CITATION: Helmer v. Belairdirect Insurance Company, 2018 ONSC 2888
DIVISIONAL COURT FILE NO.: 506/17
DATE: 20180508

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

C. HORKINS, CONWAY and C. MACLEOD JJ.

BETWEEN:	
BELINDA HELMER Applicant (Respondent in Appeal)	*Tracy L. Brooks* and *Sloane Bernard*, for the Applicant (Respondent in Appeal)
– and –	
BELAIRDIRECT INSURANCE COMPANY Respondent (Appellant)	*Ernest H. Toomath* and *Courtney Toomath-West*, for the Respondent (Appellant)
	Trevor Guy, for the Intervenor, Licence Appeal Tribunal
	HEARD at Toronto: May 8, 2018

C. MACLEOD, J. (Orally)

[1] Belairdirect appeals to this court from a decision of the Licence Appeal Tribunal (LAT) concerning entitlement under the *Statutory Accident Benefits Schedule* (SABS)[1]. Pursuant to s. 11 (1) & (6) of the *Licence Appeal Tribunal Act, 1999* [2] a party may appeal from the LAT to the Divisional Court on a question of law.

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[1] O.Reg. 34/10 made under the *Insurance Act,* RSO 1990, c. I.8, as amended
[2] SO 1999, c. 12, Schedule G

Standard of Review

[2] The appellant correctly summarizes the law. Courts exercising functions of review over specialized administrative tribunals are generally to do so under the administrative law framework whether the review is by way of a statutory right of appeal or by way of judicial review.[3] Under that framework, an interpretation of a statute entrusted to the tribunal is entitled to deference and will presumptively be reviewed on a standard of reasonableness.[4]

[3] The appellant urges us to depart from that standard and to review the impugned decision on a standard of correctness. The basis for this argument is that the LAT has relatively recently been assigned responsibility for interpretation of the SABS and the interpretation of insurance legislation is unlike the other jurisdiction exercised by the tribunal. Most of the statutes under its jurisdiction have to do with licencing rather than entitlement to benefits.

[4] We are asked to follow the dicta in *2130845 Ontario Inc. o/a Heart & Crown v. Ontario (Alcohol and Gaming Commission, Registrar),* 2014 ONSC 3595 (Div. Ct.) in which the court held that the LAT was a generalist tribunal without a "home statute" because it hears disputes arising from over 21 statutes. We are asked not to follow *751809 Ontario Inc. (Famous Flesh Gordon's) v. Alcohol and Gaming (Registrar),* 2014 ONSC 6707 (Div. Ct.) which reached the opposite conclusion and disagreed with the conclusion in *Heart & Crown*. To the extent that the *Heart & Crown* decision stands for the proposition that the LAT has no home statute and no specialized expertise, we decline to follow it. We prefer the conclusion reached by the *Famous Flesh Gordon's* panel as it is more in keeping with recent authority. Neither of these decisions dealt with the new jurisdiction of the LAT over SABS disputes.

[5] It is true that FSCO or its predecessor OIC had been adjudicating SABS disputes for over 27 years and during certain periods of time those disputes have been justiciable by the court. Indeed, for some period of time, there was overlapping jurisdiction between the two tribunals and the court. In that sense the LAT may not have a claim to specialized or expertise and specialized knowledge. On the other hand, there can be no doubt that the legislative intention in the 1999 amendments was to constitute the LAT as the only body with that adjudicative function and to give the LAT the mandate to develop systems of streamlined adjudication. We are of the view that the proper standard of review in relation to interpretation of the SABS is reasonableness and the SABS is to be regarded as one of the home statutes of the tribunal. This is precisely the view reached within the last two months by a different panel of this court in *S.H. and H.S. v. Northbridge Personal Insurance Corporation*.[5]

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[3] *Intact Insurance Company v. Allstate Insurance Company of Canada,* 2016 ONCA 609
[4] *Sattva Capital Corp. v. Creston Moly Corp.,* [2014] 2 SCR 633, 2014 SCC 53
[5] 2018 ONSC 1801. See also *Melo v. Northbridge Personal Insurance Corporation,* 2017 ONSC 5885 (Div. Ct.), *Tsalikis v. Wawanesa Mutual Insurance Company,* 2018 ONSC 1581 (Div. Ct.), *Valerio v. Security National,* 2018

[6] 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. 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.[6] This is not such a case.

Background

[7] The Respondent was injured in an automobile accident on May 6, 2016. At the time of the accident, the Respondent owned and operated an assisted living residence, where she also resided. The Respondent was unable to run her business after the accident and on May 7, 2016, she hired Roberta Holmes to work as a personal support worker ("PSW") for the clients of her business.

[8] On June 1, 2016, the Respondent also hired Ms. Holmes to provide attendant care services to her personally. The Respondent sought benefits from the Appellant, including attendant care benefits.

[9] The dispute arose pursuant to s. 3(7)(e) of the *SABS*, an insured person may only be compensated for attendant care benefits if there is evidence that the expense was "incurred".

[10] Section 3(7) of the *SABS* provides as follows:

> For the purposes of this Regulation, …
>
> (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, …
>
> (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; …

ONSC 2395 (Div. Ct.) – all of which hold that an appeal from the LAT in relation to the SABS engages the standard of reasonableness.

[6] *Alberta (Information and Privacy Commissioner) v. Alberta Teacher's Association,* [2011] 3 SCR 654, 2011 SCC 61

[11] The Appellant's position was that Roberta Holmes was not working as a PSW at the time of the accident and that, accordingly, s. 3(7)(e)(iii) of the *SABS* required that she prove economic loss, which she failed to do. The Respondent claimed that Roberta Holmes did not need to establish economic loss because she was working as a PSW prior to the accident. The LAT found that it was unnecessary to decide whether Roberta Holmes was or was not working as a PSW before the accident.

[12] The LAT concluded that s. 3(7)(e)(iii)(A) requires that the service provider was "working or was looking for work at the time s/he performed the attendant care services". It was the conclusion of the LAT that subsection (iii) (A) was satisfied as long as the person providing the service was a person otherwise employed as a PSW at the time the service was required. The phrase "but for the accident" did not have a temporal requirement. The intention of the section was to prohibit injured parties from capitalizing on their injuries by inventing jobs for friends and family members who were not legitimate providers of care. As long as Roberta Holmes would have been providing such services whether or not the applicant had been injured, then the applicant could be reimbursed for payments made to Ms. Holmes.

Analysis

[13] One ground of appeal is the fact that in arriving at its interpretation of the regulation, the LAT adopted a view different from that presumed by the parties. Both parties had focused on proving whether or not the PSW had worked as such before the accident. We do not believe that the LAT is bound to adopt a legal interpretation it believes to be faulty even if both parties initially accepted it as correct.

[14] The LAT decision is a reasonable interpretation of the section. 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. 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.

[15] The LAT decision establishes that the critical question is whether the PSW is legitimately in the business of rendering such service. What is prohibited is creating a business only out of providing care to the injured person for the injuries sustained in the accident. It is the legitimacy of the service with which the regulation is concerned and not the date on which the service provider became qualified or established his or her business.

[16] 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.

[17] *Shawnoo v. Certas Direct Insurance Company*[7] was cited by the appellant both before the LAT and before this court. We agree with the adjudicators that it is distinguishable. *Shawnoo* was a decision of the Superior Court. The court was faced with the following circumstances. CB was the injured applicant's mother and was qualified as a PSW but was not working as such prior to the accident as she was unemployed. There was no evidence she was actively seeking such employment or was likely to receive an offer for such employment. The court found that she would not ordinarily have been engaged in healthcare services employment. As such, services she rendered to the injured applicant did not qualify for attendant care benefits. Similarly CP was the injured applicant's roommate. She was qualified and employed as a child and youth worker and not as a personal care worker. The services she provided to her roommate, though commendable, were not services provided in the ordinary course of her business. By contrast, in the case at bar, the LAT found that Ms. Holmes was already providing such services for remuneration when she was engaged to provide PSW services to the applicant, Ms. Helmer. In fact there was evidence that she was doing so before the accident though that was not a finding made by the LAT.

[18] A similar decision was reached by a different adjudicator in the decision of *A.P. v. Coseco Insurance Company* cited by the appellant.[8] Moreover that decision and certain of the FSCO decisions clearly hold that the legislative intention was to distinguish between qualified service providers in the business of providing PSW services and family members who are not qualified and who can only recover if they prove an economic loss.[9] The amendment was intended to eliminate abuse of attendant care benefits. It was not designed to prevent recovery of legitimately required PSW services delivered by qualified individuals for which the injured person has actually paid. The cases cited to us show clearly that adjudicators do take into account employment post accident and clearly show that whether or not a service provider is actually working as a PSW on the date of the accident is not seen as determinative. The decision of the LAT which is under appeal before us does not demonstrate an error of law.

[19] At the hearing the appellant focused on a different argument than that which was made before the LAT and in her factum. Now the appellant argues that the three weeks of work as a PSW by Ms. Holmes which she rendered to the business before she began providing services to the applicant was also a service rendered only because of the accident. This is not an argument properly raised for the first time on appeal and in any event it deals with a question of mixed fact and law.

[20] We conclude that the interpretation of the regulation by the LAT is reasonable and within the jurisdiction conferred upon it to decide. On a standard of reasonableness it must be upheld

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[77] 2014 ONSC 7014 (SCJ)

[88] 2017 CanLii 76917 (ONLAT) and see *JCC v. Echelon General Insurance Company,* 2017 Canlii 85731 (ONLAT)

[9] See *Terranova v. Economical Mutual Insurance Company,* FSCO appeal P16-00033, unreported, December 5, 2017

but even if a reviewing court should decide that correctness is the proper standard, we concur with the LAT in the manner it applied the regulation to the facts of this case. The decision appears consistent with the legislative intent underlying the amendments to the SABS.

Conclusion

[21] In conclusion, the appeal is dismissed. We were advised that the parties had agreed upon costs.

C. HORKINS J.

[22] I have endorsed the Appeal Book and Compendium as follows: "The appeal is dismissed. Costs having been agreed. The Appellant shall pay the Respondent her costs fixed at $15,000.00 all inclusive. The Intervenor seeks no costs."

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C. MACLEOD J.

I agree

_____
C. HORKINS J.

I agree

_____
CONWAY J.

Date of Reasons for Judgment: May 8, 2018

Date of Release: May 9, 2018

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(Respondent in Appeal)

– and –

BELAIRDIRECT INSURANCE COMPANY

Respondent
(Appellant)

ORAL REASONS FOR JUDGMENT

C. MACLEOD J.

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