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INSURANCE LAW BULLETIN

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RECENT TOP DECISIONS FROM THE LAT & FSCO

WHO QUALIFIES AS A PROFESSIONAL ATTENDANT CARE PROVIDER

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LAT DECISIONS

M.P. v. Certas Home and Auto Insurance (16-000525/AABS, January 27, 2017) and *A.H. v. Belair Direct Insurance* (16-001063/AABS, August 8, 2017)

In *M.P.*, the applicant's wife was a trained and accredited professional. Following her husband's accident on July 8, 2013, she provided attendant care services to him when she wasn't at her regular employment. The adjudicator found that since the applicant's wife did not lose time from her regular work to care for her husband, she did not provide those services "but for the accident". A similar approach was taken by the adjudicator in *A.H. v. Belair Direct.*

B.H. v. Belair Direct Insurance (16-002779/AABS, August 4, 2017)

This decision clarified that a service provider must be working or looking for work at the time the provider performed the attendant care services, rather than at the time of the accident. This interpretation would avoid absurd results such as disqualifying new graduates who were hired months or years after the accident. The adjudicator considered the Superior Court decision, *Shawnoo v. Certas Home Direct Insurance,* 2014 ONSC 7014 ("*Shawnoo*") noting that the court articulated the test as one of whether Ms. Shawnoo's mother was actively working or seeking employment "at the time of the accident" as the mother incidentally began providing care immediately after the accident.

A.P. v. Coseco Insurance (16-004363/AABS, October 31, 2017)

In considering the phrase "did so in the course of employment, occupation or profession" of section 3(7)(e)(iii)A, the adjudicator found that interpreting those words to mean employment only would be far too narrow as many trained professionals would necessarily be excluded such as professionals temporarily between jobs and new graduates. The inclusion of the word "profession" was an expansion of the criteria to be

taken into consideration. With respect to the term “profession”, the adjudicator held this meant a vocation with specialized training and/or certification. While actual employment was not a mandatory criterium, actively seeking employment was an important and necessary element of the definition. The adjudicator reasoned that if an individual stopped looking for work, they were no longer “ordinarily engaged” in their profession. The adjudicator distinguished *Shawnoo* on its facts, noting that Ms. Shawnoo’s mother was retired for three years and not actively seeking employment.

J.C.C. v. Echelon General Insurance (17-000848/AABS, December 6, 2017)

The applicant was injured in an accident on October 3, 2016. He hired Paula Salazar to provide him with attendant care services. Ms. Salazar was a qualified PSW; however, she had not worked as a PSW since 2013. At the time of the accident, she was working as an event planner and prior to that, as a lab technician. Following the accident, Ms. Salazar worked for the applicant for approximately five months and subsequently, as a PSW at Spectrum Health Care. The adjudicator accepted that Ms. Salazar met all the definitional requirements of a professional care provider on the basis that she had worked as a PSW “in the past” and more importantly, that she continued to be employed as a PSW after terminating the services she provided to the applicant.

Applicant v. Allstate Insurance (17-001523/AABS, January 26, 2018)

The applicant claimed that attendant care services were provided by various PSWs employed through Perfect Physio. Allstate argued that the invoices were not payable as the PSWs were not qualified to work and were not working at the time of the accident. The applicant submitted that s.3(7)(e) of the *Schedule* did not require a PSW to be employed at the time of the accident, as long as he or she was certified and engaged in the industry prior to providing services to the applicant. The adjudicator agreed with the reasoning in *J.C.C.* that certification in the profession sufficed for the purpose of being ordinarily engaged in the profession.

Commentary

In our opinion, *J.C.C. v. Echelon* and *Applicant v. Allstate* were wrongly decided. The adjudicator in *J.C.C.* quoted many of the principles established by *A.P. v. Coseco* but misapplied them to the fact situation before her. For example, although the adjudicator correctly identified that “ordinarily engaged in” was not limited to employment but also included training, professional certification *and job searching*, she either failed to apply the last criterium to Ms. Salazar or applied it incorrectly. The adjudicator found that the fact Ms. Salazar had not sought employment as a PSW for three years prior to working for the applicant was irrelevant, because her PSW certification was sufficient to meet the test and because she was job searching in other, unrelated fields. This conclusion would appear to render the phrase “ordinarily engaged in” superfluous, which could not have been the legislator’s intention. Unfortunately, *J.C.C.* is not being appealed.

FSCO

Terranova v. Economical Mutual Insurance, [2017] OFSCD No. 329 (Appeal)

The claimant’s daughter, Jennifer Terranova, was employed on a full-time basis as a child and youth worker. Ms. Terranova also provided care to her father when she was

not working at either of her two regular jobs. The question at arbitration was whether Jennifer Terranova was "in the course of" professional care employment. Arbitrator Mangeon made a factual finding that the services Jennifer Terranova provided as part of her regular employment were not similar enough to the services she provided to her father following his accident. Delegate Evans agreed and dismissed the appeal on that basis. However, Delegate Evans also addressed other findings of the arbitrator that he considered erroneous. For example, Arbitrator Mangeon also found that in circumstances where family members were available to provide the same care as that provided by a family member charging professional rates, the services of the professional family member were not reasonable or necessary. Delegate Evans found this interpretation placed extra restrictions on payment that were not present in the legislation.

Having turned his mind to overly narrow interpretations of s.3(7)(e)(iii)A, Delegate Evans decided to take issue with the LAT decision, *M.P. v. Certas Home and Auto Insurance Insurance Company*. Delegate Evans indicated that the adjudicator treated the "but for" test as a causation test for economic loss. He disagreed with this interpretation, stating that issues of economic loss that belonged under s.3(7)(e)(iii)B should not be imported into s.3(7)(e)(iii)A as this was not the legislative requirement at the time. The Delegate stated that the "but for" test in s.3(7)(e)(iii)A was simply descriptive: the issue was whether the attendant care done before the accident equated with that done after.

Commentary

Arguably, the Delegate's view remains relevant even following the June 1, 2016 changes when the cost of professional care became limited to economic loss. Given professional care providers sustain an economic loss by virtue of providing services for which they are not paid unless the insurer agrees to fund those services, there should be no requirement to prove a second economic loss (time lost from other employment). In addition, there is a measure of inequity in the *M.P.* approach if one considers that a professional care provider who was job searching at the time they agreed to provide services to an applicant/claimant would not have the added burden of proving time lost from another job.