Entitlement to attendant care benefits upheld

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For Law Times

A Divisional Court decision upholding a woman's entitlement to attendant care benefits offers guidance on the Statutory Accident Benefits Schedule's controversial "incurred expense" provisions, according to the injured plaintiff's lawyer.

The decision in *Helmer v. Belairdirect Insurance Company* revolved around the May 6, 2016 motor vehicle accident that injured Belinda Helmer, the owner and operator of an assisted living residence.

"This decision is going to be very useful for anyone attempting to determine what his necessary to qualify for attendant care, which is one of the major benefits available to claimants under the SABS," says Toronto lawyer Ernest Toomath, who acted for Helmer.

"Some clarification was required in the law, and the Divisional Court has provided that with a very well-reasoned decision."

Toomath says the dispute has a protracted history and that, while his client was pleased with the Divisional Court ruling, her joy has been tempered by the progress of the case.

"My client was successful at the LAT, but she wasn't paid. Now she's been successful at the Divisional Court and she still hasn't been paid. It's been two years, which has been very difficult for her," says Toomath, explaining that he intends to bring a writ of execution against Belairdirect in order to enforce the judgment.

"It's disappointing because this is a step that should not be necessary, but when you have not seen any money, you are left with little choice," he adds.

The lawyers for Belairdirect did not respond to requests for comment.

The day after her accident, Helmer hired a woman named Roberta Holmes to work as a personal support worker at her business before retaining her several weeks later to perform attendant care services for Helmer personally.

But Belairdirect denied Helmer's claim for reimbursement under s. 3(7)(e)(iii) of the SABS, which deems expenses not incurred unless the service provider 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 "sustained an economic loss as a result of providing the goods or services to the insured person."

The provisions were added to the law in order to limit the use of benefits to pay caregiving professionals or to compensate non-professional family and friends of the victim who can show they gave up other opportunities to take on caregiving responsibilities following concerns about misuse by injured people inventing jobs for friends and family.

The insurer in Helmer's case claimed that she was ineligible for reimbursement because Holmes was not working as a PSW on the day of the accident, but a Licence Appeal Tribunal adjudicator hearing the case ruled that a service provider could meet the requirements as long as they were "working or was looking for work at the time" the attendant care services were performed.

While both parties focused their arguments at the LAT on proving that Holmes had worked as a PSW before Helmer's accident, the adjudicator concluded that mattered less than whether or not Holmes was legitimately in the business of offering care services.

"The key question for the LAT was whether or not the service provider would be providing services elsewhere but for the accident. In the view of the tribunal, the services must be the product of an employment, occupation or profession in which the service provider would have ordinarily been engaged even if the accident had not occurred. On the facts of this case, the tribunal concluded that the test was satisfied," reads the May 9 Divisional Court judgment upholding the LAT decision.

Deanna Gilbert says she welcomes the Divisional Court's endorsement of the focus on the legitimacy of the services when determining entitlement to attendant care benefits.

Writing for the unanimous three-judge panel, Ontario Superior Court Justice Calum MacLeod said the tribunal's ruling was a reasonable interpretation of the SABS section at issue.

"The Appellant has not been able to direct us to any jurisprudence conclusively supporting the interpretation that the regulation was intended to limit an injured party to hiring a person that was rendering services as a PSW prior to the accident," he wrote.

"As explained by the LAT adjudicators, such an interpretation would lead to the absurd result that if an injured person did not require attendant care for a year or two post accident, they could not hire a PSW who had become qualified or started a business after the accident."

Deanna Gilbert, a partner at Toronto personal injury law boutique Thomson Rogers, says she welcomes the court's endorsement of the focus on the legitimacy of the services when determining entitlement to attendant care benefits.

"The case law has been up and down on the incurred expense definition, but this gives further authority to the emerging trend," she says.

"The purpose of this legislation was really to distinguish between folks who are specifically trained and qualified to do a job compared with those who are providing a loving, caring service but without the proper training and experience. And this decision emphasizes that it's all about the legitimacy of the service provider."

By making legitimacy the key determinant, Gilbert says, the decision also takes the pressure off service providers to prove exactly when they entered or re-entered their profession.

"Where this case is more helpful than some others is that it accepts the LAT's conclusion that there isn't a need to show that the service provider was working in that capacity on the day of the accident or before that," she adds.

"There's a bit of flexibility, which makes sense. Just because you're unemployed for a week or month [is] not going to delegitimize the services you provide in a professional capacity. You don't stop being a PSW by trade just because you're out of a job for a particular period of time."

Rob Deutschmann, principal at personal injury firm Deutschmann Law in Kitchener, Ont., says the decision was a good one for Helmer, but he laments the need for these sorts of determinations at all, calling the incurred expense provision "one of the more cruel changes to the accident benefits regime.

"It seems to serve no purpose other than to cut costs and hurt injured people," he says.

Until the provisions were added in 2010, Deutschmann says, it was a relatively simple process for family members to step in to provide care, noting that expenses were naturally checked by the insurer's assessment of attendant care needs.

Further amendments to regulations in 2014 "compounded the cruelty," according to Deutschmann, by changing the definition of "economic loss" in the section to cap benefits according to the lost income of a non-professional family member, rather than the value of the attendant care services provided.

Toomath says the *Helmer* decision was also notable for confirming that the Divisional Court will review LAT decisions on a standard of reasonableness.

"This is one of the first decisions where they have been asked to clarify the standard," he says.

Belairdirect argued that a correctness was a more appropriate standard, considering the LAT only took over responsibility for accident benefit matters from the Financial Services Commission of Ontario.

"We do not agree with the appellant that the presumption of a reasonableness standard is rebutted simply because the jurisdiction of the LAT is comparatively recent," MacLeod concluded.

"In fact the Supreme Court of Canada has indicated that correctness applies only to a very narrow category of legal questions such as questions of central importance to the legal system as a whole, constitutional questions, questions regarding the jurisdictional lines between competing specialized tribunals or true questions of *vires* or jurisdiction. This is not such a case." **LT**