

**IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c l.8, as amended,
AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c. 17, as amended
AND IN THE MATTER OF an Arbitration**

BETWEEN:

PRIMUM INSURANCE COMPANY

Applicant

- and -

ALLSTATE INSURANCE COMPANY OF CANADA

Respondent

AWARD

Counsel Appearing:

Josephine Stark: Counsel for Primum Insurance Company (hereinafter called Primum)

Daniel Strigberger: Counsel for Allstate Insurance Company of Canada (hereinafter called Allstate)

Introduction:

This matter comes before me as an Arbitrator pursuant to the *Arbitration Act 1990* to arbitrate a dispute as to which of the two insurers is obligated to pay statutory accident benefits pursuant to the *Insurance Act* R.S.O. 1980 C18, as amended, to the claimant who was involved in a motor vehicle accident on October 29, 2019.

The parties selected me as the arbitrator on consent. This matter proceeded to a single day hearing via Zoom on August 11, 2022.

Primum and Allstate are automobile insurers. Primum insured a vehicle owned by EB and the claimant was a passenger in this vehicle on the date of loss.

Allstate insures the claimant's grandparents.

The claimant applied to Primmum for statutory accident benefits. Primmum claims that Allstate is the priority insurer on the basis that the claimant was principally dependant for financial support on her grandparents on the date of loss.

Record:

The parties had submitted a joint document brief, which included, *inter alia*, the various statutory accident benefits forms submitted by the claimant to Primmum, the application for accident benefits, and the transcripts of the examinations under oath of the claimant, her grandmother, and her grandfather as conducted March 2, 2022.

In addition, Allstate submitted a census profile for 2016, an article with respect to the population of Windsor where the claimant and her grandparents resided, the Market Basket Measure (MBM) threshold for 2015 and information with respect to the hourly minimum wage in Canada.

No oral evidence was called.

The parties also signed an Arbitration Agreement dated June 13 and June 23, 2022.

The Arbitration Agreement sets out in broad terms that the issue for my determination is:

“Which insurer is required to pay A. F. Statutory accident benefits”. However, this issue is narrowed down further and the matter for my determination is whether or not the claimant was principally dependant for financial support on her grandparents on October 29, 2019.

Facts:

Generally the facts of this matter are not in dispute. Primmum did point to some inconsistencies between the evidence of the two grandparents but having reviewed this carefully I did not find these relatively small areas of inconsistencies to have any bearing on the issue before me.

The claimant was born on December 12, 1998 making her approximately 21 years of age on the date of loss. She has an unfortunate history with respect to mental health and addiction issues. Just prior to this motor vehicle accident occurring, she had been in a rehab facility for approximately four days.

The claimant’s parents are divorced. She has not lived with her parents since she was 18 years of age. At that time, she started to live in her grandparents’ home. Their address is 1351 McEwan Avenue in Windsor.

Over the course of the years from the time the claimant left her parents home up until the time of the motor vehicle accident, her life was remarkably consistent. She had periods of employment. She had periods of mental health issues and addiction. She had periods of

unemployment. She was not in school. Generally her employment would not last much more than a month or so. She was under treatment with a psychiatrist and according to the claimant it had been recommended that her work be part-time in order to assist her with her mental health issues.

It is significant that in the hearing no tax returns were produced. It is also important to note that no employment records were produced. The information with respect to what the claimant might have been earning leading up to the accident was found in the application for accident benefits only. Even her evidence through the examination under oath did not clarify her earning history particularly in the one year period leading up to the accident.

There is no doubt that the claimant's grandparents were an anchor for her. As Primmum's counsel pointed out, the grandparents' home could be described as a safe haven in a storm. All the accident benefits forms produced show that the claimant used her grandparents address as her main address. Her grandmother confirmed on her EUO that the claimant was permitted to use her grandparents address as her permanent address. Despite the length of time that the claimant had used her grandparents' home as a base, neither of them had any information with respect to her employment or her earnings.

As both Primmum and Allstate agree that the time period for determining dependency should be one year, I will focus the remaining summary of the important facts on the one year prior to the motor vehicle accident.

The claimant's and her grandparents' evidence was quite consistent that the amount of time that she would spend at her grandparents home was generally no more than two days a week. The grandfather felt she may stay sometimes three nights a week but then may not stay with them for two weeks in a row. When the claimant was not at her grandparents' home, she would be staying with her boyfriend. There is also evidence that she may have stayed at a friend's home down the street. She described herself as having "no set address. I am kind of just staying wherever until I get my own place". When asked where she was living at the time of the accident, the claimant responded as follows:

"I was doing the same thing. I was on or off either staying at my boyfriend's house or I was staying with my grandparents, but there was no set place that I was actually, like, staying full-time."

According to both the claimant and her grandparents, when she was staying there a couple of nights a week, she did not pay rent, she did not have to pay for food and her grandmother did the cooking. Both grandparents were working at the time of the accident.

There was some inconsistency as to where the claimant slept when at her grandparents' house. She said she did not have a room there but the grandmother suggested that she did. The grandmother indicated that she would sleep on the couch as there was no available bedroom.

She did keep some clothes at the grandparent's home. Her grandmother would do her laundry when she brought it in.

According to the grandfather, the claimant was not "staying" at their place on the date of the accident. According to the grandmother she was.

The claimant made no contribution by way of income to the grandparents. There was no information as to what other sources of income she may have had from her boyfriend when she was staying with him and/or her friend. There was no evidence about what arrangements there were for paying rent, contributing for food, contributing in some way to the expenses of the other places where the claimant resided.

The claimant did have a key to the grandparent's house. As her grandfather put it, he wanted her to be safe and not out on the street so they gave her a key so that she could come and go. The grandfather stated that:

"We wanted to keep an open door for her in case she needed to go to rehab or if she needed to check into the hospital but I did not want to let her know that she could stay at our place for ever. To make it easier, I wanted her to try to help herself."

Both the grandparents and the claimant gave evidence at the EUO that at the time of the accident of October 2019, the claimant was not staying everyday at her grandparents' home.

With respect to employment, the claimant had only a grade 11 education. She said that she worked at Tim Hortons and Home Hardware. She would stay at each job for a month or two. She would stop working because of her mental health and addiction problems.

She also gave evidence that between jobs she would be looking for other jobs. She stated "I would be looking for other jobs and basically I would rely, you know, like the boyfriend kind of support and things like that". The claimant confirmed that she did not have any source of income other than these occasional jobs.

According to her OCF-1, the claimant was unemployed on the date of loss but she had worked in the 26 out of the previous 52 weeks. However, on her Disability Certificate, dated November 20, 2019 the claimant indicated that she had not worked in the 26 out of the 52 weeks.

According to the OCF-1, the claimant worked at Tim Hortons from July to October of 2019. She worked as a cashier/baker. She worked eight hours per week earning \$14.00 an hour. There was no OCF-2 from Tim Hortons submitted into evidence nor was there any information such as her employment file or T4 slip from Tim Hortons. No bank statements were produced. There were no pay stubs produced. The claimant was unable to give an estimate as to what her earnings were. However, if you assume the information in her OCF-1 was accurate and that she worked

eight hours at \$14.00 an hour, the most she would have earned in any one week would be \$112.00.

Parties' Submissions:

Applicant

It is the position of Primmum that the claimant must have been principally dependent for financial support on her grandparents. Primmum points to the fact that the claimant has next to no source of income. She was not employed on the date of loss. Even if she was employed based on the OCF-1 at Tim Hortons, her earnings were minimal. She had mental health and addiction issues. She was unable to maintain employment for longer than a month or two at best.

Primmum submits that the evidence is clear that the claimant was not financially independent at the time of the accident. If she was not independent, then she must have been financially dependent on someone else to provide for her needs including lodging, food, clothing and entertainment. Primmum submits on the balance of probabilities that the claimant must have therefore been principally dependent for financial support on her grandparents. She spent two or three days a week or more sleeping at their home. They provided her with food and shelter while she was there. She had own key and could come and go as she pleased and she kept some of her belongings there.

Primmum points to *Miller v. Safeco Insurance Company* (1986) 48 O.R. (2d) 451 (HCJ) affirmed 50 O.R. (2d) 797 Court of Appeal. Primmum submits that I should approach my interpretation of dependency based on the fact that the legislation is remedial in nature. The Court of Appeal in *Miller v. Safeco (supra)* indicates that this legislation was "intended to broaden insurance coverage to include members of family units as persons insured under the policy". Primmum submits that the claimant was a member of her grandparents' family unit and as such the definition of dependency should be extended to her and she should be found to be an insured person under the Allstate policy.

Primmum accepts that it has the burden of proof in this case. It submits that it must lead some evidence as to why the priority to pay accident benefits rests with Allstate and not with Primmum. Primmum submits that it has met this onus. It has led evidence of the earning capacity of the claimant in the 52 weeks prior to the accident. It has led evidence that confirms the claimant was not able to maintain employment. It has led evidence that the claimant was not financially independent and given her lack of limited employment earnings and on a balance of probabilities she was principally dependent for financial support on her grandparents. Primmum submits it is not relevant that she spent two or three or more days at their home. Their home was her base and safe haven and she was part of their family unit.

The Respondent

Allstate submits that the claimant is not principally dependent for financial support on her grandparents and that the evidence led by Primmum falls short of their meeting their required burden of proof.

Allstate submits that all three witnesses on their EUO testified that the claimant spent most of her days/night away from the grandparents' home. If she is only in her grandparents' home two or three nights a week then the majority of the seven days of the week are spent elsewhere.

As to the contribution made by the grandparents to the claimant's financial needs, Allstate submits that Primmum has not led evidence that would establish that the claimant has received more than 50% of her financial needs from her grandparents. Firstly, she was not living with them for the majority of the week. The rest of the time she was with a boyfriend and/or a friend and there was no evidence led with respect to what financial support they provided.

Allstate also submits that Primmum has not met its onus to prove that the claimant did not have the resources to support herself at the time of the motor vehicle accident. There was evidence that she was employed at Tim Hortons. However, Allstate submits that Primmum has failed to produce any evidence other than the OCF-1 about the claimant's 2019 income. Allstate points to the failure of Primmum to file tax returns, T4 slips, bank records, employment record or medical records.

Allstate accepts that the grandparents were providing the claimant with some financial support but there was no evidence as to what that was or to establish that that support covered 51% of the claimant's needs. Other sources of support were her boyfriend.

Allstate therefore submits that there is insufficient evidence to establish principal financial dependency on the grandparents.

Allstate also submits that there is evidence that demonstrates that the claimant had an ability to be self-supporting. They allege that she was an able bodied 21 year old woman who had experience working in retail and fast food. While it was her evidence that she would only last at a job for a month or two, it was also her evidence that she would be looking for other work during periods of unemployment. Allstate suggest that the claimant had the ability to find other minimum wage jobs in Windsor.

Allstate submitted that the Market Basket Measure statistics that they submitted with their materials also supports that the claimant had the capacity to be financially independent while being paid minimum wage. They suggested that the Windsor population for 2019 was approximately 220,000. When applying the applicable MBM statistic for a single person the applicable cost of meeting basic needs adjusted for inflation is \$19,755.00 per year. 50% of that is \$9,878.00 per year/\$823.00 per month. Allstate submits this is the dependency threshold.

Allstate alleges that the claimant had the ability to work part-time at least 20 hours per week at minimum wage and her income would have been \$280.00 per week or \$1,213.00 per month and that would have given her the ability to fund 74% of her needs.

Allstate also relies on the *Miller and Safeco* case. Allstate also submits that there is insufficient evidence of financial dependency on the grandparents and alternatively evidence that the claimant had the ability to be self-supporting, which is one of the criteria identified by the Court of Appeal in *Miller and Safeco* for determination of dependency.

Findings:

Onus of Proof

I agree with both Primmum and Allstate that the initial onus of proof lies on the Applicant, Primmum. Primmum must at least establish that there is some evidence to support their position that the claimant was principally dependent for financial support on her grandparents.

As I commented in my recent decision *Certas Direct Insurance Company and Wawanesa Mutual Insurance Company* (Decision dated May 24, 2022) while it may be unfair to ascribe the burden of proof to the applicant insurer in a priority dispute, there must be some process to allow an arbitrator to assess and weigh the evidence in cases such as these. As I found in that case, an applicant insurer as the initiator of the process in a priority dispute must lead some evidence as to why the obligation to continue to pay the claimant should not remain with that insurer. An arbitrator must then assess what evidence was led by the initiating insurer and whether the evidence led meets the balance of probabilities test.

In this case, I found that Primmum did not meet its burden of proof that the claimant was principally dependent for financial support on her grandparents. Primmum did however meet its burden of proof to establish that the claimant did not have the ability to be self-supporting. Let me deal with the latter issue first.

I am satisfied on the evidence led that the claimant simply did not have the ability to be self-supporting. I disagree with Allstate's characteristics of this claimant as an able bodied 21 year old woman. She was far from that. She had a limited education. She had mental health issues. She had addiction issues. While not a great deal of evidence was led about the nature of those issues, the evidence was clear that they interfered in her ability to maintain employment. At best, she was only able to maintain employment for one or two months. The only evidence before me as to the claimant's ability to earn income in the year prior to the motor vehicle accident was the very brief period of time she was employed at Tim Hortons, possibly from July until some date in October, earning about \$112.00 per week.

I do not agree with Allstate that the claimant had a demonstrated ability to work at different jobs. In fact the only evidence before me was the claimant's inability to maintain a job and her lack of

employment experience. I find that the claimant did not have the ability to be self-supporting and to that extent she had to be dependent for financial support elsewhere.

While I find that the claimant must have had her needs taken care of by someone other than her herself, however, there was insufficient evidence before me to establish that it was her grandparents who provided at least 51% of her needs. While the claimant used her grandparents' address as a mailing address, the evidence was clear that she only stayed there for a couple of days a week and sometimes she did not stay there for a couple of weeks at all.

While staying at her grandparents' home for those two days a week clearly they provided everything for her. They gave her a roof over her head, they gave her food, she could keep her clothes there and she had her laundry done. However that was only two days a week. The remaining five days and in some cases more than that, the claimant was somewhere else. I find that during the time she was somewhere else, (most likely at her boyfriend's) that her grandparents would not be providing for any of her needs. Her accommodation was with someone else. Someone else was providing her with food and looking after whatever other needs that she had. There was no evidence that her grandparents gave her significant sums of money that the claimant would have used when staying with others such as her boyfriend. The claimant's own evidence on this point seemed to be that it was her boyfriend that she considered herself to be primarily dependent on.

While I appreciate that the grandparents reached out and provided this young lady with a safe haven and a home when needed that is not the test for principal dependency. The test as established in *Federation insurance v. Liberty Mutual* [2000] O.J. 123 Court of Appeal is whether or not the claimant has received more than 50% of her financial needs from someone other than herself. While the evidence in this case supports that the claimant had her financial needs taken care of by someone else, the evidence simply did not support that that someone else was only her grandparents and that they provided at least 51% of her financial needs.

Therefore, with respect to the question of principal financial dependency, I find that Primmum has not met its burden of proof and on a balance of probabilities I conclude that on the evidence before me it did not establish that the claimant was principally dependent for financial support on her grandparents on the date of loss. Therefore, the arbitration must be dismissed.

Award:

As I have concluded that Primmum did not meet its burden of proof and did not establish that the claimant was principally dependent for financial support on her grandparents, priority remains with Primmum. I therefore find that Primmum is the priority insurer to provide statutory accident benefits to the claimant arising out of the motor vehicle accident of October 29, 2019.

Costs:

According to the Arbitration Agreement, the expenses of the Arbitrator and the expenses of the arbitration are to be apportioned as determined by the Arbitrator, taking into the account the success of the parties, any offers to settle, the conduct of the proceedings and the principles generally applied in litigation before the Courts in Ontario.

Similarly, the Arbitration Agreement provides that with respect to the legal costs, these are to be determined by me taking into account similar criteria as to the expenses of the arbitrator.

I do not know whether there was any offer to settle that may have any bearing on a costs order. Accordingly, I am not making any specific award for costs in the context of this decision. The parties have 60 days from the date of this decision to reach an agreement with respect to the arbitration expenses and the legal costs. If they are unable to reach an agreement, I will then schedule a further pre-hearing at which time we will set up a schedule to have a costs hearing.

DATED THIS 7th day of September, 2022 at Toronto.

A handwritten signature in black ink, reading "Philippa G. Samworth". The signature is written in a cursive style with a long horizontal stroke extending to the right.

Arbitrator Philippa G. Samworth

DUTTON BROCK LLP