



FSCO A06-001156

BETWEEN:

JESSICA KEYES

Applicant

and

PERSONAL INSURANCE COMPANY OF CANADA

Insurer

DECISION ON A MOTION FOR INTERIM BENEFITS

Before: David Muir

Heard: July 6, 2006, at the offices of the Financial Services
Commission of Ontario in Toronto.
Written submissions were received on July 4, 2006.

Appearances: David F. MacDonald for Ms. Keyes
Todd J. McCarthy for Personal Insurance Company of Canada

Issues:

The Applicant, Jessica Keyes, was injured in a motor vehicle accident on August 21, 2003. She applied for and received statutory accident benefits from Personal Insurance Company of Canada (“the Personal”), payable under the *Schedule*.¹ The Personal terminated attendant care benefits on or about May 16, 2006. The parties have been unable to resolve their disputes through mediation, and Ms. Keyes applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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

Ms. Keyes has brought a motion pursuant to section 65 of the *Dispute Resolution Practice Code — Third Edition* for interim attendant care benefits to be paid to her pending the resolution of her dispute with the Personal.

The issue on this motion is:

1. Is Ms. Keyes entitled to interim benefits pursuant to section 279(4.1) of the *Insurance Act*?

Several Orders are sought:

- i. An Order requiring the Personal to pay past attendant care benefits from the date of termination, May 16, 2006, in the amount of \$4,055.67 per month based on a Form 1 dated September 19, 2005;
- ii. An Order requiring the Personal to pay attendant care benefits in the amount of \$5,232.79 in accordance with the Form 1 of Ann Fitzhenry Bedard dated June 13, 2006, from June 13, 2006 until an Order arising from an arbitration hearing.

Ms. Keyes also claims interest on any amounts owing and her expenses incurred on this motion.

Result:

1. The Personal shall pay Ms. Keyes interim benefits up to the amount as set out in the Form 1 of Ann Fitzhenry Bedard dated June 13, 2006, from July 6, 2006 until an Order arising from an arbitration hearing.
2. The issue of expenses may now be spoken to if the parties are unable to resolve it themselves.

EVIDENCE AND ANALYSIS:

Section 279(4.1) of the *Insurance Act* gives arbitrators the discretionary authority to make interim orders pending the final order in any matter.

The awarding of interim benefits is an exceptional remedy and will not often be appropriate. Although there is some controversy surrounding the circumstances which will justify such an award, it is generally accepted that to be successful the onus rests with the applicant to show, based on a summary review of the available evidence, that there is a *prima facie* case supporting entitlement to the benefit in question, and some urgency in the request. Such an award is also subject to review and revision by the hearing arbitrator should the issue go to a final hearing on the merits.

The Applicant relied upon the affidavit evidence of Ms. Mary Ellen Keyes, the Applicant's mother; Dr. Elaine McKinnon, Pediatric Neuro-Psychologist; Ms. Ann Fitzhenry Bedard, Occupational Therapist; and Dr. Gordon Cheung, Neuro-Radiologist. Only Ms. Mary Ellen Keyes was cross-examined on her affidavit. In addition, the parties relied upon parts of the significant medical documentation created over the course of adjusting Ms. Keyes' claims, in particular a number of reports of physicians and other treating or assessing medical professionals, as well as the reports of two attendant care DAC assessments at the centre of the current controversy.

By way of background, Ms. Jessica Keyes was 14 at the time of the accident. She had a prior history of ADHD [attention deficit disorder accompanied by hyperactivity], and other behavioural issues but was otherwise a physically healthy child. As a result of her ADHD, Ms. Keyes struggled with her school work and was participating in an individual education plan having been identified as an exceptional pupil in need of accommodations to succeed in school. Other diagnoses were proposed and queried, including Oppositional Defiant Disorder and

Asperger's Syndrome. At the end of the academic year 2002-03, Ms. Keyes graduated with her class and would have begun high school in September.

Unfortunately, Ms. Keyes was injured in a serious pedestrian motor vehicle collision. She suffered significant head injuries including a moderate brain injury or injuries. She has been found to be catastrophically impaired as defined in section 2(1.1)(e) of the *Schedule*.

The benefit in dispute in this motion is attendant care. Ms. Mary Ellen Keyes claims that her daughter requires an attendant up to 24 hours per day, 7 days per week, largely because she cannot be safely left alone as a consequence of the brain injuries sustained in the accident, which have impaired her ability to self direct in many of her activities of daily living and, more importantly, exercise proper judgement and keep herself safe in her home and community. There are issues related to prompting required to complete certain other of her activities of daily living, but the focus of concern here is the supervision needed to keep Jessica Keyes safe in her home and community.

On the second branch of the test to establish entitlement to an Interim Order, I am satisfied that Ms. Keyes has established urgency, if the medical evidence and that of her mother is accepted. The clear preponderance of that evidence to date, including opinions relied upon by the Personal, supports the view that Ms. Keyes is potentially at risk of harm if unsupervised. If the numerous experts who have supported her claim to attendant care as well as her mother are correct in their view of the extent and nature of this young woman's impairments, then she is at risk of harm to herself. I find that whatever analysis is applied to the notion of urgency, a credible risk of physical or emotional/psychological harm to an applicant seeking a benefit would meet the standard. I am also satisfied, although this may not be necessary in the circumstances, that the loss of this benefit will impose a significant burden on the Keyes family. This will be particularly the case when Ms. Mary Ellen Keyes returns to work in September.

The more difficult issue in this matter is the strength of the claim that Ms. Keyes has suffered an impairment or impairments as a result of the accident that merits attendant care at all. The Personal submits that there is evidence that Ms. Keyes is no more impaired after the accident than she was prior to it and therefore there is no greater need for attendant care now than there was then. There is opinion evidence which supports this view. The Personal also takes issue with the CAT DAC determination and submits in effect that if it is to be bound to this determination, then Ms. Keyes must abide by the decision of the North York DAC until there is a hearing on the merits.

Dealing with this final submission first, I have reviewed the material referred to by the Personal in this regard, including the opinion of Dr. Bruce Stewart and have concluded that while there may be an issue for determination in a full hearing, the strength of that case comes nowhere near the relative merits of the parties' positions on the issue of Jessica Keyes' need for attendant care. The risk for Ms. Keyes is, of course, that if Personal is ultimately upheld in its critique of the CAT DAC, she may have no entitlement to attendant care at all, irrespective of her need for it. However, for the moment, the determination of the CAT DAC is a given.

The evidence offered by Ms. Keyes on the question of entitlement to attendant care, even considered in a summary way, is compelling.

Both Ms. Fitzhenry Bedard and Dr. McKinnon have concluded that Jessica Keyes needs continual supervision because of the brain injuries which she sustained in the car accident. For Ms. Fitzhenry Bedard, a treating occupational therapist, the pre-existing concerns have been exacerbated by the brain injuries sustained by Jessica Keyes to the point that she cannot be safely left alone for even short periods of time. Dr. McKinnon, a treating neuro-psychologist, deposed that in an unstructured environment, the demands placed on Jessica Keyes' limited cognitive abilities will overwhelm her and cause her to be unsafe. As she has gotten older, these demands have increased and that her ability to respond to emergency situations encountered in

her day to day life has been compromised such that her safety is at risk. Accordingly, in Dr. McKinnon's view, although Jessica Keyes has made considerable progress in her level of functioning, most notably in her intellectual achievement, she remains at considerable risk because of her lack of insight, disinhibition and impulsiveness, all of which can be traced back to the brain injuries sustained in the accident.

Ms. Mary Ellen Keyes deposed that her daughter needs constant prompting to attend to her personal needs, such as brushing her teeth, changing clothes, use of cosmetics, deodorant, etc. According to Ms. Keyes, her daughter also requires cueing in social situations and correction in respect of the use of socially inappropriate language. She has, according to her mother, regressed in years such that whereas prior to the accident, Jessica would provide some caregiving to her younger sister, now the youngest looks out for Jessica.

Prior to the accident, according to Ms. Keyes, her daughter, although struggling in school, was socially mature and responsible. She could and did tidy up after herself, clean her room, babysit her sister, take public transit on her own and take some responsibility for meal preparation in the home. Subsequent to the accident, Jessica is unable to do any of these things safely - "she has lost the ability to use her judgement to keep herself safe." None of Ms. Keyes' affidavit evidence in this regard was seriously challenged in cross-examination.

These views are shared by others, including but not limited to Dr. Tamarah Kagan-Kushnir, a treating psychiatrist associated with the Bloorview McMillan Centre where Jessica Keyes has been attending for treatment of her injuries, Dr. Handleman, psychiatrist, as well as an attendant care DAC conducted in August 2004. As well, Dr. Bruce Stewart, neuro-surgeon, conducted an assessment of Jessica Keyes in March 2004 and while he questioned a finding of Catastrophic Impairment, he did not otherwise differ with the predominant view of this young woman's potential for difficulty post accident.

Although it was suggested by Ms. Keyes that the cases support the notion that in determining whether or not an applicant has made out a *prima facie* case for entitlement no regard should be had to existing evidence supporting another point of view, I do not read the cases as necessarily supporting that proposition. Accordingly, I have reviewed the material relied upon by the Personal. This includes reports of Aneez Virani, Occupational Therapist, Dr. G. Kumchy, psychologist and the assessment team at North York Rehabilitation Hospital (the North York DAC). I have also reviewed the documentation provided, including the reports of various med-rehab DACs conducted in the Fall of 2005 and January 2006.²

The Personal relies upon the North York DAC reports of March 31 and April 6, 2006 and the reports of Dr. Kumchy and Aneez Virani which provide significant support for the DAC's conclusions. At the heart of the DAC's reasoning is the suggestion that Jessica Keyes was in need of attendant care prior to the accident and that the motor vehicle accident has not added to her level of disability. The North York DAC claims that this conclusion is supported by the assessments of Aneez Virani and Dr. Kumchy.

Ms. Keyes takes significant issue with the North York DAC.

Ms. Keyes contends that the North York DAC is in violation of the FSCO DAC Assessment Guidelines and is a nullity. In particular, it is alleged that the fact the DAC rendered two reports both of which are signed by the two assessors, is in violation of the Guidelines. It is also submitted that the DAC assessors erred in relying almost exclusively on Jessica Keyes' responses to questions in a structured verbal interview in the Keyes' home and conducted no demonstrative testing to verify the responses she gave. In particular, despite well documented concerns about Jessica Keyes' difficulties functioning in an unstructured environment, the DAC conducted no testing of the Applicant in such an environment or any environment other than her home.

² The Personal provided a brief entitled Medical Brief which contained a number of documents it considered important to the resolution of this issue. In addition, Ms. Keyes filed six or more briefs of documents not all of which were referred to in the hearing.

It is also submitted by Ms. Keyes that the DAC has breached the Guidelines in failing to avail themselves of an assessment by an appropriate specialist such as a psychologist, neurologist or psychiatrist where there is “concern about a brain-injured claimant’s ability to exercise appropriate judgement without supervision.” It is also alleged that the report of the DAC reveals that they have gone beyond assessment to become advocates for a point of view. By way of example, Ms. Keyes alleges that the DAC misquotes reports of treating practitioners and without foundation accuses them of conflicts of interest.

There is little doubt that there are significant issues with the North York DAC assessment. The assessment was conducted on March 13, 2006. A report, signed by both assessors, was released on March 31, 2006 with attached Form 1 indicating that no attendant care was required. A second report appeared on April 13, 2006. The clinic coordinator, Dr. Rocco Guerriero, in a cover letter, indicates that the first report was issued in error and contained only the views of one assessor, as well as lacking an executive summary. Here is the salient text of Dr. Guerriero’s letter:

As part of our quality assurance measures, we recognized that this Attendant Care DAC Assessment report recently released was done so in an incomplete manner. The report that was released dated March 31, 2006, only included the Registered Nurse’s component (pages 1 to 34). It did not include the Occupational Therapist’s component by Lyn Cook. It also did not include the Executive Summary by Lyn Cook. We are releasing the corrected report.

We apologize to all parties for this oversight. This does not change the outcome of this Attendant Care DAC Assessment report.

It is clear that the cover letter underplays the extent of the problem with the DAC assessment reports. It might have been more accurate to describe the portion that was initially released as a partial draft. It is manifestly not the same report as was issued later and, rather than being incomplete in the sense of parts of the true report of the assessors being inadvertently not included, even those portions that are largely reproduced in the so called erratum report

(the April 13th report) have been changed. To cite just one example, the description of an incident where Jessica Keyes found herself fighting a small fire in a trailer is quite different from one report to the other. In particular, the first description of the incident has Jessica Keyes in the trailer with a friend, who put a hat over the candle causing the fire. In the second description, it is said that Jessica Keyes is alone in the trailer. Both cannot be accurate, of course. The fact that both versions of the report purport to carry the signatures of both assessors calls into serious question whether or not the DAC complied with Part 4 of the Attendant Care DAC Assessment Guidelines.

The North York DAC report also contains significant errors. For example, despite the assertion to the contrary, Jessica Keyes' pre-accident conditions are acknowledged by several of her treating personnel and other assessors. Dr. McKinnon, for example, deposed that when she first assessed Ms. Keyes in September 2004, she was aware of the diagnosis of ADHD. This is confirmed in her various reports predating the North York DAC. Indeed, it is simply not accurate to claim as the North York DAC assessors do, that most of Jessica Keyes' treating practitioners ignore or downplay her pre-existing conditions. The documents are replete with comments on these pre-existing difficulties, in particular the diagnosed ADHD, but for many assessors the pre-existing diagnoses could well mean that Jessica Keyes would have even greater difficulties as a consequence of her brain injury.

By way of another example, whether this is an error, or an attempt to mislead, I will leave to the hearing arbitrator, however it is suggested in the report that Ms. Maria Hren who conducted an assessment on behalf of the Personal questioned the need for attendant care. This is simply not the case, as is evident from a fair reading of Ms. Hren's July 9, 2004 report.

The notion that Jessica Keyes required extensive supervision prior to the accident is at the heart of the concerns that the North York DAC had with her need for attendant care as a result of the accident. It is not entirely clear where this suggestion comes from. In both versions of the

North York DAC report there is reference to the report of Aneez Virani in November 2005 who claims to be in “mutual agreement with Mrs. Kumchy” who felt that prior to the accident Jessica Keyes was at risk and as such her safety was compromised. These reports stand apart from the predominant view of most assessors involved in this matter including some retained by the Personal to assess Jessica Keyes.

The difficulty with the views of Aneez Virani and Dr. Kumchy is that there is little or no evidence that prior to the accident Jessica Keyes posed a risk to herself or others as a result of her acknowledged disabilities. Although she needed support to attend efficiently to her school work, there is no suggestion in any of the considerable medical documentation related to this young person that she was in need of support to function safely in her home and community. The dearth of such evidence is evident in the various reports of Aneez Virani and Dr. Kumchy. The notion that she required direct, close and constant supervision are extrapolated from the diagnosis of ADHD and concomitant assessments conducted by Jessica Keyes’ school. There is little or no other factual support for the proposition.

On the other hand, there is very little doubt that Jessica Keyes has required significant supervision since the car accident. That said, the reporting of her treating professionals indicates that Jessica Keyes is making progress, however there remain concerns. Other non-treating assessors have begun to question whether the level of supervision and other treatment interventions remain justified almost three years post accident. All of which is to say that there are legitimate issues for debate and perhaps ultimately a determination by an adjudicator in this matter. However, even if Ms. Keyes’ evidence as a concerned mother is discounted to some degree, there is no reason, based on all of the material placed before me, to question in any significant way her evidence that Jessica Keyes continues to require more supervision than was required prior to the accident. It may be a difference of degree but that may ultimately be enough to support entitlement to extensive attendant care.

Returning to a consideration of the DAC assessment at issue here, it is significant in my view that the North York DAC expressly declined to consider whether or not Jessica Keyes' noted vulnerabilities pre-accident have been exacerbated by the injuries sustained in the accident. This is at the heart of the controversy in this case and the failure of the North York DAC to address the "thin skull" issue, leaving it rather to the "court or arbitrator" to grapple with, is remarkable in the circumstances.

I also accept Ms. Keyes' contention that the North York DAC failed to ensure that it had access to the appropriate assessment team in the circumstances contrary to the expectation of the Guidelines as set out earlier. In this regard, I also accept the contention of the Applicant that the North York DAC relied, to its detriment, too much on the report of Jessica Keyes and downplayed the input of her mother. In some instances, this caused them to get it entirely wrong. To cite just one example noted in the material, on page 30 of the second North York DAC report, it is noted that Jessica Keyes reported no major changes with her caloric intake since the motor vehicle accident. This is contrary to the well documented difficulties with diet that the Applicant has experienced since the accident.

The tone of the DAC is markedly partisan. Ms. Fitzhenry Bedard in particular is singled out with a suggestion that she is in a conflict because the Personal is funding the treatment she provides, the suggestion being that she is motivated to support more rather than less treatment. On the other hand, the assessments conducted by Aneez Virani and Dr. Kumchy are characterized as independent assessments as opposed to assessments requested by the Personal. The North York DAC team also critiques an earlier attendant care DAC which supported entitlement to the benefit, by the use of possibly confidential information somehow obtained from another DAC assessment.

Having considered all of this material I am satisfied that Ms. Keyes has made out at least a *prima facie* case for entitlement to attendant care benefits in some amount and for some period of time. Accordingly, an Order for interim benefits is appropriate in the circumstances.

Turning now to remedy, Ms. Keyes seeks a number of Orders as set out above. The Personal suggested in the alternative, that I order a new DAC assessment if I found the North York DAC to be so flawed as to amount to a nullity. It was also submitted that if an Order is made at this point, that it be for a lesser amount to take into account Jessica Keyes' attendance at school or when receiving other therapies.

I have considered the submission of the Personal, however as attractive as the option of a new DAC might have been, the legislative landscape no longer includes DACs. If Ms. Keyes were agreeable to a new DAC, I would have made such an Order were one required, however she is not apparently prepared to consent to such a process. Moreover, it is not as if there has not been extensive assessment of Ms. Keyes over the years. This is a well documented file. If need be, there will be adequate evidence to place before an arbitrator called upon to decide these issues ultimately.

I am satisfied having considered all of the material provided to me, that the most appropriate course is an Interim Order for attendant care up to the amount as set out in Ms. Fitzhenry Bedard's report of June 13, 2006. This Interim Order is effective from the date the Motion was heard, July 6, 2006, until the hearing arbitrator makes some other Order. As for the Personal's submission that a lower amount ought to be ordered to take account of Jessica Keyes' actual need on any given day, as indicated at the hearing of this Motion, I am not unsympathetic to this view. It is clear that there will be times when the Applicant is otherwise being supervised, but I accept Ms. Keyes' submission that this is a matter of what is invoiced. It may be that there will be further disputes with respect to these issues and I urge the parties to resolve them in a manner consistent with these brief reasons.

I leave the issues of any retroactive payments and interest to the hearing arbitrator.

EXPENSES:

The issue of Ms. Keyes' expenses of this motion may now be addressed should the parties be unable to resolve the issue themselves.

David Muir
Arbitrator

July 21, 2006

Date



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BETWEEN:

JESSICA KEYES

Applicant

and

PERSONAL 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 Personal shall pay Ms. Keyes interim benefits up the amount as set out in the Form 1 of Ann Fitzhenry Bedard dated June 13, 2006, from July 6, 2006 until an Order arising from an arbitration hearing.
2. The issue of expenses may now be spoken to.

David Muir
Arbitrator

July 21, 2006

Date