

**LICENCE APPEAL
TRIBUNAL**

**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**



Tribunal File Number: 18-010164/AABS

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

Between:

Sergey Malitskiy

Applicant

and

Unica Insurance Inc.

Respondent

DECISION

ADJUDICATOR:

Nidhi Punyarthi

APPEARANCES:

For the Applicant:

Gary Mazin, Counsel
Supriya Sharma, Counsel
Adam Ezer, Counsel

For the Respondent:

Angela Comella, Counsel
Jae Sung Hong, Counsel

HEARD:

In-Person, July 15-23, 2019

OVERVIEW

- [1] The applicant, Mr. Sergey Malitskiy (“Mr. Malitskiy”), was involved in an accident on March 16, 2014. He claimed benefits under the *Statutory Accident Benefits Schedule – Effective September 2010* from the respondent, Unica Insurance Inc. (“Unica”). Unica denied Mr. Malitskiy’s claims for benefits, and Mr. Malitskiy applied to the Licence Appeal Tribunal (“Tribunal”) for an adjudication of the issues in dispute.
- [2] An in-person hearing was held in this matter before me in Toronto from July 15 to 23, 2019. Mr. Malitskiy gave his evidence via a Russian interpreter.

ISSUES IN DISPUTE

- [3] I was asked to decide the following issues:
 - a. Is Mr. Malitskiy entitled to an attendant care benefit in the amount of \$6,000 per month (less the partially approved amount of \$1,199.10 per month) recommended by CaringforU the period from October 13, 2017 to date and ongoing?
 - b. Is Mr. Malitskiy entitled to a rehabilitation benefit in the amount of \$344,864 for home modifications as recommended by Adaptable Designs in a treatment plan dated October 19, 2018 and denied on November 20, 2018?
 - c. Is Mr. Malitskiy entitled to a cost of examination in the amount of \$1,559.06 for an assessment of attendant care needs completed by Katrina Chalova dated October 23, 2017 and denied on December 1, 2017?
 - d. Is Mr. Malitskiy entitled to a cost of examination in the amount of \$4,952.50 (less the partially approved amount of \$2,000) for a housing analysis assessment recommended by Functionability Rehabilitation Services in a treatment plan dated May 16, 2018, and denied on June 6, 2018?
 - e. Is Mr. Malitskiy entitled to an award under Section 10 of Regulation 664 on the basis that Unica unreasonably withheld or delayed the payment of benefits to him?

RESULT

- [4] Mr. Malitskiy is entitled to receive:
- a. Attendant care benefits from October 13, 2017 to date and ongoing in the amounts that are incurred but not exceeding \$6,000 per month, less amounts already paid by Unica.
 - b. A rehabilitation benefit for home modifications up to \$344,864.
 - c. The balance of the cost of examination for the housing analysis assessment for alternative housing, in the amount of \$2,952.50.
 - d. An award under Section 10 of Regulation 664, amounting to 25% of the partially denied amounts of the attendant care benefits and the home modifications benefit.
 - e. Interest in accordance with the *Schedule* for any overdue benefits listed above as well as the award.
- [5] Mr. Malitskiy is not entitled to receive:
- a. The cost of examination of the Form 1 prepared by Ms. Chalova on November 7, 2017.

BACKGROUND

- [6] On March 16, 2014, Mr. Malitskiy had been ice-fishing with some friends on Lake Simcoe near Thorah Island. Their vehicle hit a pressure crack on the lake and flipped over, ejecting its passengers.
- [7] The impact caused Mr. Malitskiy to suffer a brain injury and multiple fractures including to his cervical spine and wrist. He was airlifted to Sunnybrook Hospital. Later, it became apparent that the accident had also caused nerve damage in his shoulder as well as cognitive and emotional impairments.
- [8] One of Mr. Malitskiy's friends had also died upon being ejected from the vehicle during this incident.
- [9] Unica deemed Mr. Malitskiy to be catastrophically impaired as a result of the accident on February 2, 2017. Based on undisputed submissions before me, Mr. Malitskiy came within the definition of catastrophic impairment due to his brain impairment, due to having a marked impairment in the sphere of

adaptation, and due to having a combined 63% whole-person impairment as a combination of physical and mental-behavioural issues from the accident.

ANALYSIS

Attendant Care Benefits and Home Modifications

[10] I have grouped attendant care benefits and home modifications under the same subheading, as the evidence with respect to Mr. Malitskiy's functional needs is common to both issues. In order for both attendant care benefits and home modifications to be paid under the *Schedule*, they have to be reasonable and necessary.¹

Attendant Care Benefits

[11] I am satisfied, on a balance of probabilities, that Mr. Malitskiy has the functional needs requiring attendant care benefits up to the limit of \$6,000 per month.

[12] I heard evidence from Mr. Malitskiy, his spouse, and numerous professional witnesses. On a balance of probabilities, I was persuaded of the following facts:

- a. Due to the accident, Mr. Malitskiy has pain in his right shoulder and the inability to lift his right arm. He cannot hold or lift heavy items with his right arm. He even avoids leaning on his walker due to this pain.² He also experiences pain when getting in and out of his car.³ Various doctors testified that he has chronic pain;⁴
- b. He experiences difficulty while using the stairs in his home and has to use his leaning body and other arm to brace and support himself in the stairwell when he uses the stairs. If he falls, he tries to flip his body as he is falling so as to minimize injury;⁵
- c. He experiences balance issues due to his physical pain and limitations, and the balance issues get worse the later it is in the day;⁶

¹ *Schedule*, s.19(1) and s.16(1)

² Examination-in-chief and cross-examination of Mr. Malitskiy, examination-in-chief of Ms. Leanne Bernardo (case manager).

³ Examination-in-chief of Ms. Erynn Vaiman (treating rehabilitation support worker).

⁴ Examination-in-chief of Dr. Odsachy (family doctor), Dr. Nguyen (physiatrist), and Dr. Ali (neuropsychiatrist).

⁵ Examination-in-chief of Mr. Malitskiy; examination-in-chief and cross-examination of Ms. Fiona Kalp (treating occupational therapist)

⁶ Examination-in-chief of Ms. Kalp, Ms. Katrina Chalova (treating occupational therapist), and Ms. Sofia Balanovsky (treating psychotherapist).

- d. He needs assistance with dressing and supervision while showering;⁷
- e. He has cognitive and memory issues, including challenges with remembering his various medications and schedules for when to take them, and the cognitive issues get worse the later it is in the day;⁸
- f. He has emotional issues, including depression and a low sense of self-worth, and needs cuing to eat and engage in hygiene activities.⁹

[13] In order to review and assess the type of attendant care services recommended and the cost of same, I was asked to consider an Assessment of Attendant Care Needs (or "Form 1")¹⁰ dated April 10, 2017, prepared for Mr. Malitskiy by Ms. Fiona Kalp, his treating occupational therapist at the time. In this Form 1, Ms. Kalp recommended attendant care assistance for Mr. Malitskiy totaling \$6,020.63 per month.¹¹

[14] Unica engaged its own assessing occupational therapist to prepare a Form 1. Ms. Ranya Ghatas prepared a Form 1 on September 6, 2017. She recommended \$1,199.10 per month in attendant care.¹²

[15] The significant differences between the two Form 1s are as follows:

- a. Ms. Kalp allotted significantly more time in comparison to Ms. Ghatas for ensuring safety and security in the bedroom, and assistance to be able to respond in an emergency. Notably, Ms. Ghatas did not allot any time for being able to independently respond in an emergency.
- b. Ms. Ghatas did not allot time for coordination of attendant care, assistance with exercise, or for administering, monitoring, maintaining and controlling supply of medications, whereas Ms. Kalp did.
- c. Ms. Kalp allotted more time relative to Ms. Ghatas for supervising/assisting Mr. Malitskiy in walking, grooming, and bathing.

⁷ Examination-in-chief of Mr. Malitskiy, Ms. Kalp, and Ms. Chalova.

⁸ Examination-in-chief of Mr. Malitskiy, Dr. Ali, Ms. Kalp, and Ms. Chalova.

⁹ Examination-in-chief of Mr. Malitskiy, Dr. Ali, Ms. Kalp, Ms. Chalova, Ms. Balanovksy.

¹⁰ *Schedule*, s.19(2).

¹¹ Joint Document Brief, Tab B6.

¹² Joint Document Brief, Tab B7.

- [16] Overall, Unica is of the view that Mr. Malitskiy does not require overnight assistance to ensure safety and security in his bedroom. In addition, Unica has not assigned an allowance for cuing for Mr. Malitskiy to engage in activities such as feeding and grooming.
- [17] During the hearing, Unica pointed to, for example, the fact that the hospital discharge note indicated that Mr. Malitskiy was able to dress himself. When Ms. Kalp was asked about this during cross-examination, she stated that it is typical for a hospital discharge note to indicate such information when, in the longer term, the same patient will experience difficulties with dressing.¹³ I found this explanation to be reasonable.
- [18] When Ms. Ghatas conducted her assessment, she did not consider whether Mr. Malitskiy needed cuing, emotional support, and supervision at night. During cross-examination, she testified that she did not ask Mr. Malitskiy questions in this regard.¹⁴ She was unable to conclusively explain why she did not ask Mr. Malitskiy these questions.
- [19] The evidence tendered at the hearing confirmed, on a balance of probabilities, that Mr. Malitskiy struggled with balance, right shoulder and arm pain, cognitive difficulties and emotional difficulties as listed at paragraph 12 of this decision. Numerous professional witnesses testified to this evidence as part of Mr. Malitskiy's case at the hearing, and it was not displaced through cross-examination.¹⁵ Reference was also made to many records tendered as part of a joint document brief to support these witnesses' evidence.
- [20] It is reasonable to infer from this evidence that, as someone who experiences these challenges, Mr. Malitskiy will need support at nighttime for mobility, transfers, the use of facilities, and support with any emotional and cognitive concerns and responding in emergencies. I find that Mr. Malitskiy cannot "functionally exit the home"¹⁶ on his own without additional assistance to safely overcome his physical pain and mobility limitations.

¹³ Cross-examination of Ms. Kalp.

¹⁴ Cross-examination of Ms. Ranya Ghatas.

¹⁵ Examination-in-chief and cross-examination of Mr. Malitskiy, Ms. Manukyan (his spouse), Dr. Odsachy (family doctor), Dr. Ali (treating neuropsychiatrist), Ms. Bernardo (case manager), Ms. Kalp (treating occupational therapist), Ms. Chalova (treating occupational therapist), Ms. Balanovsky (treating psychotherapist), Ms. Vaiman (rehab support worker), Dr. Nguyen (physiatrist).

¹⁶ Unica submitted case law to this effect in its closing, and submitted that this is the question to ask based on earlier cases decided on overnight assistance.

- [21] In addition, given the evidence on Mr. Malitskiy's emotional distress and cognitive difficulties from the accident, support for Mr. Malitskiy should include cuing and conversation to engage in self-care activities, as well as assistance with medication management and coordination of his service appointments. With regards to medication management, it is not reasonable to expect that Mr. Malitskiy, given his cognitive limitations in evidence, will comply with blister packs without the cuing and supervision of an attendant care provider.
- [22] In other words, Mr. Malitskiy needs, based on his functional limitations set out at paragraph 12, the additional attendant care time recommended by Ms. Kalp for feeding, grooming, mobility assistance, safety and security in the bedroom, responding safely in the event of an emergency, coordination of attendant care, assistance with exercise, medications, and bathing. I find that the Form 1 submitted by Ms. Kalp on April 10, 2017 represents a reasonable and necessary assessment of Mr. Malitskiy's attendant care needs following the accident.
- [23] There was a second Form 1 submitted on Mr. Malitskiy's behalf on December 1, 2017 by Ms. Katrina Chalova. Ms. Chalova is an occupational therapist who works in the same company as Ms. Kalp and was covering her on a parental leave. Ms. Chalova recommended attendant care in the amount of \$6,245.04.¹⁷
- [24] As Unica correctly points out, I am restricted in my consideration of Ms. Chalova's Form 1 pursuant to s. 42(12) of the *Schedule*. Section 42(12) of the *Schedule* provides that, if more than 104 weeks have passed since the accident, a new Form 1 shall not be submitted by an insured person within 52 weeks from the last insurer assessment of attendant care. A new Form 1 can be submitted any time there is a change that leads to an increased amount of the benefit.¹⁸
- [25] Mr. Malitskiy needed significant attendant care both at the time of Ms. Kalp's Form 1 in April 2017 and at the time of Ms. Chalova's Form 1 in December 2017. A case may be made for gradual deterioration between the two Form 1s, which is why Ms. Chalova's Form 1 is approximately \$200 more per month than Ms. Kalp's Form 1. I am not, however, satisfied that this change is so significant as to warrant consideration of Ms. Chalova's Form 1 contrary to s. 42(12) of the *Schedule*.

¹⁷ Joint Document Brief, Tab B9.

¹⁸ *Schedule*, s.42(5).

- [26] I am, therefore, ordering that Mr. Malitskiy be paid attendant care in accordance with the Form 1 of Ms. Kalp. Even if the Form 1 of Ms. Kalp recommends attendant care in excess of \$6,000 per month, I can only order payment of the attendant care benefit up to a maximum of \$6,000 per month due to the restriction in s. 19(3) of the *Schedule*.
- [27] Mr. Malitskiy has also proven at this hearing, on a balance of probabilities, that he has incurred monthly expenses for attendant care from July 2017 to June 2019.
- [28] I have considered that CaringForU did not present daily dockets showing the hours and types of services provided to Mr. Malitskiy. I heard testimony from Mr. Malitskiy, his spouse, and the manager of CaringForU during the hearing. I also reviewed the CaringForU service agreement that was in evidence.¹⁹
- [29] I was satisfied on this evidence of the nature of the services provided, their inclusion within the services listed on the Form 1 (noted, for example, under the headings of preparing meals, personal care, and medications in the service agreement), their cultural/linguistic appropriateness, their reasonableness, and the fact that they were paid for in the amounts shown on the invoices filed in evidence.²⁰
- [30] Each invoice shows, for the most part, the number of visits, and the number of hours worked. I am satisfied on the evidence that the time identified on these invoices was spent in providing attendant care services to Mr. Malitskiy.
- [31] I am therefore satisfied, on a balance of probabilities, that Mr. Malitskiy has incurred the amounts shown on the invoices of CaringForU that were filed in the Joint Document Brief at Tab B1.
- [32] Unica raised that the number of actual hours per invoice is closer to the lower number recommended in Ms. Ghatas' Form 1 as opposed to Ms. Kalp's Form 1. However, fewer invoiced hours do not necessarily mean that Mr. Malitskiy needs less assistance. I find that the CaringForU service providers were engaged in providing the very attendant care items that Ms. Ghatas had not recommended, such as overnight assistance, and support in the form of cuing and conversation.

¹⁹ Joint Document Brief, Tab B1.

²⁰ Examination-in-chief and cross-examination of Ms. Ludmila Manukyan and Ms. Snejana Brejnava.

- [33] Mr. Malitskiy is entitled to this level of attendant care, as I have previously found. I have also found that the itemization and calculation of attendant care services in accordance with Ms. Kalp's Form 1 is reasonable and necessary. The amount of attendant care shall therefore be payable to Mr. Malitskiy up to the limit established by the *Schedule*.
- [34] I find that Mr. Malitskiy is entitled to the attendant care benefit from October 13, 2017 to date and ongoing up to the amount of \$6,000 per month, less amounts already paid by Unica. An attendant care benefit in this monthly amount is reasonable and necessary given Mr. Malitskiy's functional needs. Mr. Malitskiy is entitled to be paid the amounts that he has incurred in this regard, as long as they do not exceed the *Schedule* limit of \$6,000 per month.

Home Modifications

- [35] Home modifications were also proposed for Mr. Malitskiy. Unica is of the view that a portion of these proposed home modifications are reasonable and necessary. The significant items of contention between Mr. Malitskiy and Unica are the installation of an in-home elevator and a therapy room for space to engage in exercises and use equipment while at home.
- [36] Earlier in this decision, when engaging in the attendant care analysis, I identified at paragraph 12 the functional needs that Mr. Malitskiy has due to the accident based on the evidence. I found this same evidence persuasive when it came to determining whether the proposed home modifications are reasonable and necessary.
- [37] Based on this evidence of Mr. Malitskiy's functional needs, I am satisfied, on a balance of probabilities, that Mr. Malitskiy requires the elevator to safely access areas of the home that he needs for his ordinary living. The manner in which he negotiates stairs at present (described at paragraph 12(b) of this decision) is not safe and can contribute to his injuries.
- [38] I am also persuaded, on a balance of probabilities, that Mr. Malitskiy's struggles with negotiating stairs get worse with time, that he has to live with chronic pain, and that he is deconditioning with age.²¹ Therefore, the elevator provides him with safe access to key areas of his home for ordinary living, which include the exit/entryways, kitchen, bedroom and bathroom.

²¹ Examination-in-chief and cross-examination of Mr. Malitskiy, examination-in-chief of Dr. Odsachy, Dr. Ali, Dr. Nguyen, Ms. Balanovsky, Ms. Kalp, and Ms. Chalova.

- [39] Unica had proposed, instead of an elevator, an in-home stairlift for Mr. Malitskiy. Ms. Kalp had also initially considered and later rejected the stairlift.
- [40] The issue of whether the proposed installation of the stairlift complies with building standards was brought up during the hearing. It is outside this Tribunal's jurisdiction to evaluate compliance with building standards. However, when assessing whether the stairlift installation as proposed was reasonable as set out in the *Schedule*, I considered whether the proposed installation was lawful and compliant with construction standards.
- [41] Mr. Malitskiy's housing expert, Mr. Jeffrey Baum, testified that the stairlift as proposed by Unica would not be in compliance with the *Building Code Act, 1992*, O.Reg. 332/12 ("Ontario Building Code"). Specifically, he testified that the installation of the stairlift on Mr. Malitskiy's existing stairs would reduce the stair width below the allowable minimums under the Ontario Building Code, set out in s.9.8.2.1.
- [42] Unica's housing expert, Mr. David Borthwick, denied that this non-compliance was an issue. I was not, however, pointed to a more detailed rationale as to why this was not an issue from Mr. Borthwick's perspective. For example, there was no dispute as to the actual measurements of the proposed stairlift from Unica's perspective. Nor was I provided with other sections of the Ontario Building Code to support why the non-compliance would not be an issue.
- [43] In addition, based on the evidence before me, the stairlift would not permit Mr. Malitskiy to transit within his home and at the same time safely transport items he would need for his day-to-day use, such as a cup of tea from the kitchen. Also, based on the evidence of his treating professionals, Mr. Malitskiy's physical condition from the accident is deteriorating with time, and he will need, in the long term, assistive devices. The stairlift would not permit him to safely transport in his home along with his assistive devices and aids. Accordingly, from a functional perspective, the stairlift is not a reasonable home modification to address Mr. Malitskiy's needs as a result of the accident.
- [44] The therapy room affords Mr. Malitskiy the space and ability to engage in exercises in the convenience and relatively quiet and familiar space of his home. I find that a room of this nature has a reasonable purpose considering Mr. Malitskiy's functional impairments from the accident that were established in the evidence.

- [45] Unica was concerned that the therapy room would prevent Mr. Malitskiy from integrating within the community, but I am not satisfied on the evidence that the therapy room would promote isolation over integration. Given Mr. Malitskiy's limitations from the accident, the therapy room should be available to him at home in addition to his outdoor engagements.
- [46] Unica also disputed the proposed therapy room on the basis that Mr. Malitskiy's at-home exercise equipment could be stored in an existing room in the basement. However, Mr. Baum demonstrated at the hearing that the therapy room as proposed for Mr. Malitskiy becomes available as a consequence of putting the in-home elevator in place. The walls moved to put the in-home elevator in place have the effect of creating the therapy room for Mr. Malitskiy. In other words, the elevator and the therapy room are part of the same operation from a construction standpoint.
- [47] Mr. Baum testified that his propositions for home modifications, including the elevator and the therapy room, were sound and reasonable from a construction perspective and also priced in a manner that was the most economical for the items proposed. Unica's housing expert, Mr. David Borthwick, did not refute this testimony. The reason Mr. Borthwick did not recommend the elevator or the therapy room was because the consulting occupational therapist for Unica, Ms. Maria Paulsen, did not recommend those items.
- [48] Ms. Paulsen conceded at the hearing that her assessment of Mr. Malitskiy took place over a shorter period of time relative to Mr. Malitskiy's treating occupational therapists, and that she did not have access to Mr. Malitskiy's medical file when she opined that he did not require the elevator or the therapy room. I give less weight to Ms. Paulsen's evidence as a result of these limitations.
- [49] Overall, I am persuaded on a balance of probabilities that the home modifications proposed by Mr. Baum, including the elevator and the therapy room, totaling \$344,864, are reasonable and necessary. They help Mr. Malitskiy access areas of the home that he needs for ordinary living, and they have the purpose of eliminating the effects of his disability resulting from the accident.
- [50] I also have uncontradicted evidence that the value of these proposed home modifications is much less than the value of purchasing a new home.
- [51] Mr. Malitskiy is therefore entitled to the home modifications in the amount of \$344,864 as recommended by Adaptable Designs in its treatment plan dated October 19, 2018.

Cost of Examination: Housing Analysis Assessment

- [52] Unica should pay the balance of the cost of the housing analysis assessment. This type of assessment is not, in my view, an assessment or examination as referred to in s.25 of the *Schedule*.
- [53] It is not, as the *Cost of Assessments and Examinations Guideline* (“*Guideline*”) describes, a “clinical evaluation or an appraisal of health status.”²² It involves a review of comparable properties and prices in the real estate market. According to the treatment plan submitted, the tasks to be performed include determination of housing criteria; investigation of housing options to determine market cost for new home; and an analysis of homes found to determine approximate budget.²³
- [54] While Mr. Malitskiy’s functional needs are considered by the housing analyst, the question behind this assessment is to address s.16(4)(c) of the *Schedule*, i.e., whether the value of an alternative property is lower than the value of proposed home modifications.
- [55] In particular, s.16 of the *Schedule* refers to the “value” of modifications or purchase of a property and does not refer to an “assessment” or an “examination.”
- [56] I recognize that the Tribunal has previously characterized a housing report as an appraisal of a claimant’s health status, but the facts in that case were different from this one. In that case, the insurer applied a \$2,000 cap to every housing report. That was not the case before me, and Unica has paid in excess of \$2,000 for other housing reports. Unica also testified at the hearing that it did not consider a housing analysis assessment to be an appraisal of health status.²⁴
- [57] The fees charged correspond to market rates based on the evidence of both parties’ housing experts at the hearing.²⁵ In addition, the report itself was necessary given that s.16(4)(c) of the *Schedule* specifically states that an insurer is not liable to pay for home modifications that have a greater value than the purchase of a new home. Without this report, neither Unica nor the Tribunal would have relevant and necessary information to make a determination as to whether Mr. Malitskiy is entitled to the home modifications claimed.
- [58] Accordingly, I order Unica to pay the remainder for the housing analysis report.

²² Superintendent’s Guideline No. 08/10.

²³ Joint Document Brief, Tab C1-1.

²⁴ Cross-examination of Radhana Singh.

²⁵ Examination-in-chief of Mr. Jeffrey Baum, cross-examination of Mr. David Borthwick.

Cost of Examination: Form 1 prepared by Ms. Chalova

- [59] For Ms. Chalova's Form 1 assessment to be paid, the *Schedule* requires that the fees charged be reasonable and that the assessment itself be necessary.²⁶
- [60] Unica submits that Ms. Chalova knew or ought to have known that her Form 1 was untimely under s. 42(12) of the *Schedule*, as it was submitted less than 52 weeks after Ms. Ghatas' Form 1. I agree with Unica's submission in this regard.
- [61] In addition, while there was a deterioration between Ms. Kalp's Form 1 and Ms. Chalova's Form 1, it was not significant enough to be characterized as a change that would affect the amount of benefits that could be awarded by this Tribunal. Both Form 1s exceed \$6,000, and the Tribunal cannot award more than \$6,000 in attendant care per month for a catastrophically impaired insured person.
- [62] Based on my assessment of the evidence and interpretation of the *Schedule*, I cannot characterize the preparation of Ms. Chalova's Form 1 as "necessary." Even though I find her fees charged to be reasonable for the purposes of preparing a Form 1, I cannot find that the cost of examination for preparing this Form 1 is payable.

Interest

- [63] Unica shall pay interest on the benefits that I have found to be owing and are overdue.

Special Award

- [64] An award under Section 10 of Regulation 664²⁷ is payable where the Tribunal finds that an insurer unreasonably withheld or delayed payment of a benefit. If the Tribunal makes such a finding, the Tribunal can order the insurer to up to 50% of the withheld or delayed payment together with interest at 2% per month compounded monthly.
- [65] I recognize that Unica paid for most of the disputed benefits in part, and that it based its decisions on assessments conducted under the *Schedule*. However, I find that there was a failure on the part of Unica or its agents to ask the relevant questions about Mr. Malitskiy's functional needs.

²⁶ *Schedule*, s.25(1).

²⁷ R.R.O. 1990, Reg 664: Automobile Insurance under the *Insurance Act*, R.S.O. 1990, c.I.8.

- [66] For example, after receiving the Form 1 of Ms. Kalp and the treatment plan proposing the home modifications, Unica should have asked its assessors to investigate whether Mr. Malitskiy needed cuing, emotional support, and nighttime supervision. However, Ms. Ghatas testified at the hearing that she did not consider those questions.
- [67] It was unreasonable of Unica to focus on the reports of Ms. Ghatas and Ms. Paulsen when:
- a. Its own assessors had designated Mr. Malitskiy to be catastrophically impaired due to brain injury, a marked impairment in adaptation, and a 63% whole person impairment; and
 - b. Medical and treating evidence confirmed that Mr. Malitskiy had needs for significant assistance that included not just helping him physically but also being attentive to his psycho-emotional needs.
- [68] When read together, the reports of Ms. Ghatas and Ms. Paulsen did not correspond to the information in Mr. Malitskiy's medical and treatment file. There were important discrepancies between their assessments of his abilities and those confirmed by his treating professionals and present in records that were before Unica previously and put before me at the hearing. I was not persuaded that Unica turned its mind to the larger context of information available to it from the evidence in this matter. The opinions of Ms. Ghatas and Ms. Paulsen with respect to Mr. Malitskiy's functional needs were not supported elsewhere in the evidence.
- [69] Unica had the requisite information and basis to make further relevant inquiries into functional needs when it received the Form 1 of Ms. Kalp and the home modifications treatment plan in question. However, Unica did not make the relevant inquiries into Mr. Maliskiy's functional needs that should have been apparent based on the evidence it already had on hand.
- [70] Therefore, the position taken by Unica with respect to the attendant care benefit and the home modifications amounted, in my view, to an unreasonable withholding or denial, when the medical evidence, including evidence from Unica's own assessors, supported Mr. Malitskiy's need for these claimed benefits. I find Unica's partial denials of these benefits to be imprudent, inflexible, and immoderate.

- [71] Unica is therefore liable to pay Mr. Malitskiy an award under Section 10 of Regulation 664 with respect to the attendant care benefit and the home modifications that were denied.
- [72] These benefits were significant to Mr. Malitskiy, and his functional need for them was apparent on the medical evidence that was accessible to Unica. Unica engaged with Mr. Malitskiy's claim in that it conducted its own assessments and issued partial approvals; however, it failed to ask key questions about function that it should have on the basis of available information. Therefore, I order Unica to pay 25% of the portions of the attendant care benefits and home modifications benefit that were denied. 25% represents half of the prescribed limit for such an award.
- [73] Unica shall pay this amount in addition to interest as per s.10 of Regulation 664. The interest on the award will start accruing from the partial denial dates; i.e., October 13, 2017 for the award on the denied portion of the attendant care benefit and November 20, 2018 for the award on the denied portion of the home modifications benefit.

CONCLUSION

- [74] For the reasons given above:
- a. Mr. Malitskiy is entitled to attendant care benefits as incurred up to \$6,000 per month from October 13, 2017 to date and ongoing, less amounts already paid by Unica.
 - b. Mr. Malitskiy is entitled up to \$344,864 for home modifications as recommended in the treatment plan of Adaptable Designs dated October 19, 2018, subject to evidence that expenses towards the recommended home modifications have been incurred.
 - c. Mr. Malitskiy is entitled to the remainder of the cost of examination for a housing analysis assessment, which is the amount of \$2,952.50.
 - d. Mr. Malitskiy is entitled to interest on the above-listed benefits in accordance with the *Schedule*.
 - e. Mr. Malitskiy is not entitled to the cost of examination of the assessment of attendant care needs completed by Katrina Chalova on October 23, 2017.

- f. Mr. Malitskiy is entitled to an award under s. 10 of Regulation 664, in the amount of 25% of the portions of the attendant care benefits and the home modifications benefit that were denied, in addition to interest as per s.10 of Regulation 664 that will start accruing as of the dates on which these benefits were partially denied.

Released: January 2, 2020



Nidhi Punyarthi
Adjudicator