



Licence Appeal Tribunal File Number: 19-005892/AABS

In the matter of an Application for Dispute Resolution pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

Armanda Kuci

Applicant

and

Unifund Assurance Company

Respondent

MOTION ORDER

ADJUDICATOR: **Ludmilla Jarda**

APPEARANCES:

For the Applicant: **Ryan M. Naimark, Counsel**
Jordan Dahan, Counsel

For the Respondent: **Peter Yoo, Counsel**

Motion heard by Written Submissions : **October 17, 2022**

BACKGROUND

- [1] The applicant was injured in an automobile accident on **October 20, 2018** and sought benefits pursuant to the Statutory Accident Benefits Schedule – Effective September 1, 2010.
- [2] The applicant was denied certain benefits and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”).
- [3] Case conferences took place on **February 10, 2020** and on **October 5, 2020**.
- [4] The issues in dispute are whether the applicant sustained a catastrophic impairment as defined by the Schedule, attendant care benefits, medical and rehabilitation benefits, an award, and interest.
- [5] A 5-day videoconference hearing was initially scheduled for September 21-25, 2020. The hearing was first adjourned to September 27-October 1, 2021. It was later adjourned to November 14-18, 2022.

MOTION

- [6] On **September 6, 2022**, the respondent filed a Notice of Motion requesting the following relief:
 - a. An order removing the applicant’s claim for attendant care benefits in the amount of \$6,000.00 per month from September 19, 2019 to date and ongoing as an issue in dispute pursuant to section 55 of the Schedule; and
 - b. Alternatively, an order for productions.

- [7] The applicant opposed the respondent’s motion and sought costs of the motion.

RESULT

- [8] The respondent’s motion is denied.
- [9] The applicant’s request for costs of the motion is denied.

Relevant Facts

- [10] The applicant filed this application on September 20, 2019. The issues in dispute at that time were attendant care benefits, medical and rehabilitation benefits, an award, and interest.

- [11] On January 27, 2021, the respondent requested, pursuant to section 33 of the Schedule, the production of information and documentation concerning the invoices that had been submitted by the applicant for attendant care benefits.
- [12] The applicant provided some of the information and documentation requested, but not all the information and documentation were provided as the applicant's personal support worker ("PSW"), Khadija Omar, did not want to provide the information on the basis that it was not relevant and that providing the information would constitute a breach of privacy. Ms. Omar was an independent PSW, contracted to work with HAL Disability.
- [13] On May 19, 2021, the respondent advised the applicant that her attendant care benefits were suspended, effective March 26, 2021, due to non-compliance with their section 33 production request.
- [14] On June 1, 2021, the respondent wrote to DAL Disability and Ms. Omar, and they requested production of information and documentation relating to the applicant's claim for attendant care benefits pursuant to section 46.2(1) of the Schedule.
- [15] On June 30, 2021, the applicant reiterated that Ms. Omar was unwilling to provide the information and documentation requested by the respondent, and she provided a statutory declaration relating to her claim for attendant care benefits.
- [16] On July 20, 2021, the respondent advised the applicant that they were unable to provide consideration for payment of her attendant care expenses as the information and documentation they were seeking remained outstanding.

Request to strike the applicant's claim for attendant care as an issue in dispute

- [17] Pursuant to section 19 of the Schedule, an insurer shall pay attendant care benefits for all reasonable and necessary expenses incurred by or on behalf of the insured person as a result of the accident for services by an aide or attendant or by a long-term care facility, including a long-term care home under *the Fixing Long-Term Care Act, 2021* or a chronic care hospital.
- [18] Under section 3(7)(e) of the Schedule, an expense in respect of goods or services 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.

- [19] To determine its liability to pay attendant care benefits, section 46.2(1) of the Schedule provides that an insurer may request any of the following information from a provider:
- a. Any information required to assist the insurer, acting reasonably, to determine its liability for the payment, including access to inspect and copy the originals of any treatment confirmation form, treatment and assessment plan, assessment of attendant care needs and other documents giving rise to the claim for payment;
 - b. A statutory declaration as to the circumstances that gave rise to the invoice, including particulars of the goods and services provided; and
 - c. In some cases, the name and full municipal business address of the provider and every provider, other than the person who submits the invoice, who provided any of the goods or services referred to in the invoice as well as proof of the provider's identity and of the identities of every person who provided the goods or services referred to in the invoice.
- [20] Pursuant to section 55(1)3 of the Schedule, an insured person shall not apply to the Tribunal if the issue in dispute relates to the insurer's denial of liability to pay an amount under an invoice on the grounds that: (i) the insurer requested information from a provider under subsection 46.2(1), and (ii) the insurer is unable, acting reasonably, to determine its liability for the amount payable under the invoice because the provider has not complied with the request in whole or in part.
- [21] However, despite section 55(1)3, the Tribunal may permit an insured person to apply and impose terms and conditions under sections 55(2) and 55(3) of the Schedule.
- [22] The respondent submitted that they were provided with invoices by the applicant for attendant care services, and they requested information and documentation from HAL Disability and Ms. Omar to ascertain whether the attendant care services had been "incurred" as defined by the Schedule pursuant to section 3(7)(e) and 46.2(1) of the Schedule. The respondent did not receive all the information and documentation that they requested, and they submitted that

without this information and documentation they were unable to determine their liability to pay the invoices. As such, the respondent argued that the applicant's claim for attendant care benefits should not be permitted to proceed pursuant to section 55(1)3 of the Schedule.

- [23] The applicant acknowledged that the respondent had requested various information and documentation pursuant to sections 33 and 46.2(1) of the Schedule and noted that she had complied, in part, with these requests. However, Ms. Omar refused to provide some of the information and documentation requested by the respondent on the basis that: if produced, it would constitute a breach of privacy; or the information was irrelevant and not reasonably required by the respondent pursuant to section 46.2(1).
- [24] The applicant advised that she provided the following information and documentation to the respondent:
- a. Three Assessments of Attendant Care Needs (Form 1s);
 - b. Invoices from HAL Disability in support of the applicant's incurred attendant care expenses;
 - c. Clinical notes and records from HAL Disability in support of the applicant's incurred attendant care services;
 - d. Ms. Omar's Certificates of Accreditation;
 - e. A completed statutory declaration invoice verification form certifying that the attendant care services were provided by Ms. Omar on dates spanning between March 2020 and March 2021;
 - f. HAL Disability's response to the section 33 requests made by the respondent;
 - g. A statutory declaration dated October 3, 2022 completed by Ms. Omar who provided services to the applicant as stipulated within all the clinical notes and records from HAL Disability;
 - h. Government photo identification of Ms. Omar; and
 - i. Ms. Omar's CV.
- [25] The applicant submitted that the above information and documentation was sufficient to allow a respondent, acting reasonably under section 46.2(1) of the

Schedule to determine their liability for the amounts payable under the attendant care invoices submitted. Indeed, this information and documentation established the applicant's attendant care needs, the particulars of the attendant care services that were provided as well as an indication that the applicant has promised to pay or is legally obligated to pay for the attendant care services. The applicant further submitted that after reconciling the information and documentation provided, the respondent can determine its liability for payments of the amounts within the attendant care invoices. As such, the respondent's request to strike the applicant's claim for attendant care benefits pursuant to section 55(1)3 of the Schedule is not supported by the evidence and should not be granted by the Tribunal.

- [26] Alternatively, if the Tribunal finds that the respondent is unable, acting reasonably, to determine its liability for the amount payable under the attendant care invoices submitted, the applicant requested that the Tribunal exercise its powers under section 55(2) and (3) of the Schedule and allow the applicant to proceed with her claim for attendant care benefits, subject to any conditions the Tribunal chooses to impose.
- [27] Based on the facts and evidence before me, although HAL Disability and Ms. Omar did not initially provide the information and documentation requested by the respondent under section 46.2(1), they have since provided most of the information and documentation requested. Further, I am not persuaded by the respondent's submissions that acting reasonably they would not be able to determine their liability for the amount payable under the invoices on the basis that HAL Disability and Ms. Omar did not provide all of the information and documentation they requested. Accordingly, I find that the respondent has not met their burden of proof to be successful on this motion, and their request to strike the applicant's claim for attendant care benefits pursuant to section 55(1)3 of the Schedule is denied.

Request for productions

- [28] Pursuant to Rule 9.1 of the Tribunal's Common Rules of Practice and Procedure ("Rules"), the Tribunal may at any stage in a proceeding order any party to provide such further particulars or disclosure as the Tribunal considers necessary for a full and satisfactory understanding of the issues in the proceeding. Further, pursuant to Rule 9.3(e), a party may seek an order from the Tribunal at any stage of the proceeding ordering a party to disclose any document or thing the Tribunal considers relevant to the issues in dispute.

- [29] The respondent submitted that the information and documentation sought were relevant to the issues in dispute and that there was a nexus between the documents sought and the applicant's claim for attendant care benefits. They further indicated that the information and documentation were relevant to the issue of whether the attendant care services provided to the applicant were "incurred" as defined by the Schedule.
- [30] The applicant submitted that she had already provided most of the information and documentation sought by the respondent. As for the information and documentation that had not been produced, the applicant indicated that it was not relevant to determine liability with respect to the payment of invoices or determining whether the attendant care services provided to the applicant were incurred as defined by the Schedule. She also submitted that the respondent had not provided a justification as to why each item on their extensive boilerplate list were required, and the applicant denied that there was any nexus between the information and documentation sought with the issues in dispute. Moreover, the respondent's request for Ms. Omar's tax returns and notices of assessment, and contracts with her clients, if produced, would constitute a breach of privacy.
- [31] In response, the respondent acknowledged receipt of the various information and documentation provided by the applicant after their motion materials were served. However, the respondent did not indicate in their reply submissions whether they were satisfied by the applicant's updated productions. Further, the respondent did not provide a justification for continuing to seek the balance of the information and documentation sought.
- [32] Considering the above, there is insufficient evidence before me to establish the relevance of the balance of the information and documentation sought by the respondent. Also, I am not persuaded by the respondent's submissions that the balance of the information and documentation sought is necessary for the Tribunal to have a full and satisfactory understanding of the issues in the proceeding. Accordingly, the respondent's request for productions is denied.

Request for costs

- [33] The applicant sought costs of the motion as against the respondent pursuant to section 17.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 on the basis that the respondent's motion was unreasonable, frivolous, vexatious, an abuse of process, and brought in bad faith. The applicant submitted that the respondent did not act reasonably in their request for information and documentation in accordance with section 46.2(1) or 55(1) of the Schedule, and their request to strike the applicant's claim for attendant care benefits was

unreasonable, frivolous, and vexatious.

- [34] The respondent opposed the applicant's claim for costs and submitted that the motion was necessary to confirm that the attendant care benefits that were allegedly incurred by the applicant were "incurred" as defined by the Schedule.
- [35] Costs are a discretionary remedy imposed when a party has acted unreasonably, frivolously, vexatiously, or in bad faith pursuant to Rule 19.1. The Tribunal is also compelled to consider the criteria pursuant to Rule 19.5 in awarding costs, particularly relating to the seriousness of the misconduct, whether a party's behaviour was in breach of a direction or order issued by the Tribunal, whether or not a party's behaviour interfered with the Tribunal's ability to carry out a fair, efficient, and effective process, prejudice to the other parties, and the impact an order of costs would have on individuals accessing the Tribunal system. The test represents a high bar.
- [36] Based on the facts and evidence before me, I am not satisfied that the test under Rule 19 has been met in the circumstances of this case. Thus, no costs shall be awarded.

CONCLUSION

- [37] **The parties shall proceed to a 5-day videoconference hearing on November 14-18, 2022, as scheduled.**
- [38] **Except for the provisions contained in this Motion Order all previous orders made by the Tribunal remain in full force and effect.**
- [39] If the parties resolve the issue(s) in dispute prior to the hearing, **the applicant** shall immediately advise the Tribunal in writing.

Released: November 10, 2022



Ludmilla Jarda
Adjudicator