G.B. v. Pilot Insurance Co. et al.

[Indexed as: B. (G.) v. Pilot Insurance Co.]

89 O.R. (3d) 228

Ontario Superior Court of Justice,
Divisional Court,
Lane J.
January 21, 2008

Insurance -- Automobile insurance -- Statutory accident benefits -- Rehabilitation benefits -- Arbitrator making finding of fact that nanny expenses would be rehabilitative for insured -- Arbitrator awarding nanny expenses under s. 15(5)(l) of Statutory Accident Benefits Schedule -- Director's Delegate setting aside arbitrator's decision on basis that nanny expenses could not be awarded under s. 15 and could only be awarded as caregiver benefits under s. 13 -- Decision of Director's Delegate incorrect and patently unreasonable -- Child care expenses falling under s. 15(5)(l) where they are rehabilitative for insured -- Statutory Accident Benefits Schedule -- Accidents on or after November 1, 1996, O. Reg. 403/96, ss. 13, 15. [page229]

The insured was seriously injured in a motor vehicle accident. An arbitrator awarded her "nanny expenses" under s. 15(5)(l) of the Statutory Accident Benefits Schedule -- Accidents on or after November 1, 1996 ("SABS"). The arbitrator found as a fact, based on the evidence before him, that the provision of nanny expenses was rehabilitative for the applicant. The Director's Delegate of the Financial Services Commission set aside the arbitrator's award on the basis that

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child care expenses cannot be recovered as a rehabilitation benefit under s. 15(5)(1) of the SABS, and can only be awarded as a caregiver benefit under s. 13 of the SABS. The insured brought an application for judicial review of that decision.

Held, the application should be granted.

The standard of review of the Director's Delegate was that of correctness. However, the result would be the same if the standard of review were that of patent unreasonableness. The Director's Delegate erred in assuming that because nanny expenses as a class of expense can be obtained under s. 13, they could not be available under s. 15. Section 15 deals with the rehabilitation of the injured person herself; s. 13 deals with an allowance to replace the caregiving services which the injured person provided to others at the time of the accident. The circumstances giving rise to the need are different, as are the terms on which payment can be made under the two sections. There is no necessary or logical inference that because such expenses can be obtained pursuant to one section of the SABS in one set of circumstances, they could not be obtained in a different set of circumstances under a different section, always subject to the rule that the same expenses will not be covered twice. The Director's Delegate failed to acknowledge that there had been a finding of fact by the arbitrator, firmly based in the evidence, that the nanny expenses were rehabilitative for the insured. The decision of the Director's Delegate was both wrong in law and patently unreasonable.

Cases referred to

Federation Insurance Co. of Canada v. Vineski, [1998] O.J. No. 339, 77 A.C.W.S. (3d) 164 (C.A.), affg [1997] O.J. No. 4304, 108 O.A.C. 200 (Div. Ct.); Gouliaeff v. Commercial Union, [1997] O.J. No. 4218 (Div. Ct.); Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services) (2007), 86 O.R. (3d) 1, [2007] O.J. No. 2176, 2007 ONCA 416; Kumar v. Coachman Insurance Co., [2004] O.J. No. 4421 (C.A.), affg [2004 O.J. No. 2494, 14 C.C.L.I. (4th) 310, 131 A.C.W.S.

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(3d) 933 (Div. Ct.) [Leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 195]; Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services), [2004] 3 S.C.R. 152, [2004] S.C.J. No. 51, 242 D.L.R. (4th) 193, 2004 SCC 54, 45 B.L.R. (3d) 161, 17 Admin. L.R. (4th) 1; Turner v. State Farm Mutual Automobile Insurance Co., [2004] O.J. No. 731, 184 O.A.C. 186 (Div. Ct.)

Statutes referred to

Insurance Act, R.S.O. 1990, c. I.8, s. 281(5) [rep.]

Rules and regulations referred

Statutory Accident Benefits Schedule -- Accidents on or after November 1, 1996, O. Reg. 403/96, as am., ss. 2(1.1), 13, 15, 27, 28, 36(1), 38(12) [rev.], 43, 52

Authorities referred to

Sullivan, Ruth, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham, Ont.: Butterworths, 2002) [page230]

APPLICATION for a judicial review of the decision of the Director's Delegate allowing an appeal from an order of the arbitrator.

Steven Rastin, for applicant.

William G. Scott, for respondent Pilot.

No one appeared for the Commission.

The judgment of the court was delivered by

[1] LANE J.: -- The applicant, G.B., seeks judicial review of the decision of the Director's Delegate of the Financial

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Services Commission (August 28, 2006) whereby the appeal of the respondent Pilot was allowed and the order of Arbitrator Blackman (December 22, 2005) was set aside. The Arbitrator had ordered that Pilot pay to the applicant certain "nanny expenses" pursuant to s. 15(5)(l) of the Statutory Accident Benefits Schedule -- Accident on or after November 1, 1996 [See Note 1 below] (hereinafter "SABS-1996").

[2] For the reasons which follow, I am of the opinion that the decision of the Director's Delegate should be set aside and the order of Arbitrator Blackman restored.

Factual Background

[3] On August 28, 1998, the applicant sustained serious injuries, including fractures of her right forearm, right leg and heel and facial, jaw and dental injuries in a motor vehicle accident. At the time she was 22, single and childless. Subsequently the applicant married and, on April 20, 2004, she gave birth to a daughter.

[4] In October 2001, a Future Care Costs report, commissioned by Pilot, recognized that in the future the applicant might need the services of a nanny to help her care for a child as she was unable to perform some of the physical activities necessary to care for young children. Having a child or children was a long-term pre-accident goal of G.B., which was not unreasonable for a young adult and, as a result of the accident, G.B. was not able to perform many of the physical requirements of the care of young children. The report presented a need for a future five-year period, covering the infant care to age three of two children for 50 hours a week for 48 weeks a year for a cost of $25,800 annually. The costs were recommended by the future care cost specialist as necessary to assist G.B. "to maximize her ability to function" and "to compensate for physical child care needs that the client is unable to complete" and that these needs resulted from the accident. [page231]

[5] In late 2001, the applicant applied for a "catastrophic impairment" designation. The insurer opposed and ultimately a hearing was scheduled for March 2005.

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[6] On November 2, 2004, the applicant submitted a treatment plan to Pilot pursuant to s. 15(5)(l) of SABS-1996 which plan included provision of nanny services to help the applicant care for the child. The plan had been prepared by Ms. P. Saunoris R.N. and specifically referred to the consequences of the fractures of the right radius and ulna as inhibiting the handling of the baby. This plan will be referred to as the "Saunoris Proposal".

[7] On November 9, 2004, Pilot refused to accept the Saunoris Proposal on the basis that the expenses were not reasonable and necessary as a result of the injuries sustained in the accident and, further, that the applicant was "not deemed catastrophic". An independent DAC [See Note 2 below] medical and rehabilitation assessment of the applicant in January and February 2005 concluded that 50 hours of nanny services weekly for six to 12 months, to be then reviewed, were reasonable and necessary for the applicant to ensure the safe care of her child.

[8] Pilot then changed its ground and refused to accept the Saunoris Proposal because it claimed that the applicant was not entitled to the benefit under the language of SABS-1996. The applicant launched arbitration proceedings and sought an interim order requiring Pilot to pay the benefit as found in the DAC assessment. Her interim motion was heard on December 13, 2005, and she was successful in obtaining the funding pending the final arbitration. In late 2005, Pilot had responded to claims for additional child care expenses by reiterating that the applicant was not catastrophically impaired. By the time of the interim motion, the applicant's catastrophic impairment claim had been heard, also by Arbitrator Blackman, and the decision was pending. On March 16, 2006, that decision was released finding that the applicant was catastrophically impaired as defined by [s.] 2(1.1)(f) of SABS-1996. That decision was appealed and the appeal was dismissed on September 4, 2007.

[9] The present proceeding is confined to the narrow issue of the nanny expenses of $2,267/month which Arbitrator Blackman ordered Pilot to pay to the applicant on an interim basis in

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his Award of December 22, 2005. The appeal to the Director's Delegate was heard on April 21, 2006 before Director's Delegate [page232] Makepeace. In her decision on August 28, 2006, the Director's Delegate held that the Arbitrator erred in law in directing a payment of such expenses based on s. 15(5)(l) of SABS-1996. Before discussing the competing analyses of Arbitrator Blackman and Director's Delegate Makepeace, I turn to the legislation itself.

The Regulatory Provisions

[10] Part V of SABS-1996 provides for Medical, Rehabilitation and Attendant Care benefits and contains s. 15:

> 15(1) The insurer shall pay an insured person who sustains an impairment as a result of an accident a rehabilitation benefit.
>
> (2) The rehabilitation benefit shall pay for reasonable and necessary measures undertaken by an insured person to reduce or eliminate the effects of any disability resulting from the impairment or to facilitate the insured person's reintegration into his or her family, the rest of society and the labour market.
>
> (3) Measures to reintegrate an insured person into the labour market include measures that are reasonable and necessary to enable the person to
>
> (a) engage in employment that is as similar as possible to employment in which he or she engaged before the accident; or
>
> (b) lead as normal a work life as possible.
>
> (4) In determining whether a measure is reasonable and necessary for the purpose of subsection (3), the insurer shall consider the insured person's personal and vocational characteristics.
>
> (5) The rehabilitation 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 purpose referred to in subsection (2) for,

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[here follows a list of items (a) to (k) such as life skills training, family, vocational or employment counselling, home, vehicle and workplace modifications, etc., ending with item (l)]:

> (l) other goods and services that the insured person requires, except services provided by a case manager.

[11] Part IV of SABS-1996 provides for Caregiver Benefits in s. 13 of the Schedule:

> 13(1) The insurer shall pay an insured person who sustains an impairment as a result of an accident a caregiver benefit if the insured person meets all of the following qualifications:
>
> 1. At the time of the accident,
>
> i. the insured person was residing with a person in need of care, and
>
> ii. the insured person was the primary caregiver for the person in need of care and did not receive any remuneration for engaging in caregiving activities. [page233]
>
> 2. As a result of and within 104 weeks after the accident the insured person suffers a substantial inability to engage in the caregiving activities in which he or she engaged at the time of the accident.

[12] Part VIII of SABS-1996 provides by ss. 27 and 28 that insurers shall offer as an optional benefit a dependent care benefit which, inter alia, provides for the payment to the insured person of reasonable and necessary expenses incurred by the insured person in caring for her dependents if the insured person suffered an impairment as a result of the accident, was employed at the time of the accident and is not receiving a caregiver benefit.

The Decision of the Arbitrator

[13] The Arbitrator dealt carefully with the many arguments put forward by Pilot in support of its denial of the

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applicant's claim. Most of those arguments were not pressed before us. The main thrust of Pilot's case was that child care was governed by s. 13 and so could not be obtained under s. 15. The Arbitrator dealt with this submission beginning at p. 17 of the reasons, p. 29 of the Application Record. Pilot submitted to the Arbitrator that SABS-1996 was a complete code for determining accident benefits; was a restrictive code of benefits; was contractual and not tort compensation; and was not intended to provide full compensation for all losses. Section 13 provided expressly and exclusively for caregiver benefits and therefore the Saunoris Proposal could not be accepted based on s. 15. It was a caregiver plan and not a rehabilitative one. There could be "double-dipping" if the applicant succeeded.

[14] The Arbitrator rejected these submissions. He found that the Saunoris Proposal pertained to rehabilitation expenses under Part V of SABS-1996. It met all the prerequisites of s. 15; the DAC opinion had found the expenses to be reasonable and necessary "other services"; the purpose was to reduce or eliminate the disability resulting from the accident and to facilitate her reintegration into her family. He further rejected the submission that s. 13 was the exclusive basis for caregiver funding. The language of s. 15(5)(l) contains an express exclusion of services provided by a case manager, but no other exclusion limiting the broad language "other goods and services that the insured person requires", a requirement which the DAC opinion supported. He found nothing in s. 13 to foreclose specific services from being considered as rehabilitation expenses if they met the criteria for the latter. He considered the evidence as to the rehabilitation aspect of the Saunoris Proposal. At p. 22 of the reasons (p. 34 of the Application Record), he wrote: [page234]

> In this case, in the summary of his neuropsychological assessment, Dr. Comper expressly stated that "the provision of childcare assistance would allow [the applicant] time to focus on rehabilitation". Dr. Comper supported such assistance as part of a larger rehabilitation program, including counselling, cognitive behavioural therapy, a pain management program and review of the applicant's current

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> medication regimen, which did not then include psychotropic (modifying mental activity) medication.

[15] The Arbitrator also noted Dr. Comper's comments that "this wasn't an endless loop of attendant care, this was to help her deal with a difficult time"; that the Saunoris Proposal was reasonable and necessary to ensure the safe care of the child, and that in the absence of her accident-related significant orthopaedic injuries and the resultant pain, the applicant would not have a chronic mood disturbance. He found that Dr. Comper's evidence, oral as well as his reports, led to the conclusion that without this kind of assistance the well-being of mother and child was at risk. He concluded that:

> I am unable to discern what impairment barriers caused by a motor vehicle accident, be they physical or emotional, could be potentially more compelling to reduce or eliminate than those between a mother and her newborn child. This case is not about replacing pre-accident duties. It is not about "double dipping". This case is now, in significant measure, about whether certain recommended services are reasonable and necessary to rehabilitate a family at risk. I have no hesitation in finding that the Saunoris Proposal is properly advanced as a rehabilitation expense under paragraph 15(5)(l) of the Schedule.

The Director's Delegate's Decision on Appeal

[16] The decision of Director's Delegate Makepeace states the issue at the outset:

> This appeal concerns a narrow legal issue: whether nanny expenses may be recovered as a rehabilitation benefit under s. 15(5)(l) of the SABS-1996.

[17] Having stated the issue, she stated her conclusion that the Arbitrator "erred in law". Addressing the issue of whether child care expenses are a rehabilitation benefit, the Director's Delegate agreed with the Arbitrator that s. 15 is widely drawn and, tracking the statutory language of the objectives set out in s. 15(2), states that she has "little doubt that access to child care services may reduce or

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eliminate the effects of a caregivers accident-related disability or facilitate her reintegration into her family and the labour market". The Director's Delegate also agreed with the Arbitrator that nothing in s. 15(5) specifically excluded nanny benefits from the scope of rehabilitation benefits, but she states that the subsections of s. 15 set out "specific limits" on the rehabilitation expenses and goes on to argue that the failure to exclude nanny expenses does not imply that they are included, [page235] but speculates that perhaps the drafters saw them as under s. 13 and not requiring an exemption. To understand the section, it must be read in the legislative context as a whole. The error of the Arbitrator is said to be that his interpretation of s. 15 as permitting caregiver benefits renders s. 13 superfluous: "If the Arbitrator is right about s. 15 of the SABS-1996, it is difficult to give any coherent meaning to s. 13, s. 28 or s. 36(1)3."

[18] Section 36(1) is the "no stacking" rule that one who elects one form of benefit cannot then claim another form of benefit. The Arbitrator's ruling would, in the Director's Delegate's opinion, undercut this rule. Further, the Arbitrator ought to have, but did not, consider the availability of optional coverage under s. 28 for dependant care. However, the question of whether this coverage would actually have applied to the applicant's case of a child born after the accident was "beyond the scope of this appeal", and so the Director's Delegate did not decide that issue. Finally, the Director's Delegate stated that the Arbitrator's interpretation would allow a claim for a child born after the accident, thus circumventing the requirement in s. 13 that the insured person be a caregiver "at the time of the accident". Further it would allow a "top-up" from the maximums provided in s. 13 for child care.

[19] There follows a review of the evolution of the SABS regime through SABS-1990, SABS-1994 to SABS-1996. Caregiver benefits first appeared in 1990 as a supplement to weekly income benefits based on the number of children at the time of the accident and without proof of actual expense. Under that regime, child care expenses were allowed under the medical-

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rehabilitation benefits "basket clause" s. 6(1)(f) of SABS-1990, which the Director's Delegate described as the predecessor to s. 15(1)(l) of SABS-1996. "Arbitrators allowed these claims while recognizing that the med-rehab benefits provided under section 6 were intended to pay for reasonable goods and services that are required for the injured claimant's recovery and rehabilitation, and were not intended to replace the services she provided before the accident."

[20] Returning to the provisions at issue, the Director's Delegate stated that the significant change was that caregiver benefits are now available for "reasonable and necessary expenses incurred as a result of the accident in caring for a person in need of care". As a result of her analysis of the evolution of the child care provisions from 1990 to 1996, she wrote:

> In my view, the Legislature intended the SABS-1996 to provide for child care expenses through s. 13 (weekly caregiver benefits for stay at home mothers) and s. 28 (optional dependant care benefits for working mothers). I am not persuaded s. 15 was intended to pay for nanny services for a mother who is unable to care for her child because of accident injuries. [page236]

[21] In summing up, the Director's Delegate makes the following statement:

> In this case there seems to be no suggestion that [the applicant] needs a nanny so she can attend rehabilitation assessments or participate in rehabilitation programs otherwise covered under s. 15, and the appeal does not concern any dispute about counselling or other rehabilitative assistance directed at the psychological problems affecting [the applicant's] ability to care for her child.

[22] As a result, the Director's Delegate allowed the appeal and dismissed the claim under s. 15.

Standard of Review

[23] As Director's Delegate Makepeace states the issue at the

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outset of her decision:

> This appeal concerns a narrow legal issue: whether nanny expenses may be recovered as a rehabilitation benefit under s. 15(5)(l) of the SABS-1996.

[24] Having stated the issue, she stated her conclusion that the Arbitrator "erred in law". It is thus clear that the issue before us is also a question of law.

[25] In the course of the debate before us, Mr. Scott conceded that if ss. 15(l) and 15(2)(l) were the only relevant sections, the benefit sought would be payable. However, he contended that the Arbitrator erred in not finding that s. 13 governed the entire field of caregiver benefits as the Director's Delegate had found. The heart of this case is this question of law.

[26] Ordinarily, a question of law is determined on the standard of correctness, the court being in a better position than the administrative tribunal to determine the issue. [See Note 3 below] However, where the issue does not involve pure statutory interpretation, and involves matters dealt with regularly by the administrative tribunal and engaging the tribunal's particular expertise, the pragmatic and functional approach assesses, inter alia, the relative expertise of the court and the tribunal and the result is often that a more deferential standard is called for, which will normally be reasonableness. [See Note 4 below]

[27] The parties both submitted that the standard of review of Director's Delegate Makepeace's decision is that of patent unreasonableness. This court has so held on a number of occasions in dealing with appeals or judicial reviews from the respondent [page237] Commission. In Gouliaeff, [See Note 5 below] the issue was the dismissal of the injured persons' claim as a result of a series of delays and failures on his part and the refusal of the Director's Delegate to extend the time for filing an appeal. The court held that having regard to the entire record and the applicant's conduct throughout, the decision was not patently unreasonable and dismissed the

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application. The case is not of particular assistance to us because the issue before the court was not a question of law, but of the exercise of discretion and there is ample authority that such a decision is within the expertise of the agency and entitled to a high level of deference.

[28] More to the point is Vineski [See Note 6 below] where the issue was whether the fact that the injured person, a bicyclist, had ridden into a pothole and been injured because he had been alarmed and distracted by the sudden sound of an auto engine starting, meant that he had been injured as a result of an "accident": that is, an incident in which the use or operation of an automobile caused the injury. Both the Arbitrator and the Director's Delegate held that he had been injured as a result of an accident. The application of the definition to the facts is a mixed question of fact and law, but closer to the true question of law where correctness usually applies. This court held that the standard was patent unreasonableness and the decision was not patently unreasonable. Leave to appeal to the Court of Appeal was refused. At para. 4, Flinn J. wrote:

> The standard of review in these circumstances has been held to be that of patent unreasonableness. The Arbitrator and the Director's Delegate are full-time persons with the Commission. Under section 20 of the Insurance Act, they are given exclusive jurisdiction to exercise the powers conferred upon them and to determine all questions of fact and law and their decision is final unless otherwise provided. There is in the statute provision for the Director to state a case for the Divisional Court on a question of law.

[29] A similar issue arose in Kumar [See Note 7 below] where the Arbitrator found that the taxi went into the ditch because the passenger struck the applicant driver with a stone, thereby causing the injuries. No injury was caused by contact with the interior of the vehicle. Both the Arbitrator and the Director's Delegate found that the injuries were not caused by an accident as defined in [page238] SABS-1996. This court agreed, finding that the law was well settled that the standard of review was that of patent unreasonableness, citing the passage from Vineski quoted above, and noting that the issue was the application of

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the definition to the facts. The court distinguished the case from Turner [See Note 8 below] where the issue was the interpretation of s. 281(5) of the Insurance Act, R.S.O. 1990, c. I.8, a question of law. In Turner, at para. 15, MacFarland J. wrote:

> We are in agreement that the interpretation of section 281(5) of the Insurance Act is a question of law (Kirkham v. State Farm Mutual Automobile Insurance Co., [1998] O.J. No. 6459, 1998 Carswell Ont. 2811, leave to appeal refused [1998] O.J. No. 2872 (QL). The standard of review therefore, of the Director's Delegate's decision in this case is one of correctness. In our view she erred in law when she found there had been a clear and unequivocal refusal in the circumstances of this case.

[30] On the basis of these authorities, I am of the opinion that the issue before us is one of law, as the Director's Delegate correctly characterized it, and that the standard of review ought to be correctness. However, the argument proceeded on the basis of patent unreasonableness and I am prepared to proceed on that basis because of the view I take that the end result is unavoidably the same.

Analysis

[31] There are a number of serious flaws in the reasoning of the Director's Delegate. One, which underlies the whole of the reasons, is the view that because "nanny expenses", as a class of expense, can be obtained under s. 13, they could not be available under s. 15. There is no logic in this assumption. Section 15 deals with the rehabilitation of the injured person herself; section 13 deals with an allowance to replace the caregiving services which the injured person provided to others at the time of the accident. The circumstances giving rise to the need are utterly different, as are the terms on which payment can be made under the two sections. There is no necessary or logical inference that because such expenses can be obtained pursuant to one section of the Regulations in one set of circumstances, they could not be obtained in a different set of circumstances under a different section of the regulations, always subject to the common sense rule that the

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same expenses will not be covered twice.

[32] A second flaw is the Director's Delegate's failure to recognize that the Arbitrator had made an important finding of fact, based on his having heard the oral evidence, as well as the written [page239] record; a finding that lies at the heart of the case. In her reasons, the Director's Delegate observed that she has "little doubt that access to child care services may reduce or eliminate the effects of a caregiver's accident-related disability or facilitate her reintegration into her family and the labour market". The evidence certainly supports that view, but by stating the proposal as an abstract principle, she failed to acknowledge that there had been a factual finding by the Arbitrator, based on the evidence, particularly that of Dr. Comper, that in this particular case the provision of nanny expenses in accordance with the Saunoris Plan was rehabilitative for the applicant. This finding was firmly based in the evidence, which the Director's Delegate had not heard, although she was aware of it.

[33] In my view, that was an important finding for two reasons. First, as a finding of fact by the trier of fact, it ought to have attracted deference from the Director's Delegate who did not have the advantages possessed by the arbitrator of seeing and hearing the witnesses in the focused atmosphere of the actual hearing. Second, because it eliminates the possibility of the use of this decision as a precedent to open the door to the wholesale funding of child care expenses in circumvention of s. 13. Much of the Director's Delegate's decision appears to assume that if this applicant can obtain benefits under s. 15, then any injured person with a child can do so. That is manifestly an error. Only those for whom, like the applicant, such expenses are for her rehabilitation and not simply to fund child care, can access the benefit under s. 15(5)(l). It is a provision embedded in a section entirely devoted to the rehabilitation of the injured party and so the finding of fact by the Arbitrator is central to the availability of any benefit. It is unreasonable to suppose that a floodgate will open and s. 13 will be rendered unnecessary or ineffective. There is ample room for both sections to operate.

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[34] The basis for the Director's Delegate's finding that s. 15(5)(l) cannot benefit the applicant is her analysis of the prior legislation and her view that the evolution of these sections shows that nanny expenses are not available under that section. She noted that under the prior regime, child care expenses were allowed under the medical-rehabilitation benefits "basket clause" s. 6(1)(f) of SABS-1990, which the Director's Delegate described as the predecessor to s. 15(1)(l) of SABS-1996 . She said: "Arbitrators allowed these claims while recognizing that the med-rehab benefits provided under section 6 were intended to pay for reasonable goods and services that are required for the injured claimant's recovery and rehabilitation, and were not intended to replace the services she provided before the accident." This sentence describes precisely the [page240] present case. The 1990 predecessor to s. 15(5)(l) was used for the very purpose for which Arbitrator Blackman used s. 15 here; the injured person's rehabilitation, not to replace her previous services.

[35] I have previously noted that the Director's Delegate agreed with the Arbitrator that nothing in s. 15(5) specifically excluded nanny benefits from the scope of rehabilitation benefits, but that she stated that the subsections of s. 15 set out "specific limits" on the rehabilitation expenses and went on to argue that the failure to exclude nanny expenses did not imply that they are included, but speculated that perhaps the drafters saw them as under s. 13 and not requiring an exemption.

[36] This approach to s. 15 is flawed in two ways. Section 15(5)(l) is not of lesser importance than (a) through (k), nor is it an "exemption" and so to be construed narrowly. On the contrary, its existence demonstrates the Legislature's intention that rehabilitation expenses be construed as broadly as the needs of the claimant for rehabilitation require.

[37] Secondly, the Director's Delegate's speculation that the drafters felt that child care expenses were "beyond the scope of section 15" and so there was no need for an exemption, is just that: speculation for which there is no support in the language of the legislation. Indeed, the law of statutory interpretation

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is precisely the opposite. [See Note 9 below] When a provision specifically mentions one item but does not mention a comparable item, the presumption is that the omission was deliberate. It is patently unreasonable to read the phrase "other goods and services that the insured person requires, except services provided by a case manager", as leaving the door open to add further exclusions of services provided by some other class of provider. The phrase means what it says, subject to the purposes in s. 15(2). It would be entirely reasonable to exclude child care services that are not rehabilitative in nature, but it is s. 15(2) that does that; there is no need to import an unenacted addition to s. 15(5) (l).

[38] For these reasons, I am of the opinion that the decision of the Director's Delegate is both wrong in law and patently unreasonable. I would allow the application for judicial review, set aside the order of the Director's Delegate and restore the order of the Arbitrator.

[39] Costs should follow the event. If the parties cannot agree on the quantum, the applicant may submit brief written submissions within 15 days of the release of these reasons and the respondent within a further 15 days.

Application granted.

Notes

Note 1: O. Reg. 403/96 as amended.

Note 2: A Designated Assessment Centre is an independent organization appointed to assess medical and rehabilitation needs pursuant to ss. 38(12), 43 and 52 of SABS-1996.

Note 3: See for example Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services), [2004] 3 S.C.R. 152, [2004] S.C.J. No. 51.

Note 4: See Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services) (2007), 86 O.R. (3d) 1, [2007] O.J. No.

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2176, 2007 ONCA 416, at paras. 24-43.

Note 5: Gouliaeff v. Commercial Union, [1997] O.J. No. 4218 (Div. Ct.), at para. 37.

Note 6: Federation Insurance Co. of Canada v. Vineski, [1997] O.J. No. 4304, 108 O.A.C. 200 (Div. Ct.), leave to appeal refused [1998] O.J. No. 339, 77 A.C.W.S. (3d) 164 (C.A.).

Note 7: Kumar v. Coachman Insurance Co., [2004] O.J. No. 2494, 131 A.C.W.S. (3d) 933 (Div. Ct.), leave to appeal dismissed [2004] O.J. No. 4421 (C.A.), leave to appeal to S.C.C. refused [2005] S.C.C.A No. 195.

Note 8: Turner v. State Farm Mutual Automobile Insurance Co., [2004] O.J. No. 731, 184 O.A.C. 186 (Div. Ct.).

Note 9: See Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham, Ont.: Butterworths, 2002), pp. 187-88.

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