applicant suffers from chronic pain of the lumbar spine and chronic headaches and sleep disorder (insomnia). Dr. Brown attributes the worsening low back pain, headaches and psychological distress directly to the December 6, 2013 accident.<sup>5</sup>
49. Dr. El Hage opines that the applicant meets the diagnostic criteria for Major Depressive Disorder, Generalized Anxiety Disorder as well as Non-Organic Sleep Disorder, all of which he attributes to the subject accident.
50. A minor injury means a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and any clinically associated sequelae.
51. The applicant takes the position that she is suffering from chronic pain which takes her out of the MIG. The onus is upon the applicant to show that the chronic pain as an injury or condition is separate and apart from the minor injury. I see no evidence that this is the case here. I find that the applicant's injuries were minor in nature and in this case the applicant's chronic pain is the sequelae of her minor physical injuries.<sup>6</sup> The medical evidence put forward by the applicant does

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<sup>5</sup> The applicant also relies upon the expert medical reports of Dr. Stephen Brown and Dr. Monique Costa El-Hage. Dr. Brown's report was based upon an assessment done on August 12, 2016, and Dr. El-Costa's assessment was done on August 23, 2016.

<sup>6</sup> I find the FSCO decision submitted by the respondent, *Ganal v. Coseco* (FSCO A14-010070), persuasive on this issue.

not meet that onus on the issue of chronic pain being separate and more than sequelae of her minor physical injuries.

52. The applicant also submits that her psychological injury takes her outside of the MIG. I accept the opinion of Dr. El-Costa that the applicant has been diagnosed with Major Depressive Disorder, Generalized Anxiety Disorder, as well as Non-organic Sleep Disorder. The symptoms that Dr. El Costa notes in her reports are consistent with the observations provided by the applicant's mother and sister, which I accept as credible evidence.
53. I find that the applicant's depression and anxiety were the result of the accident and as such the applicant's impairment falls outside of the MIG.

### **Attendant Care Benefits**

54. I was impressed by the testimony of the applicant, her mother and her sister. Given that events took place three years ago, it is understandable that it is difficult to recollect every detail. The fact that in each of these witnesses' affidavits receipts were put forward for services purported to have been performed by the husband and the grandmother and neither were in Canada is testament to the difficulty of revisiting the past. I view their collective mistake on the first two receipts as honest mistakes and not an attempt to mislead in any way.
55. The applicant lived in the basement of her parents' home with her two children. The home is also shared with her adult siblings. It is clear that the family is close and very supportive. And, like all close and supportive families, they will help their family members in need. Even before the accident, family members assisted the applicant with her children.
56. However, I find that there is no reliable evidence by way of invoices, logs or any other corroborative evidence to show what services, when, by whom and for how long were provided. I also am not satisfied that the applicant has proven on a balance of probabilities that she had "incurred" the expenses as required in section 3(7)(e) of the Schedule.
57. Section 3(7)(e) provides:
- e) subject to subsection (8), an expense in respect of goods or services referred to in this Regulation is not incurred by an insured person unless:
- (i) the insured person has received the goods or services to which the expense relates,
  - (ii) the insured person 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,
  - (A) did so in the course of the employment, occupation or profession in which he or she 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 insured person.
- 58. All of the evidence of the services provided is vague and very general and only compiled after the fact some 2.5 years after the accident. The witnesses and the applicant have done their best in recollecting what they did and when, but the evidence falls short of the mark.
- 59. In terms of creating a legal obligation to pay, the fact that no one bothered to track what services, by whom and for how long at the time suggests quite strongly that there was no agreement, enforceable or otherwise, between the applicant and her family. All of the evidence is consistent with the notion that the family members volunteered to help and that there was no discussion about payment until much later.
- 60. I also find it odd that each receipt documents the attendant care provided exclusively by only one family member over an entire month. It is difficult to accept that in the period covered by each receipt, the person named provided the care exclusively without any assistance from the other family members who were also present in the household.
- 61. In terms of establishing that services were provided by the grandmother, the sister and second husband, there is no reliable evidence by way of invoices or logs or any other corroborative evidence to show what services, when and for how long were provided.
- 62. The applicant argues that EmR suffered economic loss in that she was prevented from securing employment and going to interviews because she was caring for the applicant.
- 63. No evidence was put forward to show what attempts EmR made to look for work or why she did not have time to seek employment. As noted earlier, of the 24 invoices only 11 were for the services provided for by EmR. Presumably over the other 13 months she was available to look for employment.
- 64. Lastly, there was no evidence put forward that any of the family members provided attendant care services to the applicant do so in the course of their employment, occupation or profession in which they would ordinarily have been engaged for remuneration as required in section 19(3) of the schedule.

65. In terms of the sister's past employment providing support to a person with an intellectual disability the evidence presented fall well short of showing that her employment was one in which she was ordinarily engaged in for remuneration.

### **Post 104 Weeks**

66. The respondent also advanced the argument that the applicant's ability to claim attendant care benefits is barred because of the Form 1 being signed and submitted to the insurer more than 104 weeks after the date of the accident.

67. The respondent cites s. 20(2) of the *Schedule* in its argument that the applicant must submit the Form 1 within 104 weeks of the accident. Section 20(2) provides that "no attendant care benefit is payable for expenses incurred more than 104 weeks after the accident."

68. Given my ruling that the applicant is not entitled to attendant benefits because the expenses were not incurred the section does not apply and the issue is moot.

### **ORDER**

69. The application is dismissed.

**Released:** June 27, 2017



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**Joseph Nemet, Adjudicator**