

2019 CarswellOnt 7809
Ontario Licence Appeal Tribunal

R.T. and The Economical Insurance Group, Re

2019 CarswellOnt 7809

**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**

R.T. (Appellant) and The Economical Insurance Group (Respondent)

Kate Grieves Adjud.

Heard: September 19, 2018; September 20, 2018; September 21, 2018

Judgment: April 30, 2019

Docket: 17-008069/AABS

Counsel: Jonah Waxman, for Applicant

Heather Kawaguchi, for Respondent

Kate Grieves Adjud.:

OVERVIEW

1 The applicant was struck by a vehicle as a pedestrian on *December 10, 2011*. As a result of the collision, the applicant suffered very serious injuries including, but not limited to, a moderate traumatic brain injury causing a cognitive disorder, ataxia, gait impairment, fatigue and personality changes. The applicant's injuries have caused both physical and cognitive problems.

2 Following the accident, the applicant sought benefits from the respondent pursuant to Ontario Regulation 34/10, known as the *Statutory Accident Benefits Schedule — Effective September 1, 2010* (the "*Schedule*").

3 The applicant was deemed catastrophically impaired with a 60% whole person impairment under Criteria 7 in relation to her gait impairment and facial neuralgia, and a Class IV impairment in adaptation under Criteria 8. The applicant continues to receive a weekly housekeeping benefit and \$6,000.00 per month in attendant care benefits. The parties settled the non-earner benefits as well as claims for kitchen, dining room and deck renovations.

4 A dispute arose with respect to additional housing modifications. While the parties agree that further home modifications are required, there is a disagreement with respect to the scope and quantum of what is reasonable and necessary. The applicant applied to the Licence Appeal Tribunal — Automobile Accident Benefits Service (the "*Tribunal*") to resolve this dispute.

ISSUES

5 The disputed claims in this hearing are:

i. Is the applicant entitled to receive a rehabilitation benefit in the amount of \$415,334.00 for home modifications and home devices recommended by Ross Rehabilitation and Adaptable Design, submitted on May 10, 2017 and partially denied on May 26, 2017?

ii. Is the applicant entitled to interest on the overdue payment of benefits?

iii. Is the respondent liable to pay an award under Regulation 664 because it unreasonably withheld or delayed payments to the applicant?

RESULT

6 I find that the applicant is entitled to the proposed treatment plan in part. More specifically, I find that the rehabilitation benefits with respect to the rear entrance and deck, and the intercom system and alarm system are reasonable and necessary.

7 The rehabilitation benefits related to installation of an elevator, bedroom addition with ensuite bathroom, and the addition for a therapy room are not reasonable or necessary.

8 The applicant is entitled to any interest on those portions of the treatment plan that are both reasonable and necessary and for which costs have been incurred. If none have been incurred, no interest is payable.

9 The respondent is not liable to pay an award under Regulation 664.

RELEVANT FRAMEWORK AND LAW

10 Section 16 of the *Schedule* sets out the regulatory framework with respect to the disputed benefits. In order to determine if the applicant is entitled to the disputed benefits, pursuant to section 16(1) I considered whether the rehabilitation benefits were reasonable and necessary for the purpose of:

(a) Reducing or eliminating the effects of any disability resulting from the impairment; or,

(b) To facilitate the person's reintegration into her family, society and the labour market.

11 Section 16(3) states that such activities or measures include home modifications and home devices, including communications aids, to accommodate the needs of the insured person, or the purchase of a new home if it is more reasonable to purchase a new home than to renovate the existing home.

12 Pursuant to subsection 16(4)(b), the insurer is not liable to pay expenses to renovate the person's home if the renovations are only for the purpose of giving the insured person access to areas of the home that are not needed for ordinary living.

13 The reasonableness and necessity of the disputed benefits should be interpreted fairly, liberally, and with an eye towards the consumer protection objective of the foregoing provisions of the *Schedule*.¹

14 Previous cases have discussed the appropriate interpretation of the home modification provisions of the *Schedule*. For example, Arbitrator Makepeace held as follows:

The underlying purpose of section 6 [as it was in the previous version of the *Schedule*] is to return the applicant to his or her pre-accident level of function, to the extent that is reasonably possible. Mr. MacMaster is not entitled to receive a 'windfall' as a result of his accident. He is not entitled to hold out for a house and accept nothing less. He must be reasonable in working with the insurer to reach a solution which, while it may not be ideal, is workable and reasonable. Nor is he required to accept a standard of living he would not have accepted before the accident.²

CURRENT LEVEL OF FUNCTION

15 The applicant is 88 years-old. She lives with her daughter, A.T., in a 2,040 square foot, two-storey home with A.T.'s partner and A.T.'s two 18 year-old sons. The applicant has been living with A.T. for 18 years.

16 As a result of the accident, the applicant sustained very serious injuries and was deemed catastrophically impaired. She receives weekly housekeeping benefits and \$6,000.00 per month for attendant care services provided by A.T., specifically

for assistance with dressing, grooming, meal preparation, hygiene, mobility, exercise, maintenance of equipment, and basic supervisory care.

17 Previous modifications to the applicant's home included stair glides to provide access to the second floor. The bathroom was renovated and the tub/shower was replaced with a roll in shower.³ Kitchen modifications included a new refrigerator and cupboard slider, so items the applicant used were more accessible.

18 As of May 2017, the applicant continued to receive treatment from several providers, including a case manager, twice weekly physiotherapy sessions, and sessions with a rehabilitation support worker (RSW). The applicant has suffered several falls since the accident, including one at home in February 2018 when she fractured her right hip. She was hospitalized and underwent surgery on February 15, 2018 for a hip replacement (bipolar hemiarthroplasty). After suffering some complications, including a bout of pneumonia, the applicant was eventually discharged from hospital in May 2018 and was noted to be ambulating with the assistance and supervision from her daughter.

TREATMENT PLAN IN DISPUTE

19 Ms. Deborah Prestwood submitted the disputed treatment plan on May 10, 2017, proposing the following housing modifications,⁴ based on a report prepared by Mr. David Wallace from Adaptable Design:⁵

1)	Additions and Interior/Exterior Modifications	\$185,000.00
2)	Disability Features (Elevator, Intercom, etc.)	\$101,000.00
3)	Construction Expenses (Drawings, Engineering and Permits)	\$82,100.00
4)	HST	\$47,034.00
5)	Documentation	\$200.00
	Total	\$415,334.00

20 Mr. Dan Gauthier (occupational therapist), Mr. David Borthwick (accessibility design consultant) and Mr. Wayne Parson (architect/design consultant) prepared a home modification report on behalf of the respondent, dated August 21, 2017, in which they determined that the disputed plan was partially reasonable and necessary. The respondent approved the modifications as follows:

1)	Additions and Interior/Exterior Modifications	\$34,300.00
2)	Disability Features (Elevator, Intercom, etc.)	\$0
3)	Construction Expenses (Drawings, Engineering and Permits)	\$2,000.00
4)	HST	\$4,745.00
5)	Documentation	\$200.00
	Total	\$41,245.00

21 Consistent with the case law, the parties agree that I am not bound to accept either expert report as definitive but, rather, that I may and indeed should consider the reasonableness and necessity of each proposed modification on a case-by-case basis.⁶ Thus, I have broken the proposed renovations down into the following categories, and will consider each in turn:

- 1) Elevator vs Continuous Stair Glide;
- 2) Second Floor Bedroom Addition and Ensuite Bathroom;
- 3) Rear Addition/Multi-Purpose Room;
- 4) Accessible Primary and Secondary Entrances, and Rear Deck;
- 5) Kitchen Modifications;

6) Laundry Room; and

7) Other proposed modifications.

22 Both the applicant and her daughter testified at the hearing. The Tribunal also heard evidence from Ms. Prestwood, Mr. Wallace and Mr. Gauthier.

Wheelchair Accessibility vs. Walker Accessibility

23 A central issue in this dispute is that the applicant's report is premised on wheelchair accessibility. The report from Adaptable Design⁷ refers only to the applicant's use of a wheelchair. Nowhere does it indicate that any of the modifications proposed are reasonable or necessary for the use of a walker. At the hearing, A.T. testified that no one has recommended that she use a wheelchair within the home.

24 All of the medical documents before me indicate that the applicant uses a walker or a cane for mobility within the home. On other outings into the community, such as attending physiotherapy, shopping or to a restaurant, the applicant uses a walker and/or cane for mobility. When she is on an extended outing with the RSW, such as when going to Niagara Falls or to a museum, the applicant will use a wheelchair. The applicant does not currently use a wheelchair in the home, and none of the medical reports recommend that she use a wheelchair within the home.

25 The use of a wheelchair inside the home, as contemplated by Adaptable Design's report, is speculative. Mr. Wallace testified that the report was premised on the "worst case scenario" of a future possibility of wheelchair use.

26 The respondent submits that the rehabilitation proposed in the treatment plan is not to accommodate the needs of the insured, but rather a future possibility. I find that, while a wheelchair accessible house could accommodate a walker or cane, the proposal for wheelchair modifications is excessive. Put simply, the report does not address the applicant's current disability.

27 The evidence before the Tribunal from a home modification expert with respect to the turning radius of a walker is an email from Mr. Wallace to Ms. Prestwood which she refers to in her report at Exhibit 12. This report includes an excerpt of the email from Mr. Wallace, in which he advised Ms. Prestwood that, if the home design should accommodate a walker and not a wheelchair, the turning radius would reduce from five feet for a wheelchair to three feet for a walker. He reported to Ms. Prestwood that "most of the turning radiuses" in the home are accommodated within the existing home floor plan."⁸ Therefore, no modifications would be required to accommodate the turning radius walker in the current home. Despite that, Mr. Wallace did not complete any further addendum report, nor revise the report in any way to reflect walker accessibility, and not a wheelchair.

28 Ms. Prestwood testified that, while the turning radius for a walker is typically three feet, the applicant requires closer to a four foot turning radius because she is unsteady and does not walk in a straight line. This information is not included anywhere in the materials before the Tribunal, including the report in which she considers the exact issue concerning turning radius.⁹ There is a significant difference in the abilities of a person who requires a wheelchair, and a person who can walk with the assistance of a mobility aid, such as a cane or walker.

Elevator vs Continuous Stair Glide

29 The elevator was proposed to provide wheelchair access to all floors.¹⁰ The proposed elevator would be located in the foyer, where the closet is currently located. It would be accessible by the front foyer and from the garage. It would extend up to the proposed new second floor bedroom, as well as down to the basement. The basement space is necessary for structural reasons and for the equipment regardless of whether it stops in the basement.

30 The applicant submits that the elevator is reasonable and necessary because it:

(a) eliminates the risk posed by the stair glide;

(b) allows her to use her walker to traverse the floors of the home independently without assistance; and

(c) serves as an accessible primary entrance to the home.

31 The second floor of the home is accessed by a set of stairs near the front entrance. The current stair glides have been in place since shortly after the accident. The glide starts on the main floor up to the landing, where the applicant must disembark and transfer to a second glide which takes her up to the second floor. The applicant submits that she is unable to safely transfer on and off the stair glide.

32 A.T. testified that the applicant was able to mobilize using a cane and the stair glide initially after the accident. Over time, her balance has worsened and she has fallen several times. The applicant started using a walker several years ago. Ms. Prestwood opined that the applicant is able to use a walker safely.

33 A.T. testified that the applicant was unable to use the stair glide safely even after repeated education by her family and rehabilitation team regarding its proper use. The applicant does not use the seatbelt and will mount and dismount in an unsafe manner. The applicant requires constant cueing with mobility, including reminders to use her walker. If she is not cued, the applicant will use the walls or furniture to balance while mobilizing.

34 The respondent has proposed a new continuous stair glide that would eliminate the need for transfers on the landing. The applicant conceded that the continuous glide would be safer insofar as it eliminates the need for those transfers. However, there are other risks associated with the use of the glide, including her failure to raise and lower the arm to mount and use of the seatbelt. Both Mr. Gauthier and Ms. Prestwood agreed that the applicant's current use of the stair glide is unsafe, and she should not use it unsupervised.

35 The respondent pays for 24 hour attendant care services (including 8.16 hours per week of assistance for mobility¹¹), and transfers and supervision. Other adjudicators and arbitrators have found that modifications were unnecessary where the applicant has been provided with attendant care assistance.¹²

36 I find that the elevator is not reasonable or necessary. Together with the attendant care services that the applicant already receives to assist her with her mobility and transfers, the continuous stair glide provides the applicant safe access to her home. An elevator would be reasonable if the applicant required a wheelchair for mobility; however, she uses a walker, as recommended by all of her treatment providers. The applicant is at risk of falling when unsupervised. The elevator is not required to eliminate or reduce the effects of her disability or the level of care she will require. Both Ms. Prestwood and Mr. Gauthier agreed that installation of an elevator would not reduce the need for 24 hour supervision.

Second Floor Bedroom Addition and Ensuite Bathroom

37 I find that the proposed bedroom and bathroom are not reasonable or necessary. The applicant's current bedroom is located on the second floor, adjacent to the bathroom.

38 The proposed second floor bedroom addition would be added above the existing garage. The proposed elevator would stop inside this bedroom on the second floor. Her current bedroom would be converted to a new accessible ensuite bathroom, including a wheelchair accessible counter, shower, and a larger tub with bath lift.

39 As noted above, these modifications were predicated on the applicant's use of a wheelchair for mobility. Given that the applicant does not use a wheelchair, I find that the proposed addition and ensuite bathroom are not reasonable or necessary. The applicant's bathroom has already been renovated for almost \$16,000.00 to accommodate her walker, and provide a roll-in shower. There is no evidence before me that she is unable to navigate the bedroom with a walker. Further renovation to the bathroom or a bedroom addition is not required to reduce the effects of disability or increase her level of independence.

Rear Addition/Multi-purpose Room

40 I find that the proposed addition and multipurpose room is not reasonable or necessary because it does not achieve the goals of reducing the effect of disability or facilitate reintegration to the family or community.

41 The applicant is currently attending physiotherapy in the community twice a week for approximately one hour sessions.

42 Ms. Prestwood proposed an addition to the rear of the home for a sound-attenuated room where the applicant could perform her physiotherapy and cognitive therapy. That way, the applicant could have her physiotherapy provided in the home in future, for example in case of inclement weather. Ms. Prestwood testified that the applicant lives in a crowded, busy house and needs the ability to concentrate.

43 I find that it is not reasonable or necessary to build an addition to the home for the hypothetical need for therapy in the home, potentially only in bad weather, for a total of two hours per week. This also does not facilitate reintegration into the community, particularly in light of the applicant's expression that she really enjoys going out to attend treatment. The applicant's cognitive therapy includes playing cards, which she testified was a social activity performed at the kitchen table with family and friends. She also reads a lot, usually in the living room. The applicant testified that she read ten books in August.

44 Part of the rationale for the therapy room is that it is a busy home, and this would provide a quiet space. However, A.T.'s evidence was that it is often just she and her partner at home, and the twins work and attend school.

45 In light of the foregoing, I find that the proposed addition for a therapy room is not reasonable or necessary.

Accessible Primary and Secondary Entrances and Rear Deck

46 The rear entrance is a sliding patio door providing access to the rear deck. There is a threshold to step down onto the deck, and then two raised platforms down to the backyard. During his assessment in August 2017, the applicant demonstrated the ability to open the patio door and access the deck using her quad cane.

47 The respondent approved the replacement of the back deck with a single, level deck including raised planters.

48 The applicant's proposal includes a stair lift, while the respondent's modifications to the deck include a railed stairway to the backyard.

49 Given the applicant's inability to navigate stairs inside the home, thereby justifying the need for a stair glide, I fail to see how the applicant can safely navigate stairs outside the home.

50 Although she demonstrated the ability to access the deck during the assessment, the applicant was using a quad cane and Mr. Gauthier testified that her use of a quad cane was unsafe. The applicant has been recommended to use a walker for mobility. The respondent's approved modifications to the deck do not include any modification to the sliding door, despite the evidence from A.T., the applicant, and Mr. Wallace that the applicant is unable to navigate the narrow door and raised threshold with the walker.

51 I find that the proposed stair lift and accessible entrance to the rear deck are reasonable and necessary. This will allow the applicant to independently access the back deck, and the ability to evacuate in the event of an emergency if the primary entrance is blocked.

52 The home's main entrance has a threshold, and then two steps down to the path. The applicant does not currently exit her house with a walker because none of the exits are accessible. The applicant received assistance with exiting from either A.T. or an RSW.

53 The applicant's proposed entrance through the garage is predicated upon the installation of the elevator, as the stop in the garage would provide her primary entrance to the home. As indicated above, I found that the elevator is not reasonable or

necessary. Mr. Gauthier stated in his report dated January 31, 2018 that a ramp to the front porch would be reasonable, if the applicant began to use her walker to enter and exit the home independently.

Kitchen Modifications

54 The applicant and her daughter both testified how much she enjoyed cooking and baking prior to the accident, and how central those activities were to her life.

55 The proposed modifications include wheel-under sink, counter and cook top, low mounted wall oven, side-by-side refrigerator and freezer, dishwasher, and an accessible pantry and storage. The applicant submits that these modifications would restore some independence with cooking and baking, given her current difficulties with participation due to counters that are too high. The stated goal of these modifications were for unobstructed wheelchair mobility and so she could participate (with assistance) in kitchen tasks from a seated position. ¹³

56 I find that the proposed kitchen modifications are not reasonable or necessary. The applicant already received rehabilitation benefits towards kitchen modifications in 2016, including a new refrigerator. The applicant does not use nor require a wheelchair. Making her kitchen wheelchair accessible will not reduce or eliminate the effects of her disability or reintegrate her with the family. The evidence supports that applicant is able to prepare light meals and snacks. She eats two meals a day with her family at the table. She also reads and plays cards in the kitchen. The reason the applicant does not participate in as much meal preparation is due to her level of fatigue and reduced physical tolerances. ¹⁴

Laundry Room

57 I find that the proposed laundry room modifications are not reasonable or necessary. The existing laundry facilities are already front loading. The applicant proposes to widen the doorway, unstack-the existing appliances and put them on a pedestal to facilitate seated access. The applicant submits that this would restore some level of independence with respect to laundry activities.

58 I find that renovations to the laundry room are unnecessary as it is not part of the applicant's area for ordinary living. Further, she has been found to have a substantial inability to do housekeeping activities, and receive a weekly housekeeping benefit as a result. I am not satisfied that the applicant will be able to do laundry with the proposed modifications, nor reduce the effect of her disability.

Other Proposed Modifications

59 Ms. Prestwood recommended an intercom system in the home, as well as hardwired fire and carbon monoxide alarms. Home devices and communication aids are specifically contemplated by section 16 of the Schedule to reduce or eliminate disability and facilitate reintegration. I find that the proposed modifications are reasonable and necessary.

60 The reasonableness and necessity was uncontested by the respondent during the hearing. The recommendations provide easier communication between the applicant and her family, particularly given that she is easily fatigued. The alarm system has a relatively modest price and would increase her safety. A hardwired alarm system would provide reliable, prompt alarms in the event of an emergency. Given that the applicant will require additional time to exit the home in the event of an emergency due to her mobility issues, I find that the proposed alarm system is also reasonable and necessary.

61 Ms. Prestwood also recommended widening various doorways throughout the home, as well as installation of kick plates, corner guards and wall protection. The proposed doorways are 36" in order to accommodate a wheelchair. Given that the applicant does not use a wheelchair, I do not find that the recommendations are reasonable or necessary.

INTEREST

62 I find that the applicant is entitled to interest in accordance with the *Schedule*, with respect to the rehabilitation benefits that are reasonable and necessary if they have been incurred: the rear access and deck, intercom, and alarm system.

AWARD PURSUANT TO REGULATION 664

63 Section 10 of Ontario Regulation 664, R.R.O. 1990 states that, if the Tribunal finds that an insurer has unreasonably withheld or delayed payments, the Tribunal may award a lump sum of up to 50% of the amount to which the person was entitled to at the time of the award with interest. The applicant argues that the respondent's uncritical reliance on their expert reports despite the existence of other information should attract a special award.

64 The case law has established that an award should be granted only where there was unreasonable behaviour by an insurer in withholding or delaying payments, which can be seen as excessive, imprudent, stubborn, inflexible, unyielding or immoderate.

65 I find that the respondent did not unreasonably withhold or delay payments. The respondent approved portions of the treatment plan, up to \$36,500, but none of the approved renovations have been completed. The respondent has already approved and paid for renovations to the kitchen and bathroom.

66 When new information was provided, the respondent took steps to obtain updated expert advice. It considered the new documentation and information as they were received. I find that the respondent acted reasonably.

CONCLUSION

67 For the reasons set out above, I find that the applicant is entitled to rehabilitation benefits for the rear access and deck, the intercom and alarm system, with interest on any incurred portions of those costs.

68 The applicant is not entitled to the elevator, bedroom addition and ensuite bathroom, the therapy room, kitchen or laundry room modifications.

Footnotes

1 *Alfred v. Allstate Insurance Co. of Canada*, [2004] O.J. No. 848, 2004 CarswellOnt 559 (Ont. S.C.J.), at paras 21 to 25.

2 *MacMaster v. Dominion of Canada General Insurance Co.*, [1994] O.I.C.D. No. 122, 1994 CarswellOnt 4976 (Ont. Insurance Comm.) at para 77.

3 Exhibit 30.

4 Exhibit 11.

5 Exhibit 18.

6 *Hill v. Cosco Insurance Co./HB Group/Direct Protect* FSCO A04-001991, 2006 CarswellOnt 7377 (F.S.C.O. Arb.), at para 46.

7 Exhibit 18 at pages 3, 9, 10, 11, 12, and 32.

8 Exhibit 12.

9 Exhibit 12.

10 Exhibit 18.

11 Exhibit 8.

- 12 *Macedo v. Allstate Insurance Co. of Canada* [2013 CarswellOnt 18045 (F.S.C.O. Arb.)], FSCO A10-000421; *17-001170 v. The Guarantee Company of North America* [2018 CarswellOnt 13383 (Ont. L.A.T.)] ONLAT 17-001170/AABS.
- 13 Exhibit 18.
- 14 Exhibit 8 and Exhibit 29.