



FSCO A08-002244  
FSCO A08-002229

**BETWEEN:**

**ANGELINE BURLEIGH**

**Applicant**

**and**

**ALLSTATE INSURANCE COMPANY OF CANADA**

**Insurer**

### **REASONS FOR DECISION**

**Before:** Judith Killoran

**Heard:** By telephone conference call on September 17, 2009

**Appearances:** Jennifer DeThomasis for Ms. Burleigh  
Ian D. Kirby for Allstate Insurance Company of Canada

**Issues:**

The Applicant, Angeline Burleigh, was injured in a motor vehicle accident on November 30, 2006. She applied for and received statutory accident benefits from Allstate Insurance Company of Canada ("Allstate"), payable under the *Schedule*.<sup>1</sup> The parties were unable to resolve their disputes through mediation, and Ms. Burleigh applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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<sup>1</sup>*The Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

The issue in this hearing is:

1. Is the cost of the Adapt-Able Design Group reports payable under section 15 or under section 24 of the *Schedule*?

**Result:**

1. The cost of the Adapt-Able Design Group reports is payable under section 24 of the *Schedule*.

**EVIDENCE AND ANALYSIS:**

**Agreed Statement of Facts**

The parties filed the following agreed statement of facts:

1. The applicant is a 17 year old girl (d.o.b. April 24, 1992) who was injured as a result of a motor vehicle accident on November 30, 2006.
2. The applicant has sustained a "catastrophic impairment" within the definition of the *Statutory Accident Benefits Schedule* as a result of the said accident.
3. Adapt-Able Design Group was retained by Applicant's counsel, with the agreement of the Insurer, to identify and quantify the reasonable and necessary expenses required to modify the applicant's existing dwelling to accommodate the needs of the applicant.
4. Adapt-Able Design Group produced three reports dated July 24, August 7 and September 7, 2007 and an invoice dated August 8, 2007 in the amount of \$8,489.38.
5. The applicant and the insurer cannot agree as to whether Adapt-Able Design Group's invoice is payable pursuant to section 15 or 24 of the *Statutory Accident Benefits Schedule*.

## **Applicant's Submissions**

Ms. Burleigh was found to be catastrophically impaired as a result of a motor vehicle accident which occurred on November 30, 2006. The medical/rehabilitation costs available to her under section 15 of the *Schedule* are capped at \$1 million. An OCF-22, which is entitled "Application for Approval of an Assessment or Examination", was submitted on June 27, 2007 by Patricia Morand, an occupational therapist. A letter dated June 28, 2007 was attached to the OCF-22 explaining the rationale and description of the requested assessments.<sup>2</sup>

Section 5(a) of the OCF-22 which was devoted to concerns that need to be addressed was expanded upon in the letter with the following:

As a result of the motor vehicle accident on November 30, 2006 Ms. Burleigh suffered a catastrophic impairment, and has been diagnosed with a brain injury involving diffuse, axonal injury with a petechial hemorrhage on the right side of the putamen. She also sustained a right ankle fracture and laceration of the right hip, with a GCS of 3/15 at the scene of the accident. As a result she is wheel chair dependent.

As required by section 15.5(i), 15.7 and 15.8 of the current Statutory Accident Benefits Schedule, it is necessary to complete an assessment of Ms. Burleigh's pre-accident home to determine what home modifications would make the home suitable for her needs. Therefore, the Adapt-Able Design Group has been requested to complete a Home Accessibility Report.

Section 5(b) of the OCF-22 which required a description of the assessment was supplemented with the following:

A Home Accessibility Report completed by the Adapt-Able Design Group determines what home modifications are required to accommodate a person in their home as a result of their functional limitations. Recommendations are based on the medical information provided from available sources to maintain objectivity. The report identifies accessibility/safety problems in the home that must be overcome along with the most appropriate design solution considering client's needs, and architectural/structural possibilities, and zoning regulations.

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<sup>2</sup>Applicant's Document Brief, Tab 2

The report includes photographs of the home along with architectural sketches and a description to help the reader understand what aspects of the home impede safety and accessibility. Solutions to resolve the client's housing issues are provided, including architectural sketches and a brief description of the proposed changes to the affected areas. A cost summary provides an estimate of what the Adapt-Able Design Group believes the price range of the work will be once the job is tendered to local contractors. Also the report notes that the Adapt-Able Design Group has 19 years experience specializing in this type of assessment and is highly qualified to assist with a resolution to Ms. Burleigh's housing needs.

On July 3, 2007, the OCF-22 was approved by Allstate.<sup>3</sup>

The Adapt-Able Design Group Report dated July 24, 2007<sup>4</sup> states:

This report is in accordance with subsections 15.5(i), 15.7, and 15.8 of the Statutory Accident Benefits Schedule (SABS) of the Ontario Automobile Insurance legislation. The SABS infer that there is an obligation to assess an injured individual's pre-accident/existing accommodation with respect to the disability-specific home modifications/renovations that would be required to accommodate same, from which to derive the injured party's extraordinary housing cost(s).

Under the heading: "Follow-Up", Adapt-Able expresses the opinion that it would be imprudent to incur the costs for detailed architectural drawings and project specifications pending further approval and medical team input.

The Home Accessibility Report from the Adapt-Able Design Group repeats the paragraph reproduced earlier in my decision which states that the report is in accordance with subsections 15.5(i), 15.7 and 15.8 of the *Schedule*. Page 3 of the Report notes that information was gathered from, among others, the functional assessment referral form dated July 23, 2007 from Ms. Burleigh's occupational therapist at Bloorview Kids Rehab

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<sup>3</sup>Applicant's Document Brief, Tab 3

<sup>4</sup>Applicant's Document Brief, Tab 4

and an Assessment of Home Environment Report by Ms. Patricia Morand of Patricia Morand Occupational Therapy Services dated February 16, 2007.

On August 8, 2007, Adapt-Able submitted an invoice for \$8,489.38 for the Home Accessibility Report and the Home Evaluation Assessment Report together with disbursements.<sup>5</sup>

Section 15(1) of the *Schedule* states:

The insurer shall pay an insured person who sustains an impairment as a result of an accident a rehabilitation benefit.

The purpose of the rehabilitation benefit is outlined, as follows, in subsection 15(2):

The rehabilitation benefits 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.

Subsection 5 states:

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).

Subsection 5(i) includes in the list "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 to accommodate the needs of the insured person than to renovate the insured person's existing home."

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<sup>5</sup>Applicant's Document Brief, Tab 6

Subsection 15(8) states:

The amount of the rehabilitation benefit for the purchase of a new home shall not exceed the value of the renovations to the insured person's existing home that would have been required to accommodate the needs of the insured person.

Ms. Burleigh submits that this limit makes it more necessary to have an assessment to determine what Allstate should pay.

Ms. Burleigh relies on *Stukic v. Personal Insurance Company of Canada*<sup>6</sup> and more specifically, the following paragraph:

...[Personal] has entertained a number of claims for the legal expense of obtaining a guardianship order with respect to catastrophically impaired insureds and has paid them for two reasons. The first is self interest: paying money to or at the direction of a court-appointed guardian reduces or eliminates the possibility of the insured regaining his competence and making unpleasant and potentially expensive allegations against the insurer. The second is altruistic: the insurer charges the expense to "file expense" rather than paying it as a benefit, thus preserving the maximum available to the insured for expenses which is capped at \$1,000,000 for insureds with catastrophic impairment.

Ms. Burleigh submits that the reports in question did not meet the purpose tests outlined in section 15(2). That is, the reports do not directly either "reduce or eliminate the effects of any disability resulting from the impairment" or "facilitate the insured person's reintegration into his or her family, the rest of society and the labour market."

Subsection 24(1) states:

The insurer shall pay the following expenses incurred by or on behalf of an insured person ...

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<sup>6</sup>(2005) Carswell Ont 3476 (Ontario Superior Court of Justice) August 10, 2005

Paragraph 11 states:

Reasonable fees, other than fees referred to in any of paragraphs 1 to 10, that are charged by a member of a health profession or a social worker for conducting an assessment or examination and preparing a report if the assessment or examination is reasonably required in connection with a benefit that is claimed or in connection with the preparation of a treatment plan, disability certificate, assessment of attendant care needs or application for the determination of a catastrophic impairment.

Ms. Burleigh submits that subsection 15(5) of the *Schedule* which enumerates those expenses which qualify as rehabilitation expenses is consistent with Part V of the *Schedule*, which is entitled Medical, Rehabilitation and Attendant Care Benefits. Part VI is entitled Payment of Other Expenses and is concerned with pecuniary losses. Section 24 is found in Part VI and concerns the costs associated with assessments. Paragraph 3 of the Agreed Statement of Facts specifies that Adapt-Able was retained to identify and quantify the reasonable and necessary expenses for the renovation.

Ms. Burleigh distinguishes *A.K.P. and ING Insurance Company of Canada*<sup>7</sup> where the arbitrator ruled that the actuary's report did not fall under section 24 as it did not assist the applicant in establishing her entitlement to benefits.

In summary, Ms. Burleigh submits that the reports in dispute are not a direct benefit, they do not meet the purpose test found in subsection 15(2) and they are not listed as a rehabilitation benefit under subsection 15(5) of the *Schedule*. They are not devices or home modifications but rather, they are the reports necessary to establish the quantum of benefits. The occupational therapist requires the reports to establish quantum and Adapt-Able assists the occupational therapist in achieving this, while relying on her information to prepare their reports.

Ms. Burleigh submits that the intent of the legislation cannot have been to use a benefit to reduce another benefit. In other words, Ms. Burleigh's rehabilitation benefits are a vital resource to her for the remainder of her life. At the same time, she requires assessments to quantify her

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<sup>7</sup>(FSCO A04-000219, May 3, 2006)

entitlement. Allstate approved the assessments proposed in the OCF-22 and is now estopped from claiming that this is a benefit under section 15 rather than an assessment under section 24.

Subsection 24(5) states:

Vocational assessments referred to in clause 15(5)(f) are not assessments for the purposes of this section.

If the legislative intention was to exclude the disputed assessments, they could have been noted in the same fashion. Ms. Burleigh submits that the reports do not qualify as a benefit but rather, they are a benefit to the insurer to assist in determining the quantum of entitlement. It does not fulfil the purpose of section 15 for the applicant to have a rehabilitation benefit eroded by the cost of ongoing assessments.

### **Insurer's Submissions**

Allstate emphasized that this case is not about an insurer trying to avoid paying a benefit. The two reports in dispute have been paid in full. The issue is whether the payment should be attributed as a section 15 or a section 24 expense.

Jeff Baum co-authored the two reports and examined the applicant's house. He has a Bachelor of Business Administration. The second author is Kevin Field who has a Bachelor of Architecture. The third author is David Lum who has a Bachelor of Science in Human Kinetics.<sup>8</sup>

It appears that the third report dated September 7, 2007 was authored solely by Jeffrey Baum.<sup>9</sup> Although the OCF-22 was signed by Patricia Morand, occupational therapist, and approved by an Allstate representative, the reports themselves were not authored by an occupational therapist.

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<sup>8</sup>Applicant's Document Brief, Tab 5, page 32

<sup>9</sup>Applicant's Document Brief, Tab 7



Allstate submits that section 15 provided the authority for the disputed reports and indeed, the letters attached to the OCF-22s refer specifically to subsections 15.5(i), 15.7 and 15.8. It appears that Adapt-Able was preparing the reports under section 15 and not section 24.

According to Allstate, section 24 specifies under paragraph 11 that reasonable fees can include those charged by a member of a health profession or a social worker for conducting an assessment or examination and preparing a report if the assessment or examination is reasonably required in connection with a benefit that is claimed or in connection with the preparation of a treatment plan, disability certificate, assessment of attendant care needs or application for the determination of a catastrophic impairment.

Allstate submits that as none of the authors of the reports were members of a health profession as defined in section 2 of the *Schedule*, section 24 does not apply. In the case of Mr. Lum, although the *Kinesiology Act* has received royal assent, it has not been proclaimed and as such, kinesiologists are not regulated health professionals under the *Regulated Health Professions Act, 1991*.

Allstate relies on *Joshi and ING Halifax Insurance Co.*<sup>10</sup> where the arbitrator stated:

The use of the term “means” in the definition of case manager is significant. By its use the drafter indicates that the definition is exhaustive. If the thing cannot be found within the definition, it cannot be included even if the thing would customarily be included as akin or analogous to one of the enumerated things.

Allstate submits that the word “means” was not used in section 15 to indicate that the list of rehabilitation expenses was exhaustive.

In *Stukic and Personal Insurance Company of Canada*<sup>11</sup> the judge ruled the following about subsection 15(5) of the *Schedule*:

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<sup>10</sup>(FSCO A02-000140, August 7, 2002)

<sup>11</sup>See footnote 6, supra

One characteristic shared by all or most of the specifically enumerated items in ss.(5) is that they are goods and services which are not ends in themselves but rather means to other ends. A guardianship order is a means of achieving the ends discussed above. As stated, a guardian is an aid which enables this insured to communicate with others. The court notes that in ss. 5(i) "communication aids" are to be included in home modification or provision.

In *Tsimidis and Liberty Mutual Insurance Company*<sup>12</sup>, the arbitrator found that the applicant was entitled to part of the cost of a functional abilities evaluation, which was prepared by a chiropractor, under section 24. Allstate distinguished this case as a chiropractor fits within the ambit of section 24 since a chiropractor meets the section 2 definition of a health practitioner.

Allstate submits that nowhere on the OCF-22 does it say that it is an application for approval of a section 24 assessment. Allstate is not estopped from asserting that it does not qualify as a section 24 assessment for that reason and because there has been no detrimental reliance on Ms. Burleigh's part.

The Adapt-Able reports were prepared pursuant to section 15 for the purpose of determining the quantum of a benefit, but not for assessing whether entitlement to a benefit exists. A section 24 report determines entitlement to a benefit. The Adapt-Able reports were prepared for a health practitioner, Ms. Morand, the occupational therapist, and involved examinations of a house, but not a person. The prepared reports were a resource to assist the occupational therapist in completing a treatment plan. The reports were necessary to determine the modifications needed to the applicant's house and the quantum of funds to be expended.

Allstate relies on subsection 15(2) and the two purposes outlined, which are 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" to maintain that the Adapt-Able reports qualify as a section 15 rehabilitation expense.

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<sup>12</sup>(FSCO A98-000388, January 6, 1999)

Allstate challenges the notion that because an occupational therapist submits the OCF-22, the reports fit under the umbrella of section 24. In reality, the occupational therapist authorized the OCF-22, but not the cost of the reports. Allstate pointed out that the health practitioner, Ms. Morand, authorized the reports but did not examine Ms. Burleigh. According to Allstate, the reports were a means to an end and qualified for payment under subsection 15(5)(l) as “other goods and services that the insured person requires, except services provided by a case manager.”

## **CONCLUSION**

The preparation of accessibility and design reports is necessary to comply with the requirements found in section 15 of the *Schedule*. That is, for the payment of all reasonable and necessary expenses incurred by the insured person for home modifications and home devices to accommodate their needs and achieve the twin goals 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.” I interpret the references to section 15 in the Adapt-Able reports as providing the context for the reports rather than interpreting them as relying on section 15 as a source for payment of the reports.

I do not agree with Allstate’s argument that because accessibility and design reports are required for this purpose that the payment of these reports is a benefit under section 15. Rather, the reports are required to allow the Applicant access to the benefit, in the same way that reports which are compensated under section 24 are needed to allow the Applicant access to other benefits.

Accessibility and design reports are more properly compensated under section 24 of the *Schedule*. If the intention of the legislation was to omit coverage of these particular reports from section 24, that could have been accomplished in the same fashion as it was done for vocational assessments in subsection 24(5) which states:

Vocational assessments referred to in clause 15(5)(f) are not assessments for the purposes of this section.

The accessibility and design reports in the case before me were prepared in consultation with health professionals who offered input and expertise needed to properly determine the needs of Ms. Burleigh. The applications for approval of an assessment or examination were submitted by Adapt-Able Design Group and approved by Allstate's Rehabilitation Service Provider.

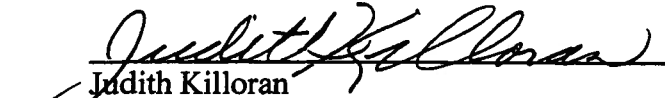
The forms and process for approval were the same as for any section 24 expense. An OCF-21, an Automobile Insurance Standard Invoice, which is the form required for medical and rehabilitation services that are payable by an insurer under the *Schedule*, was not submitted. At all times, both Allstate and Ms. Burleigh treated the reports prepared by Adapt-Able as section 24 expenses. Under Part 3 of the application which requires the signature of a regulated health professional or social worker as required by section 24, Patricia Morand, an occupational therapist, has signed.

Adapt-Able Design Group has been compensated for its reports by Allstate. That compensation was paid as a result of Allstate's approval of Adapt-Able's applications for approval of an assessment or examination. The OCF-22 which was submitted specifies that this form must be used to request prior approval for payment of an assessment or examination.

I also find that Allstate is estopped from arguing at this late date that the expenses for the Adapt-Able's reports should be subtracted from Ms. Burleigh's global entitlement to rehabilitation benefits. There is an issue of detrimental reliance as the process engaged in between Ms. Burleigh and Allstate for payment of the reports has contributed to a belief on Ms. Burleigh's part that the reports would not erode her entitlement to rehabilitation benefits. I find that it would not be in keeping with the spirit of the accident benefits legislation to require that the very reports which are required to grant access for Ms. Burleigh to a rehabilitation benefit and assess the quantum of that benefit should be used to decrease the amount of her entitlement to other rehabilitation benefits.

**EXPENSES:**

The parties are encouraged to resolve the issue of expenses. If unsuccessful, they may request an expense hearing before me under the *Dispute Resolution Practice Code*.

  
Judith Killoran  
Arbitrator

December 4, 2009  
Date



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**BETWEEN:**

**ANGELINE BURLEIGH**

**Applicant**

**and**

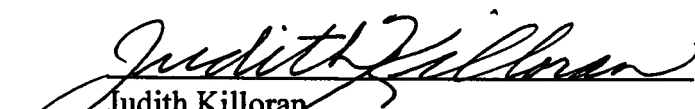
**ALLSTATE INSURANCE COMPANY OF CANADA**

**Insurer**

**ARBITRATION ORDER**

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. The cost of the Adapt-Able Design Group reports is payable under section 24 of the *Schedule*.

  
Judith Killoran  
Arbitrator

December 4, 2009  
Date