



FSCO A12-005783

**BETWEEN:**

**QUY LUONG**

**Applicant**

**and**

**ALLSTATE INSURANCE COMPANY  
OF CANADA**

**Insurer**

## **REASONS FOR DECISION**

**Before:** Pamila Ahlfeld

**Heard:** January 6, 7, 8, and 9, 2014, at the offices of the Financial Services Commission of Ontario in Toronto. Oral submissions were heard on January 17, 2014. Written submissions were received on March 7, 2014 and March 14, 2014

**Appearances:** D. Joel Dick for Ms. Luong  
David Murray for Allstate Insurance Company of Canada

### **Issues**

The Applicant, Quy Luong, was injured in a motor vehicle accident on February 13, 2010. She applied for and received statutory accident benefits from Allstate Insurance Company of Canada (“Allstate”), payable under the *Schedule*.<sup>1</sup> Disputes arose between the parties and they were unable to resolve the disputes through mediation. Ms. Luong 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 issues in this hearing are:

1. What is the amount of attendant care benefits that the Applicant is entitled to from May 1, 2012 to present and ongoing?
2. Is the Applicant entitled to receive \$6,825.00 for the cost of a home renovation treatment plan dated May 5, 2010?
3. Is the Applicant entitled to interest pursuant to section 46(2) of the *Schedule*?
4. Is the Applicant entitled to a special award pursuant to section 282(10) of the *Insurance Act*?
5. Is either party entitled to expenses of the arbitration proceeding pursuant to section 282(11) of the *Insurance Act*?

**Result:**

1. The Applicant is entitled to receive the following attendant care benefits:
  - i. From May 22, 2012 to May 31, 2012 the copay amount of \$612.30 plus an additional \$345.47 for family services which totals **\$957.77**. The total amount of attendant care benefits for the month of May 2012 is \$4,153.80 (prorated amount paid prior to the Applicant moving to Kennedy Lodge)<sup>2</sup> plus \$957.77 = **\$5,111.57**.
  - ii. From June 1, 2012 to February 28, 2013, the copay amount of \$1,862.41 plus an additional \$1,070.98 for family services which totals **\$2,933.39** a month.
  - iii. From March 1, 2013 to March 19, 2013, the copay amount from Kennedy Lodge of **\$1,163.37** plus an additional \$34.54/day x 19 days = **\$656.26**; and from March 20, 2013 to March 31, 2013, the copay amount from Mon Sheong of **\$897.48** plus the

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<sup>2</sup>Submission of February 7, 2014 from the Applicant and Allstate.

family services of **\$381.60**. The total amount of attendant care benefits for March 2013 is **\$3,098.71**.

- iv. From April 1, 2013 to July 1, 2013, the copay amount from Mon Sheong of **\$2,274.86** plus the family services of **\$985.90** which totals **\$3,260.76**.
  - v. From July 1, 2013 and onwards, the copay amount of **\$2,308.32** plus the family services of **\$985.90** which totals **\$3,294.22**.
2. The Applicant is not entitled to receive \$6,825.00 for a home renovation treatment plan dated May 5, 2010.
  3. The Applicant is entitled to be paid interest in accordance with section 46(2) of the *Schedule* on the amount owing for attendant care calculated as the difference between what has been paid monthly and the new rate set in this decision.
  4. The Applicant is not entitled to a special award.
  5. The parties will attempt to resolve the issue of the expenses of the arbitration among themselves, failing which they may request an expense hearing before me in accordance with section 79.1 of the *Dispute Resolution Practice Code*.

## Background

The Applicant was struck by an SUV on February 13, 2010 and she was pinned under the vehicle for approximately 25 minutes.<sup>3</sup> The Applicant testified that she spent a few weeks in the hospital and she was then transferred to St John's Rehab Hospital ("St. John's"). A discharge summary from St. John's indicates that the Applicant left the facility on May 5, 2010.<sup>4</sup>

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<sup>3</sup>See Exhibit A-1, Ambulance Report, p. 373.

<sup>4</sup>See Exhibit R-1.

At the time of discharge, the Applicant was found to have suffered the following injuries:

- Bilateral pelvic rami and sacral fractures, with external fixation surgery on February 14, 2010
- Bilateral intertrochanteric fractures, with ORIF surgery on February 14, 2010
- Left distal humerus fracture
- Multiple rib fractures
- Pelvic extravasation and bladder wall injury
- Blood transfusions
- Embolization of multiple vessels
- Right pneumothorax
- Right foot drop
- Right knee instability<sup>5</sup>

Prior to her release from St. John's, the Applicant's attending Occupational Therapist (OT), Holly Mo wrote a report addressing concerns with respect to accessibility in her son's home.<sup>6</sup> Upon the Applicant's release from the rehabilitation centre in May 2010, a Home Renovations report was submitted to the Insurer. An OCF-22 was submitted to Allstate in the amount of \$6,825.00. Allstate denied payment for the amount set out in this report.

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<sup>5</sup>See Exhibit R-5, p. 3.

<sup>6</sup>See Exhibit R-2.

According to the Applicant's son, Ken, the Applicant returned to live with him and his family when she left St. John's. He testified that the Applicant was put on a waiting list for a nursing home prior to her discharge but he was told that the wait could take years. He stated that upon the Applicant's return to his home, he sought options with respect to her care in his home including a report which addressed home modifications to allow the Applicant to move into the basement and have a self-contained apartment all on one level.

Ken testified that it was difficult to care for the Applicant at home; that his wife worked at home making it distracting to have the health care professionals going in and out. Ken stated that he expanded the search for a nursing home and when a semi-private room became available at Kennedy Lodge, a decision was made to move the Applicant there until a private room could be secured at Mon Sheong Nursing Home ("Mon Sheong"). Ken testified that the Applicant moved to Kennedy Lodge in May 2012.

Approximately two years post-accident, the Applicant was deemed to be catastrophic. Allstate paid attendant care to the Applicant in the amount of \$6,000.00 per month while she lived at Ken's residence. Thus, there is no dispute over the attendant care paid prior to May 2012.

The cost of the accommodation to the Applicant at Kennedy Lodge as a "copay"<sup>7</sup> was \$1,862.41 per month.<sup>8</sup> The Applicant remained in Kennedy Lodge until a private room became available at Mon Sheong. The Applicant testified that she moved to Mon Sheong in March 2013. Ken testified that the Applicant now has a private room at Mon Sheong and her co-payments increased to approximately \$2,308.32 per month.

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<sup>7</sup>A copay is the portion of the cost to the Applicant that she is responsible for with respect to her accommodation and services at a nursing home.

<sup>8</sup>Exhibit A-1, Tab 15, page 166

**ATTENDANT CARE**

**1. Introduction**

There is no dispute with respect to the Applicant’s catastrophic impairment and both parties have agreed that there is no dispute that the Applicant has, pursuant to the Form 1’s submitted, shown eligibility for 24-hour care. It is the Applicant’s position that she is entitled to monthly attendant care benefits in the amount of \$6,000.00 since May 2012 to date and ongoing.

Allstate has paid to the Applicant the following amounts since May 2012:

May 2012	\$5,009.30
June 2012 to February 2013	\$2,600.05 per month
March 2013	\$2,798.49 per month
April 2013 to present	\$3,012.50 per month

**2. Is the Applicant entitled to \$6,000.00 per month even if the actual amount charged by the nursing home is less than that amount?**

***a) Applicant’s Position***

It is the Applicant’s position that she is entitled to the full \$6,000.00 of attendant care benefits notwithstanding that her obligations to the nursing homes were and are considerably less than that amount. The Applicant asserts that the *Schedule* makes clear that once attendant care benefits have been deemed reasonable and necessary, the insurer is obligated to pay them in accordance with the Form 1. In this regard, the Applicant relies on the specific words “*shall*” in sections 16(2) and 16(4).

The claim is governed by the provisions of the *Schedule* for accidents on or after November 1, 1996, O. Reg 403/96, under the *Insurance Act*, R.S.O. 1990, c. I.8. The *Schedule* provides for attendant care benefits as follows:

16(1) The insurer shall pay an insured person who sustains an impairment as a result of an accident an attendant care benefit. O. Reg. 403/96, s. 16 (1).

... ..

(2) The attendant care 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) services provided by an aide or attendant; or

(b) services provided by a long-term care facility, including a nursing home, home for the aged or chronic care hospital. O. Reg. 403/96, s. 16 (2).

... ..

(4) The monthly amount payable by the attendant care benefit shall be determined in accordance with Form 1. O. Reg. 403/96, s. 16 (4).

Counsel for the Applicant argued that accident benefits, as consumer protection legislation, should be interpreted broadly in favour of an Applicant. He relied on the Ontario Superior Court of Justice decision of *Belair Insurance Co. v. McMichael*.<sup>9</sup> In that case, Mr. McMichael was awarded attendant care benefits by an arbitrator for a period of time when no benefits were provided because the insurer had not provided funding and he himself could not afford the expense. The Court opined that even if the benefits paid to Mr. McMichael were arguably a windfall to him (given that during the specified time period no attendant care benefits were incurred), non-payment would result in a windfall to the insurer who is the one with the statutory obligation to pay.<sup>10</sup>

Much of the Applicant's argument centres on the interpretation of the word "incurred." It was submitted that I be guided by the interpretative approach adopted in the case of *Monks v. ING Insurance Co. of Canada*<sup>11</sup> in which the Court referred to the case of *McMichael*,<sup>12</sup> that

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<sup>9</sup>(2007) 86 O.R. (3d) 68.

<sup>10</sup>*Ibid* at paragraph [21].

<sup>11</sup>(2008) 90 O.R. (3d) 689.

<sup>12</sup>(2007) 86 O.R. (3d) 68

cited with approval the following statement in *Wawanesa Mutual Insurance Co. v. Smith (Committee of)*<sup>13</sup> in rejecting a narrow construction of the word “incurred” as used in the *Schedule*:

A purposive and remedial interpretation requires that the legislation be read so as not to require an insured person to finance, or to pledge her credit, in order to secure the very benefits for which she is insured.

The Court then went on to conclude that:

an insured ... need not actually receive the items or services or spend the money or become legally obligated to do so. It is sufficient if the reasonable necessity of the service or item and the amount of the expenditure are determined with certainty before the end of [the specified time limit under the applicable benefits schedule]”.<sup>14</sup>

In post-hearing submissions, counsel for the Applicant asked that I follow the recent decision in *Marcus (Estate of) and Toronto Transit Commission Insurance Company Limited*.<sup>15</sup>

The Applicant submitted that notwithstanding that *Marcus* was decided under the current regulation, it nonetheless deals with the same issue as in this case, that once the need for care was established, the quantum of the benefit was to be determined in accordance with the Form 1.

In the case at bar, the nursing home Form 1’s completed by Functionability on behalf of the Applicant<sup>16</sup> and by Margit Sampogna & Associates<sup>17</sup> on behalf of Allstate, both indicate attendant care needs for the Applicant are in excess of the \$6,000.00 maximum eligibility by the *Schedule*. The Funtionability Form 1 indicates that the reasonable and necessary needs would be in accordance with Form 1’s. The nursing home attendant care needs are calculated at \$7,026.69

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<sup>13</sup>(1998), 42 O.R. (3d) 441, [1998] O.J. No. 5058 (Div. Ct.), at paras. 38 – 39.

<sup>14</sup>See footnote 11 *supra*, at paragraph [49]

<sup>15</sup>(FSCO A12-006408, January 13, 2014)

<sup>16</sup>See Exhibit A-1, Tab B2

<sup>17</sup>See Exhibit A-1 Tab B4



per month.<sup>18</sup> It was further calculated that the Applicant's family was also providing attendant care services equivalent to \$2,266.31 per month.<sup>19</sup> Ms. Sampogna's Form 1 for the nursing home specifies that the needs for these services are equivalent to \$7,795.95<sup>20</sup> while the family contribution is \$737.64 per month.<sup>21</sup>

It was further submitted that given that the amounts calculated in the Form 1's exceed the \$6,000.00 limit, the Applicant is entitled to receive this maximum benefit from Allstate and manage the distribution of the funds as she sees fit; that once the need has been identified, quantified and deemed reasonable and necessary, Allstate is bound to pay. The Applicant argues that Allstate is not entitled to a discount just because the Applicant is only responsible for the copay to the nursing home; that this would be an absurd result. Counsel stated that the rates attributed to attendant care needs in the *Schedule* are below marketplace rates; that insured people in general have to manage with the rates and often go without some services because this maximum amount often does not cover all identified needs; and that in these circumstances, it will be up to the Applicant and her family to manage the funds.

### ***b) Allstate's Position***

Allstate argued that the issue with respect to the attendant care benefits is whether or not the *expense* is reasonable and necessary. Allstate agreed that statutory interpretation cannot be founded on the wording of one phrase in isolation alone but the words have "to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament."<sup>22</sup> In this regard, it was submitted that an automobile policy is a contract of indemnity that requires an insured establish a loss which then forms a basis of entitlement. Thus, when reading section 16 as a whole, section 16(1)

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<sup>18</sup>See Exhibit A-1, p. 24

<sup>19</sup>See Exhibit A-1, p. 31

<sup>20</sup>*Ibid*, p. 44

<sup>21</sup>*Ibid*, p. 50

<sup>22</sup>*Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, paragraph 21.

provides to whom an attendant care benefit is paid, section 16(4) indicates how the monthly amount is determined and 16(2) states that the funds will be paid for *all reasonable and necessary expenses incurred by or on behalf of the insured person.*

Allstate submits that it has never taken the position that the attendant care benefit is less than \$6,000.00 but the amount payable to the Applicant is the cost of reasonable and necessary services that are being provided by the family as per the Form 1 and the amount billed to the Applicant by the nursing home. It was argued that it would undermine the principle of indemnity to suggest that there needs to be no loss; that it would render the reasonable and necessary section of the *Schedule* irrelevant. Accordingly, it was argued that in the case at bar, there is no issue as to whether services are being incurred. Rather the issue is the amount of expenses reasonably and necessarily incurred by or on behalf of the Applicant.

In a response to post-hearing submissions by the Applicant, Allstate submits that the decision of *Marcus* should be distinguished as the issue in that case is very different. Allstate argues that the issue in *Marcus* was whether or not the expense was incurred within section 3(7) of the 2010 *Schedule* and not whether the individual expense is reasonable and necessary.

Allstate asked that I adopt the reasoning in *McKnight and Guarantee Company of North America*<sup>23</sup> where Arbitrator Skinner found that section 16(4) of the *Schedule* requires that the benefit be paid in accordance with the amounts set out in the Form 1 only after the entitlement to the benefit had been established.<sup>24</sup> She stated that “[s]ubsection 16(2) of the *Schedule* contemplates that an attendant care benefit is to be paid for reasonable and necessary expenses incurred. The Form 1 identifies attendant care needs, but does not constitute evidence that expenses have been incurred.”<sup>25</sup>

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<sup>23</sup>(FSCO A02-000299, October 28, 2003), in Tab E of the Respondent’s Brief of Authorities.

<sup>24</sup>*Ibid*, p. 4.

<sup>25</sup>*Ibid*, p. 5.

Allstate further submitted that attendant care needs should be considered together with other available statutory accident benefits such as medical and rehabilitation expenses<sup>26</sup> and relied on the case of *Whyte and Non-Marine Underwriters, Mbrs. of Lloyd's*,<sup>27</sup> where Arbitrator Muzzi deducted from the applicant's attendant care benefits, amounts credited to the insurer for the time when the applicant was otherwise supervised. Allstate relied on many of the cases cited in its Book of Authorities as standing for the premise that one cannot just look at the Form 1. Rather, one has to look at everything; that the Form 1 identifies services and costs and then looks to see if the expenses are reasonable and necessary such that they be incurred but the quantum of the expense must be reasonable and necessary.

In the case at bar, Allstate submits that the evidence demonstrates that the services at the nursing homes are paid by OHIP and as such, pursuant to section 60(2) of the *Schedule*, Allstate is only required to pay the copay amount.

Section 60(2) of the *Schedule* provides:

- 60(2) Payment of a medical, rehabilitation or attendant care benefit or a benefit under Part VI is not required for that portion of an expense for which payment is reasonably available to the insured person under any insurance plan or law or under any other plan or law. O. Reg 403/96, s. 60(2).

Accordingly, Allstate argues that the Applicant is not entitled to the \$6,000.00 a month as indicated on the Form 1's for the nursing home but only to the copay amount plus the amount that I determine is reasonable and necessary from the Form 1's submitted with respect to the family contributions.

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<sup>26</sup>*Ms. M.G. and The Economical Mutual Insurance Company* (FSCO A09-002443, November 23, 2012) in Tab G of Respondent's Book of Authorities

<sup>27</sup>(FSCO A06-000028, June 14, 2007) in Tab H of the Respondent's Brief of Authorities

**c) Analysis**

After having reviewed all of the evidence and hearing submissions from the parties, I find Allstate's arguments to be more persuasive. The cases presented by the Applicant are distinguishable from the case at bar as the applicants in those cases were not seeking benefits over and above the rate set as a copay for nursing homes. Generally speaking, when an injured person demonstrates that he/she requires attendant care services that are reasonable and necessary, the insurer will pay the amount determined on the Form 1 directly to that Applicant. The rate for the services under this benefit is set, and as found by the Court in *Daly v. ING Halifax Insurance Co.*<sup>28</sup>, an insured person cannot dispute the hourly rate for the services set out in the Form 1. In these types of circumstances, the insured can then make the determination as to who will provide what services to them and how often. The insurer does not get involved in the management of the attendant care services. The insurer merely pays the amount identified as reasonable and necessary.

In the case at bar, the Applicant has chosen to avail herself of the care of a nursing home. The reasonable and necessary services required by the Applicant have been recorded in Form 1's for the nursing home and Form 1's for the family. The services in the Form 1's for the nursing home exceed the \$6,000.00 limit of attendant care benefits. Notwithstanding, as stated by Ms. Strumbo, Executive Director of Kennedy Lodge, the home is funded by OHIP and residents are required only to reimburse the home the copay amount. That is to say, the Applicant is entitled to receive all of the nursing home services deemed reasonable and necessary by the occupational therapist in the Form 1 for the cost of the monthly copay amount which, in the case of Kennedy Lodge was \$1,862.41 and in the case of Mon Sheong, \$2,308.32.

In my view, in order for the Applicant to receive attendant care benefits over and above the copay amount, the Applicant must demonstrate through a separate Form 1 that there are reasonable and necessary expenses that are not provided by the nursing home. In these particular circumstances, I am of the view that paying the Applicant \$6,000.00 monthly for

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<sup>28</sup>(2006) 85 O.R. (3d) 70 in the Applicant's Book of Authorities, Tab 5.

attendant care benefits that she is receiving for less, without demonstrating the need for the additional benefits amounts to unfair enrichment of the Applicant that cannot be justified. This, in my view is quite different from the case of *Belair Insurance Co. v. McMichael*,<sup>29</sup> where the insurer had denied attendant care benefits for three years because Mr. McMichael had not incurred the expense within the meaning of s. 16 because the insurer had wrongfully withheld payment notwithstanding that the needs had been identified. It is also different from *Marcus* which deals with whether or not an expense was incurred and no similar issues with respect to section 60(2) of the 1996 *Schedule*.

Allstate has acknowledged that the Applicant is entitled to attendant care benefits in this case. The question in this case centres more on the discount as a result of OHIP coverage for the nursing homes and whether Allstate is also entitled to that discount. My findings in this regard are that Allstate is entitled to that discount given the wording of section 60(2).

### **3. Is the Applicant entitled to attendant care benefits over and above the copay amount?**

I heard a considerable amount of testimony over the course of the hearing with respect to the Applicant's attendant care needs. I heard from the Applicant, her son Ken, daughter Cherry, the Applicant's current occupational therapist Julia Wong, Allstate's occupational therapists, Margit Stampogna and Jean Turgeon, and Linda Strumbo of Kennedy Lodge Nursing Home.

As I indicated earlier in this decision, both Julia Wong and Margit Stampogna submitted Form 1's for both the nursing home and the Applicant's family. Before getting into the Form 1's, I have to consider the oral testimony tendered with respect to the Applicant's attendant care needs and I intend to do so in a brief summary of the witnesses' descriptions of those needs.

Ken testified that his mother had to move to a nursing home because he could not provide the proper care to her and he had to return to work. He stated that she could not be left alone in the house. He testified that although the Applicant moved to Kennedy Lodge in May 2012, he still had to provide her with a lot of assistance. He stated that in the beginning, the Applicant could

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<sup>29</sup>See footnote 9, *supra*

not get dressed by herself; that he assisted her in this regard as well as assisted her with her orthotics, making decisions about the type of orthotics she required and having them made for her. He stated that he, his wife and children assisted the applicant with her grooming. When the Applicant's hair was messed up he would comb it; when her glasses were stained he would clean them; and for her dry skin he and the family would often apply cream to her body. He also testified that he would wash his mother's face when he would visit and sometimes he would take her to have her hair done. He stated that he would also help her with meals, especially in the beginning when she first arrived at the nursing home. He also stated that he would walk with his mother in the hallways to make sure she was doing her exercises and in the summer months he would take her to the garden. Ken acknowledged the laundry is done by an attendant at the home, but he stated that he washes her braces.

According to Ken, the Applicant's emotional state has been precarious. He stated that particularly when the Applicant first entered Kennedy Lodge, she would miss the family. He stated that she was lonely and she would cry a lot and that sometimes she would tell him that she did not want to live.

Ken testified that he provides ongoing emotional and physical support to the Applicant on a daily basis. He said he visits the Applicant mostly on weekends, although he sometimes visits during the week. He stated that given the Applicant's emotional state, he speaks to her by telephone a number of times during the day.

The Applicant testified that she is "very low." She said when she moved to Kennedy Lodge, her children would sometimes help dressing and undressing her; and that they would take care of her hair and nails. The Applicant testified that the nursing staff looked after her overall grooming but that her daughter would sometimes assist her as well. She stated that she ate her meals by herself but that she did not like the food at Kennedy Lodge and her family would bring her snacks.

The Applicant testified that Ken would sometimes take her to the garden when he visited. She said she manages all of her own finances but sometimes her son and daughter assist her.

The Applicant testified that she receives a lot of assistance from other sources as well. Prior to moving to Mon Sheong, she would attend the day program at Mon Sheong twice a week, she had a physiotherapist working with her, an occupational therapist, a person to take her for weekly shopping trips and a social worker with whom she could talk. Since moving to Mon Sheong, the Applicant testified she is able to go to the day program on her own.

The Applicant testified that Cherry buys personal items for her and when she visits, she brings her special Vietnamese foods including soup. She stated that Cherry trims her nails, looks after her clothes when they are missing a button, does her hair and rubs cream on her body.

Cherry's testimony confirmed the testimony I heard from her brother and mother. Cherry also testified that she takes the Applicant out on Saturdays; usually for dim sum or lunch and this outing can last a number of hours.

Cherry testified that she assists the Applicant during her visits. For example, she stated that before Kennedy Lodge installed a high toilet seat for the Applicant, she would assist the Applicant to go to the washroom. She stated that when she takes the Applicant on outings, she continues to assist her with toileting, including getting on and off the toilet and undressing and dressing. She stated that whenever she comes to visit the Applicant, she assists her with her exercises; stretching her legs, arms and fingers. She stated that she will apply creams to Applicant and often has to scratch itchy parts of the Applicant's body because of the dryness.

Cherry testified that the Applicant loves Chinese soups and while the Applicant was at Kennedy Lodge, she or her aunt would cook the Applicant soup a couple times a month and bring it to her. She stated that since the Applicant is at Mon Sheong, there is no need to make soup as they serve it there but she stated she will often pick up pastries to bring to the Applicant.

I heard testimony from Linda Strumpo, the Executive Director of Kennedy Lodge Nursing Home. Ms. Strumpo testified that the Applicant had resided on the third floor of the facility between May 22, 2012 and March 22, 2013 in a semi-private room. She stated that the floor has

54 residents with 5 personal support workers (PSW's) during the day; 5 in the evening and 3 at night.

Ms. Strumpo testified that the home is funded by the Ministry of Health; that there are audits performed by the Ministry to determine staffing levels and adequacy and that she is not aware of any complaints by the Ministry with respect to this home.

According to Ms. Strumpo, upon admission, the Applicant was assessed with a plan of care which included assessments from health professionals and input from the family. This plan of care is then used to provide care to residents. During the Applicant's sojourn at Kennedy Lodge, Ms. Strumpo testified that she was not aware of any problems or concerns from the family. In fact, during the family and the Applicant's testimony, there were no significant complaints about the services provided by the home.

Cherry acknowledged how hard the Kennedy Lodge nursing home employees were working but indicated that because of the few numbers of support workers, sometimes it could take a long time for the worker to assist the resident. She stated that it could sometimes take 15 minutes from the time the Applicant called someone before they would assist her. She stated that this was problematic because the Applicant had developed urgency issues around bladder control. In this regard, Ms. Strumpo stated that while it might take some time to get to providing assistance, spot audits confirmed to her that someone would answer the resident within 2 minutes, albeit that they might have to tell the resident that they will get to them soon.

I am satisfied from the evidence that I heard that Kennedy Lodge Nursing Home provided the Applicant with a significant amount of services that although not perfect, were adequate. That being said, I am also persuaded that the Applicant's well-being was and is contingent upon some of the services provided by her family.



Julia Wong of FunctionAbility Rehabilitation Services completed the Form 1's on behalf of the Applicant. Julia testified that she became involved in the Applicant's care in late 2011. She testified that in completing the Form 1 of November 2012, she spoke to the nursing staff, the Applicant and her family, and had access to some of the Applicant's medical reports.<sup>30</sup> Julia testified that she would see the Applicant once per week or biweekly since 2011 and she is very familiar with the family.

Margit Sampogna, who carries on business under the name Margit and Sampogna and Associates, is an occupational therapist who was asked to provide an assessment and Form 1 on behalf of Allstate. Her Form 1 is dated January 4, 2013.<sup>31</sup> Ms. Sampogna testified that she acquired the information pertaining to the nursing home duties through a questionnaire she gave to Ms. Strumpo who in turn had someone from her staff complete it and return it to Ms. Sampogna. Ms. Sampogna testified that she conducted an in-home assessment with the Applicant and Cherry present. She also stated she reviewed some medical reports.

Both occupational therapists were examined and cross-examined at length regarding their findings. According to Ms. Wong, the Applicant's family provided her with a total of \$2,266.31 of attendant care<sup>32</sup> compared to Ms. Sampogna's finding of a total of \$737.64 for the family contribution of attendant care.<sup>33</sup>

Given that I found some problems in each of the Form 1's presented and given that I do not overall prefer one Form 1 over the other, I have decided to go through the categories on the Form 1's in order to calculate the reasonable and necessary quantum of attendant care related to services provided by the Applicant's family.

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<sup>30</sup>See Exhibit A-1, pp. 25 – 31.

<sup>31</sup>See Exhibit A-1, pp. 39 – 44.

<sup>32</sup>See Exhibit A-1, p. 31.

<sup>33</sup>See Exhibit A-1, p. 50.

**4. What is the quantum of entitlement for the services provided by the Applicant's family?**

***a) Introduction***

Allstate does not object to the copay amount nor to the fact that the family provides services over and above the copay amount. It is the quantum of the family's contribution that is in dispute as the Insurer finds the Applicant's OT's Form 1 to be excessive.

The Applicant's OT Form 1 indicates that the Applicant is entitled to **\$2,266.31** for family services.<sup>34</sup>

Allstate's OT Form 1 indicates that the Applicant is entitled to **\$734.64** for family services.<sup>35</sup>

***b) Part 1: Level 1***

***(i) Dressing/Undressing***

Ms. Sampogna has distributed the minutes attributable to dressing and undressing only to the upper body. She testified that she merges the cells and takes an average of both. She allocated 10 minutes per week in total to this activity and indicated that the dressing and undressing was predominantly with outerwear like a coat when the family takes the Applicant on outings.

Ms. Wong allocated 7 minutes to each of the upper and lower body dressing and undressing 4 times a week for a total of 56 minutes a week. Ms. Wong's calculation included the family's assistance in dressing and undressing during those times when the Applicant may not be wearing clean clothes during visits at the nursing home in addition to her going out.

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<sup>34</sup>See Exhibit A-1, p. 31.

<sup>35</sup>See Exhibit A-1, p. 50.

I accept the family's testimony that they assist the Applicant with some of her dressing and undressing. That being said, the changing of clothes was not an occurrence each and every visit. I have considered that it could be twice a week and together with the family outing once a week, I find that the Applicant should receive 5 minutes for dressing upper and lower and 5 minutes for undressing upper and lower twice a week for a total of 20 minutes a week.

*(ii) Orthotics*

Ms. Sampogna did not allocate any time to orthotics as it was her testimony that the Applicant does not wear her wrist brace and she had no information with respect to the family assisting with orthotics. Ms. Wong testified that Ken and Cherry assist the Applicant with adjusting her brace when it falls. Ms. Wong allocated 20 minutes 4 times in a week to this activity which I find to be excessive given that the testimony did not disclose that the brace slipped 4 times in a week. I am of the view that 10 minutes per week in total is more reasonable for this activity.

*(iii) Grooming*

Ms. Sampogna did not allocate any family time to grooming. The testimony revealed that the Applicant is assisted with hair brushing, washing her face, cutting toenails and fingernails, and washing hands. Even though the home provides these services, I can accept that it is important to a person's dignity to have their family perform some of these more personal tasks and, as such, I find there needs to be some time allocated to these activities. Given that the service providers in the home also participate in these activities, I find it is reasonable to award half of the time allocated by Ms. Wong for a total of 63 minutes a week.

*(iv) Feeding*

Ms. Sampogna allocated 60 minutes per week for assisting in preparing, serving and feeding meals. This time was allocated once a week when the family took the Applicant out of the home for a meal. She did not allocate any time to the specialty soups prepared by the Applicant's daughter and sister. It is her position that their soup is not nutritionally necessary and therefore

not a reasonable expense. Ms. Wong allocated 40 minutes to assisting, preparing and serving meals 4 times a week for a total of 160 minutes and she further allocated 180 minutes 4 times a week for the preparation of specialty soups.

With respect to the family specialty soups, I find their preparation and presentation should have been allocated some time, especially given the testimony that the Applicant had considerable adjustment problems at Kennedy Lodge in the beginning and eating the specialty soup was an important part of her routine. Notwithstanding, I find Ms. Wong's numbers are excessive. The testimony was that the family prepares the soup a couple of times a month. Furthermore, the Applicant testified that she generally ate her meals in the dining room where, if needed, she had the assistance of staff. I find that the allocation of time to sit down and eat the soup to be excessive and I agree with Ms. Sampogna's numbers with respect to providing assistance in serving which again is 60 minutes in total for a week. I have also allocated 90 minutes per week for each of the two soups per month (180 minutes twice a month) for a period up until the Applicant moved to Mon Sheong. The total for feeding is therefore 150 minutes per week.

*(v) Mobility*

Ms. Sampogna allocated a total of 45 minutes once a week for mobility with respect to supervision and assisting with walking. Ms. Wong, on the other hand, allocated 40 minutes a week for assisting the applicant from a sitting position, 40 minutes for supervising walking and 40 minutes for performing transfers.

Ms. Sampogna described that while the Applicant needed a set of eyes on her when she was out in public, she was able to move around unaccompanied and had in fact gone out into the community with a driver to the day program. She could not however indicate where she made an allowance under this heading for transfer needs.

Ms. Wong's numbers in this area are, in my view, inaccurate. Her report of November 6, 2012 indicates that family accompany Ms. Luong when going out approximately 4 times per week.

“For example, they go to medical follow-up visits, restaurants, shopping, and social functions.”<sup>36</sup> The testimony however revealed that there is one family outing per week. In fact, the Applicant stated that she attended appointments many times on her own with a driver. I find therefore that Ms. Wong’s numbers are overstated. Consequently, I have added an additional 20 minutes per week to Ms. Sampogna’s numbers which would reflect familial assistance to washrooms and transfers in and out of the vehicle for their outings. Mobility should therefore be a total of 65 minutes per week.

*(vi) Extra Laundering*

Ms. Sampogna did not allocate any time for the laundering of the Applicant’s leg brace as she testified that she was not notified of this task. I therefore accept Ms. Wong’s allocation of 20 minutes a week for this task.

*(vii) Conclusion – Level 1*

I find that a total of **328** minutes per month be allocated to the Applicant for the reasonable and necessary services that her family provides over and above the services of the nursing home.

**c) Part 2: Level 2**

*Basic Supervisory Functions*

This section takes into account services related to hygiene, basic supervisory care and coordination of attendant care. I found Ms. Sampogna’s numbers and rationale under this heading both in her oral testimony and her written report<sup>37</sup> to be reasonably consistent with the testimony of the witnesses and I therefore accept her opinion that the Applicant requires 122.41 minutes per day 7 days a week.

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<sup>36</sup>See Exhibit A-1, p. 113.

<sup>37</sup>See Exhibit A-1, p. 69.

*(i) Conclusion – Level 2*

I find that a total of **856.88** minutes per week be allocated to the Applicant for the reasonable and necessary services provided by her family over and above the services of the nursing home under this category.

**d) Part 3, Level 3**

*(i) Genitourinary tracts, bowel care, tracheostomy care, ventilator care*

Ms. Sampogna did not allocate any family assistance for genitourinary tracts and bowel care as she testified that these tasks are generally associated with bladder incontinence that may require the use of a catheter or bowel programs designed for persons with evacuation problems. Although Ms. Sampogna recognized that the Applicant has some urgency issues with respect to her bladder, she is not at a point where she requires disposable briefs or bedpans. I accept and adopt Ms. Sampogna's reasoning in this regard especially given Ms. Wong's difficulty in explaining functions in this area and her inclusion of toilet flushing into the minutes allocated. I therefore find no minutes should be allocated in this regard.

*(ii) Exercise, skin care, medication, bathing (oral hygiene), other therapy*

Based on the testimony of the Applicant and her children, I find that these activities are reasonable and necessary in the circumstances. Ms. Sampogna did not allocate any time for the family's assistance in cuing for exercise, applying cream and cleaning dentures. She did not know that the Applicant's daughter cleans her dentures. Ms. Sampogna testified that the Applicant does her exercise with the physiotherapist. With respect to body creams, she stated that the creams are not prescribed so she did not allot any time to this activity.

Under this level, I adopt Ms. Wong's numbers as they relate to creaming and denture cleaning. Accordingly, I accept 40 minutes per week for skin cream and 40 minutes per week for cleaning dentures. With respect to cuing exercising, I find that Ms. Wong's numbers are excessive given

all of the other assistance the Applicant receives from physiotherapists. I recognize that reminding the Applicant to do her exercises and occasional cuing is reasonable and necessary and as such I allot 15 minutes a week for this activity.

*(iii) Conclusion – Level 3*

I find that a total of 95 minutes per month be allocated to the Applicant for the reasonable and necessary services provided by her family over and above the services of the nursing home under this category.

**e) Calculation of Attendant Care that was reasonable and necessary over and above the services provided by the nursing home**

*(i) For the Period of May 22, 2012 to March 19, 2013*

	Total Minutes Per week		Total Weekly hours		Total Monthly hours		Hourly Rate		Monthly Care Benefit
Part 1	328	÷ 60 =	5.46	x 4.3 =	23.50	x	13.19	=	310.05
Part 2	856.88	÷ 60 =	14.28	x 4.3 =	61.40	x	10.25	=	629.35
Part 3	95	÷ 60 =	1.58	x 4.3 =	6.80	x	19.35	=	131.58
<b>Total Monthly Care Benefit</b>									<b>\$1,070.98</b>

\*The prorated amount for May 2012 (May 22, - 31) is \$34.54/day x 10 days is \$345.40 for the attendant care provided by the family.<sup>38</sup>

*(ii) For the Period of March 20, 2013 and onwards*

Given that the Applicant and her family have indicated that since becoming a resident of Mon Sheong, their soup preparation is no longer necessary, I have deducted the amount of their soup preparation in Part I for the period from March 20, 2013 onwards as follows:

<sup>38</sup>Based on the amounts provided by the Applicant and Allstate on February 7, 2014.

	Total Minutes Per week	Total Weekly ÷ 60 = hours	Total Monthly x 4.3 = hours	Hourly Rate	Monthly Care Benefit
Part 1	238	÷ 60 = 3.96	x 4.3 = 17.05	x 13.19	= 224.97
Part 2	856.88	÷ 60 = 14.28	x 4.3 = 61.40	x 10.25	= 629.35
Part 3	95	÷ 60 = 1.58	x 4.4 = 6.80	x 19.35	= 131.58
Total Monthly Care Benefit					<b>\$985.90</b>

\*The prorated amount for March 1, 2013 to March 19, 2013 while the Applicant was at Kennedy Lodge is \$34.54/day x 19 days is \$656.26 for the attendant care provided by the family.

\*The prorated amount for March 20, 2013 to March 31, 2013 when the Applicant moved to Mon Sheong is \$31.80/day x 12 days is \$381.60 for the attendant care provided by the family.

\*The copay amount for Mon Sheong changed on July 1, 2013 to \$3,012.50 per month.<sup>39</sup> In their submission of February 7, 2014, the Applicant has advised me that Allstate has agreed to pay the increased amount.

Given all of the above, the Applicant is entitled to the following attendant care benefits:

- i) From May 22, 2012 to May 31, 2012 the copay amount of \$612.30 plus an additional \$345.47 for family services which totals **\$957.77**. The total amount of attendant care benefits for the month of May 2012 is \$4,153.80 (prorated amount paid prior to the Applicant moving to Kennedy Lodge)<sup>40</sup> plus \$957.77 = **\$5,111.57**.
- ii) From June 1, 2012 to February 28, 2013, the copay amount of \$1,862.41 plus an additional \$1,071.98 for family services which totals **\$2,934.39** a month.
- iii) From March 1, 2013 to March 19, 2013, the copay amount from Kennedy Lodge of **\$1,163.37** plus an additional \$34.54/day x 19 days = **\$656.26**; and from March 20, 2013 to

<sup>39</sup>See Exhibit A-1, Tab 17.

<sup>40</sup>Submission of February 7, 2014 from the Applicant and Allstate.



March 31, 2013, the copay amount from Mon Sheong of **\$897.48** plus the family services of **\$381.60**. The total amount of attendant care benefits for March 2013 is **\$3,098.71**.

- iv) From April 1, 2013 to July 1, 2013, the copay amount from Mon Sheong of **\$2,274.86** plus the family services of **\$985.90** which totals **\$3,260.76**.
- v) From July 1, 2013 and onwards, the copay amount of **\$2,308.32** plus the family services of **\$985.90** which totals **\$3,294.22**.

**5. Adaptability Report – Is Allstate required to pay to the Applicant \$6,825.00 for a Home Accessibility Report provided by Adapt-Able Design Group on May 12, 2010?**

Jeff Baum, President of Adaptable Design Inc., testified that he was first contacted by the office of the Appellant's counsel and asked to assess Ken's family home. He stated that he was told that the Applicant was due to be discharged from St. John's on May 5, 2010 and that an Occupational Therapist (OT) report of April 2010 considered accessibility issues relating to the Applicant's discharge home.

Mr. Baum testified that a site visit was conducted on May 5, 2010 and an Application for Approval of an Assessment or Examination (OCF 22) was completed and signed by the then occupational therapist, Holly Mo, and the Applicant on that date. He stated that Holly Mo's report just prior to discharge stated that due to the Applicant's injuries, she would require 24-hour care and a more permanent solution was recommended. He stated that his report was finalized on May 12, 2010.

Mr. Baum acknowledged that he received Allstate's response from the OCF-22 saying it was not approved and referred the matter for a section 42 examination. However, he stated that given that there were safety concerns with the Applicant coming home on a permanent basis, he went ahead with the assessment nonetheless.

It is the Applicant's position that the assessment was reasonable and necessary. It was submitted that the treating occupational therapist found there to be a safety issue and wanted the report done. The Applicant also argued that Allstate was remiss in not providing their OT (Mr. Turgeon) with a copy of the May 7, 2010 report from the Applicant's treating OT. It was submitted that Mr. Turgeon had not seen the home and did not know there were 21 stairs on a centre hall staircase and that he thought that there were only 8 steps. The Applicant further submitted that Mr. Turgeon during his testimony indicated he knew that the Applicant had a leg fracture but he did not know she also had a pelvic fracture which, it was argued, is a significant piece of information.

Allstate argued that the assessment was initiated before the OCF-22 was submitted and the report was generated after the Applicant already knew that Allstate was requesting a section 42 examination. It was submitted that section 24(1.1) makes clear that a person must obtain the approval of the insurer prior to incurring an expense for an assessment, examination or report and the insurer is not required to pay for an expense incurred in this regard before the insurer gives approval. Allstate urged that I be guided by Arbitrator Feldman's decision in *Wei Fu Wilfred Tan and Royal & Sun Alliance Insurance Company of Canada*<sup>41</sup> in which it was held that reasonableness (or lack of reasonableness) is immaterial where section 24(1.1) applies.

Sections 24(1.1) and (1.2) provide:

- 1.1 Despite subsection (1), an insurer is not required to pay for an assessment or examination referred to in subparagraph 11 ii of subsection (1) if the expense for the assessment or examination is incurred,
  - a) before the insurer approves the expense;
  - b) before the insurer receives the report of an examination under section 42, if the insurer requires the insured person to be examined under that section; or

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<sup>41</sup>(2004) FSCO A04-000656, Respondent's Brief of Authorities, Tab M.

- c) before the insurer receives the report of a designated assessment, in the case of an application for approval of an assessment or examination under section 38.2, if the insured person is required to undergo a designated assessment. O. Reg. 546/05, s. 3 (1).

1.2 Despite subsection (1.1), the prior approval of an insurer is not required for the following:

1. An assessment or examination for the purposes of preparing a treatment plan under section 38 in circumstances in which an immediate risk of harm to the insured person or a person in the insured person's care makes obtaining the prior approval of the insurer impractical.

In my view, the *Tan* case is distinguishable from the case at bar. The Applicant in this case is relying on section 24(1.2) in that she is claiming that there were safety concerns about her returning to her home making the assessment reasonable and obtaining prior approval impractical.

One can understand that the Applicant's family were struggling to find a solution for her once she was discharged from St. John's Rehab Hospital. It is also understandable that the family would want to have before them different options in order to make the best decision for the Applicant. However, I am not persuaded on a balance of probabilities that there were was an immediate risk of harm to the Applicant upon her return to Ken's home.

In a letter written by Holly Mo (the Applicant's OT at the time) dated April 26, 2010, Ms. Mo, who was familiar with the outlay of Ken's home, informed the insurer that the Applicant will be using her old bedroom temporarily but the long-term plan will be a renovation of the basement.<sup>42</sup> In fact, Mr. Baum testified that construction of the basement in Ken's home would take months. The testimony heard revealed that different temporary options had been suggested to Ken such as lifts and ramps but he was not interested in those options because of the potential of their affecting the price of his home. While I recognize that it would have probably been helpful for Mr. Turgeon to have access to Ms. Mo's report, I am not persuaded that his findings would have

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<sup>42</sup>See Exhibit R-2.

been different given that Ms. Mo was the Applicant's treating OT at the time and she was the one who indicated in her April 26 report that a temporary solution is required before a long-term plan is implemented. Given that there were options available to the Applicant and that these options were immediate in that they addressed safety concerns upon return to Ken's home, I find there is no justification for proceeding without prior approval from Allstate under section 24(1.2) and the Applicant was subject to the provisions of section 24(1.1).

The evidence is clear that the Applicant had the assessment done prior to the insurer even being notified of an intention to do so and the report was generated prior to the insurer's approval. Accordingly, the Applicant is not entitled to be reimbursed for a Home Accessibility Report provided by Adapt-Able Design Group dated May 12, 2010.

## 6. Interest

Given my findings with respect to the attendant care benefits that the Applicant is entitled to is greater than the amount being paid by Allstate since May 2012, the Applicant is entitled to the interest on the difference. The parties agreed that the appropriate amount is 2% per month compounded monthly as per *T.N. and The Personal Insurance Company of Canada*.<sup>43</sup>

The Applicant shall therefore be paid interest at the rate of 2% per month compounded monthly on overdue attendant care amounts.

## 7. Special Award

The Applicant is requesting a special award in that the benefits were not paid out in accordance with the *Schedule*. My jurisdiction to grant a special award arises from section 282(10) of the *Insurance Act* as follows:

If the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to awarding the benefits and interest to which an insure person is entitled under the *Statutory Accident Benefits Schedule*, shall 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 then owing

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<sup>43</sup>(FSCO A06-000399, July 3, 2012)

to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the *Schedule*.

In light of the fact that I did not find the Form 1 submitted by the Applicant to accurately reflect the Applicant's family contributions to her attendant care and given my interpretation of attendant care benefits and how they should apply in circumstances in which a nursing home is part of the equation, I find a special award is not warranted. I have not been presented with any other case with these particular attendant care issues which makes the issues in this case novel. Furthermore, I find that up until the point of the disputed benefits, one of which had a novel issue of law, Allstate continued to adjust this claim in a reasonable manner.

**EXPENSES:**

The parties made no submissions with respect to expenses. I encourage them to resolve this issue, failing which they may request an expense hearing before me in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

  
\_\_\_\_\_  
Pamila Ahlfeld  
Arbitrator

\_\_\_\_\_  
March 31, 2014  
Date



FSCO A12-005783

**BETWEEN:**

**QUY LUONG**

**Applicant**

**and**

**ALLSTATE INSURANCE COMPANY  
OF CANADA**

**Insurer**

## **ARBITRATION ORDER**

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.1.8, as amended, it is ordered that:

1. The Applicant is entitled to receive the following attendant care benefits:
  - i) From May 22, 2012 to May 31, 2012 the copay amount of \$612.30 plus an additional \$345.47 for family services which totals **\$957.77**. The total amount of attendant care benefits for the month of May 2012 is \$4,153.80 (prorated amount paid prior to the Applicant moving to Kennedy Lodge)<sup>44</sup> plus \$957.77 = **\$5,111.57**.
  - ii) From June 1, 2012 to February 28, 2013, the copay amount of \$1,862.41 plus an additional \$1,071.98 for family services which totals **\$2,934.39** a month.
  - iii) From March 1, 2013 to March 19, 2013, the copay amount from Kennedy Lodge of **\$1,163.37** plus an additional \$34.54/day x 19 days = **\$656.26**; and from March 20, 2013 to March 31, 2013, the copay amount from Mon Sheong of **\$897.48** plus the family

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<sup>44</sup>Submission of February 7, 2014 from the Applicant and Allstate.

services of **\$381.60**. The total amount of attendant care benefits for March 2013 is **\$3,098.87**.

iv) From April 1, 2013 to July 1, 2013, the copay amount from Mon Sheong of **\$2,274.86** plus the family services of **\$985.90** which totals **\$3,260.76**.

v) From July 1, 2013 and onwards, the copay amount of **\$2,308.32** plus the family services of **\$985.90** which totals **\$3,294.22**.

2. The Applicant is not entitled to receive \$6,825.00 for a home renovation treatment plan dated May 5, 2010.
3. The Applicant is entitled to be paid interest in accordance with section 46(2) of the *Schedule* on the amount owing for attendant care calculated as the difference between what has been paid monthly and the new rate set in this decision.
4. The Applicant is not entitled to a special award.
5. The parties will attempt to resolve the issue of the expenses of the arbitration among themselves, failing which they may request an expense hearing before me in accordance with section 79.1 of the *Dispute Resolution Practice Code*.

  
\_\_\_\_\_  
Pamela Ahlfeld  
Arbitrator

March 31, 2014  
\_\_\_\_\_  
Date