Surprising Special Award Against Insurer

Alon Barda
January 2020

A recent decision of the Licence Appeal Tribunal ("LAT") indicates that an insurer cannot simply rely on the opinion of an assessor when determining a claimant's needs.

The adjudicator said that the insurer should have considered all relevant medical evidence and should have followed up with the assessors for clarification of the claimant's needs. The failure to do so resulted in a special award against the insurer.

Background

In *Malitskiy v. Unica Insurance*, 18-010164/AABS, the claimant sought entitlement to attendant care in the amount of $6,000 per month less the partially approved amount of $1,199.10. He also sought entitlement to a rehabilitation benefit of $344,864 for home modifications and entitlement to some cost of examinations. The claimant also sought a special award for unreasonably withheld or delayed payments.

The claim involves an ice fishing accident that occurred on March 16, 2014. The vehicle in which the claimant was travelling hit a pressure crack on the lake and slipped over, ejecting the passengers in the process.

The impact caused the claimant to suffer a brain injury and multiple fractures, including to his cervical spine and wrist. It was later discovered that the accident caused nerve damage in the claimant's shoulder as well as cognitive and emotional impairments.

Unica deemed the claimant to be catastrophically impaired as a result of the accident.

The adjudicator was persuaded on a balance of probabilities that: the claimant has pain in his shoulder and cannot lift heavy items; he experiences difficulty while using the stairs in his home; he experiences balance issues; he needs assistance with dressing and supervision while showering; he has cognitive and memory issues; and he has emotional issues and needs cuing to eat and engage in hygiene activities.

Attendant Care

The adjudicator considered the Form 1 completed by the claimant's OT assessor recommending $6,020.63 in attendant care per month and the insurer's assessor recommending $1,199.10 per month in attendant care assistance.

The significant difference between the Form 1's surrounded assistance to respond to an emergency, coordination of attendant care assistance, and supervision/assistance regarding certain daily tasks. In particular, the insurer was of the view that the claimant did not require overnight assistance to ensure safety and security in the bedroom.

When the insurer's assessor conducted the assessment, she did not consider whether the claimant needed cuing, emotional support and supervision at night, and she was unable to explain conclusively on cross-examination why she did not do so.

The adjudicator ultimately found that, based on the claimant's various functional limitations, the additional time recommended by the claimant's assessor represented a reasonable assessment of the claimant's attendant care needs and that the claimant is entitled to $6,000 per month from October 13, 2017 to date and ongoing less amounts paid by the insurer.

Home Modifications

Unica agreed that some of the home modification recommendations were reasonable and necessary but the significant items of contention included the installation of a home elevator (the insurer proposed an in-home stair lift) and a therapy room for space to engage in exercises and use the equipment while home.

Based on the claimant's functional needs, the adjudicator found on a balance of probabilities that the claimant required the disputed renovation items and that the home modifications totaling $344,864 are reasonable and necessary.

Special Award

The most notable aspect of this case is the finding regarding the special award. Under section 10 of Ontario Regulation 664, if the LAT finds that an insurer has unreasonably withheld or delayed payments, the LAT, in addition to awarding the benefits and interest to which an insured person is entitled under the *SABS*, may award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts at 2 per cent per month, compounded monthly.

While the adjudicator found that Unica paid for most of the disputed benefits in part and that it based its decisions on the assessments it completed, the adjudicator still found that there was a failure on the part of the insurer to "ask the relevant questions" about the claimant's functional needs.

For example, the adjudicator states that, after receiving the Form 1 and the treatment plan proposing the home modifications, Unica "should have asked its assessors to investigate whether [the claimant] needed cuing, emotional support, and nighttime supervision". The assessor testified at the hearing that she did not consider those issues.

Furthermore, the adjudicator found that it was unreasonable of Unica to focus on the reports of their assessors on the core issues in dispute when its assessors had designated the claimant to be catastrophically impaired on various grounds and the medical and treating evidence confirmed that the claimant "has needs for significant assistance that included not just helping him physically but also being attentive to his psycho-emotional needs."

The adjudicator found that, when read together, the reports of the insurer's assessors on the issue of attendant care and home modifications did not correspond with the information in the claimant's medical and treatment file and that their opinions as to the claimant's functional needs were not supported elsewhere in the evidence.

While Unica had the information available to make further relevant inquiries into the functional needs of the claimant, the adjudicator found that it did not do so despite the fact that this should have been readily apparent based on the evidence already in its possession.

As such, the adjudicator ultimately held that the position taken by Unica with respect to the attendant care benefit and home modifications amounts to an "unreasonable withholding or denial, when the medical evidence, including evidence from Unica's own assessors, supported [the claimant's] need for these claimed benefits."

Accordingly, the adjudicator found the partial denials of these benefits to be "imprudent, inflexible, and immoderate" and ordered a special award. Unica is required to pay 25% of the portions of attendant care and home modifications benefit that were denied. This represents half of the limit outlined in the Regulation. Unica is also required to pay interest at 2 per cent per month, compounded monthly.

Takeaway

While the adjudicator was entitled to reject the opinions of the insurer's assessors, it is highly questionable as to whether Unica "unreasonably withheld or delayed payments" to warrant a special award.

Insurers are not medical experts. An insurer should be able to rely on the expertise of assessors who conduct benefit-specific assessments, including occupational therapists who complete a Form 1, which is a detailed document. There was no evidence that the insurer withheld relevant medical documentation from the assessors.

However, based on the decision of the adjudicator, it seems that insurers should confirm that assessors are asked all the appropriate questions that may arise from the medical evidence available and to ensure that the response to the benefit at issue includes consideration of the file in its entirety.

An attendant care assessor must consider all the attendant care assistance recommended for a claimant and, if providing a response that does not conform to the medical evidence to date (or earlier insurer examinations), then the assessor should provide detailed reasons explaining why that is the case, particularly on more serious cases involving catastrophically injured claimants.