IN THE MATTER OF the *Insurance Act* R.S.O. 1990, c. I.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:

INTACT INSURANCE COMPANY

Applicant

- and -

TD GENERAL INSURANCE COMPANY

Respondent

DECISION

AWARD

COUNSEL:

Leah Dick, counsel for Intact Insurance Company (hereinafter called "Intact").

Nicole De Bartolo, counsel for TD General Insurance Company (hereinafter called "TD").

BACKGROUND

This matter comes before me pursuant to s. 268 of the *Insurance Act* R.S.O. 1990 c. I.8 and more specifically Regulation 283/95. This is a dispute between two insurers as to which insurer stands in priority for the payment of statutory accident benefits to the claimant arising out of an accident that occurred on June 5, 2021.

Intact insures a 2015 Dodge Ram 1500 that was being driven by the claimant on the date of loss. This vehicle was owned by his parents.

The claimant himself owned two vehicles: A 2007 Dodge Ram 2500 and a 1991 Mustang. Both those vehicles were insured by TD on the date of loss.

Intact received the OCF-1 on July 25, 2021 and commenced paying statutory accident benefits to

the claimant. However, Intact takes the position that the claimant is not principally dependent for financial support on his parents and therefore TD would be the priority insurer.

The OCF-1 in this matter was submitted to Intact on July 15, 2021.

A Notice to Applicant of Dispute Between Insurers was served by Intact on TD and the claimant on July 29, 2021.

This arbitration was commenced by Intact by notice dated July 13, 2022. Thereafter the parties on consent selected me as their arbitrator pursuant to Regulation 283/95.

PROCEEDINGS

There were various pre-hearings and ultimately counsel agreed that this matter could proceed forward to a written hearing. The parties filed an Agreed Statement of Facts and a Joint Document Brief. The Joint Document Brief included, *inter alia*, the following: The transcripts of the examination under oath of the claimant, his father and his mother; a copy of the OCF-1; an unsigned statement of the claimant dated September 9, 2021; various bank records and tax returns of the claimant; his unemployment/CERB file; some mortgage documentation; and as well bank records of the claimant's mother and father.

Both parties submitted written Factums together with various Books of Authority.

There was no oral evidence.

FACTS

I set out below the facts as I find them taken from both the Agreed Statement of Facts and relevant facts from the documents submitted by way of the Joint Document Brief.

The claimant in this matter was born on July 4, 1976 and was 44 years old when the accident occurred. He had been divorced approximately 15 years prior to the accident of June 5, 2021. He had one son from this relationship aged 15 at the time of the accident. Custody was shared with his ex-spouse but at the time of the accident the claimant's son lived with him 100% of the time in large part due to issues relating to COVID.

As noted at the time of the accident the claimant owned two vehicles, the Dodge Ram and a Mustang, both of which were insured by TD. He also owned two ATVs and a snowmobile, both of which were insured with TD.

At the time of the accident the claimant resided in a house with his son on Kraus Road in Barrie. The claimant had a mortgage on his home in the amount of $1,250 per month. The property itself is a two-storey home approximately 1,250 sq ft.

The claimant was the sole owner of this property and had been the sole owner since 2003.

His parents were retired and lived in their own home supported by their pension.

With respect to the claimant's expenses at the time of the accident the evidence from the examinations under oath suggests the following:

1. The mortgage for the Kraus Road property, $1,250
2. The cost of the insurance for the Ford and Mustang with TD, $111.18 per month
3. Internet/cable, approximately $130 to $140 per month
4. Water, $100 per month
5. Gas, $100 per month
6. Groceries, approximately $250 per week

The claimant had his own bank account and he had his own credit card. He did not have any line of credit. The review of the bank records suggests that there were minimal amounts in the claimant's bank account and there were a number of NSF cheques in the months leading up to the accident. He also owed roughly $3,000 on his credit card.

On the date of loss the claimant was unemployed. He had been receiving EI benefits as he had been laid off from his seasonal job. The records also suggest that prior to the date of loss he had been receiving CERB.

His immediate pre-accident employment was with a company called Gull Wing Lake Resort Inc. According to the ROE he started working there on June 10, 2019 and the last day he worked was October 18, 2019. During the time he worked for Gull Wing he earned $11,631.92. This was a job as a campground maintenance worker.

Prior to the Gull Wing job the claimant had worked at JBE Tilt-N-Load. His first day of employment there was September 26, 2012 and his last day of employment was January 31, 2018 according to his ROE. According to the ROE the reason the claimant stopped work was because he was unable to perform regular duties. A doctor's note had been provided suggesting that he was not available for work until further notice effective January 22, 2018. Both the claimant's parents and the claimant gave evidence that he had had some form of WSIB claim as a result of an injury at work in 2017. It does not appear the claimant was employed between January 2018 and when he started at Gull Wing in 2019.

It is agreed between the parties that the claimant was not employed between October 15, 2019 and the accident of June 5, 2021.

After being laid off from the Gull Wing job the claimant applied for unemployment benefits. According to the unemployment file he received EI from November 24, 2019 to December 29, 2019. The claimant was paid EI in a total amount of $1,746. The employment file suggests that

he was receiving $500 a week and these payments are described as “regular payments”.

While the EI continued to be paid in 2020, that was also the year that COVID struck. The EI file indicates that the claimant's payments were converted to a CERB payment. Over the course of 2020 up until September 30, 2020 the claimant received a total of $17,492 combined unemployment and CERB. This is consistent with his bank statements which showed, for example, a deposit on June 11, 2020 of $1,000 for “Canada EI”. There are similar deposits shown throughout 2020.

By letter dated September 16, 2020 the claimant was advised that his CERB payment would end soon. It is noted that the CERB payment was being made through the unemployment insurance program. However the CERB was only payable to a maximum of either $14,000 or over 28 weeks. It appears that the claimant's entitlement ended September 30, 2020 as it had reached the $14,000.

However he was also advised that once the CERB ended Service Canada would automatically review his file and start a new claim for EI regular benefits if he qualified. This was in fact done. By letter dated October 5, 2020 the claimant was advised that he did not qualify for unemployment insurance as he did not have sufficient insurable employment hours. The letter indicates:

> “You had 300 hours of insurable employment between November 17, 2019 and September 26, 2020. However you needed 420 hours of insurable employment to qualify for benefits.”

Therefore the claimant did not qualify for ongoing EI.

There again appears to be no dispute between the parties that from the date the claimant was cut off EI and CERB on September 30, 2020 to the date of the accident of June 5, 2021 that the claimant had no source of income. He was not receiving EI. He did not have a job. There is no evidence of any employment. His tax return for the year 2020 shows a total earnings between EI and CERB of $17,492 and his tax returns for 2021 show no earnings.

According to the evidence of the claimant and his parents it is at this time for roughly six months prior to the accident his parents had to help him out. According to the claimant's examination under oath which took place on February 1, 2022, for roughly six months pre accident his parents had to help him out with his expenses. His evidence was that they paid for his mortgage, gas, hydro, water, TV, internet and cable. If his son needed anything such as clothing, his parents would help with that as well.

With respect to the balance owing on his credit card his parents were helping him pay that down. His parents were also paying approximately $50 a month towards a life insurance policy of the

claimant's. When asked whether he felt that he was principally dependent financially on his parents the claimant's answer was “yes”. His evidence was also that no one else was providing him with any financial support.

The evidence of the claimant's father was similar. He said he and his wife were the main source of income for their son on the date of loss. He reported that they paid for his living expenses and that it all started about six months prior to the accident. The evidence of the father however was that all of that was organized by his wife and he had very little in terms of specifics to provide during his examination under oath. When asked whether he believed his son was principally dependent for financial support on his parents at the time of the accident, the father's answer was yes.

The claimant's mother was examined under oath on June 9, 2023. She confirmed that at the time of the accident her son was not working but he was looking for work. As he was not employed his main source of income was herself and her husband. They “carried him throughout this whole thing”. Their son had no other source of income in the year before the accident and he did not have any savings.

The claimant's mother said she paid for his life insurance, his mortgage, his hydro, water, gas, phone “you name it all of it”. She paid for the groceries and she paid for the claimant's son's expenses.

The mother in fact reported that as a result of the support she provided to her son that their pension money is now gone. She too responded affirmatively when asked whether she considered her son principally dependent for financial support on her at the time of the accident.

She was also asked whether at any point in the year before the accident whether her son paid her back any money and her response was “he didn’t have any money to pay back”.

The claimant and his parents also were asked questions with respect to the claimant's efforts to find employment in the year prior to the accident.

According to the claimant he had been looking for work. He stated he had been looking for driving jobs. However he also indicated that it was difficult to look for jobs because his son was living with him. His son had to be at home and it appears the claimant was suggesting that as his son was living with him full-time that it was difficult to look for a job and find a job. He agreed when asked if the pandemic had affected his ability to look for work.

There was also some quite unclear evidence with respect to whether or not the claimant was about to start a job or accept a job just prior to the accident of June 5, 2021. According to the claimant a company that his brother did work for was prepared to offer the claimant a job.

The job was going to be driving a rock truck. The claimant's evidence on this issue is summarized below:

1. He had not gone for an interview for this job prior to the accident.

2. It was a couple of weeks or a week before the accident that his brother talked to him about it.

3. The job was his if he wanted it because of his driving experience.

4. He did not know how many hours per weeks he would have been working.

5. He did not know what duties he would have other than driving a rock truck.

6. He did not know what physical duties he would have as he had not had an opportunity to talk to them about the job.

7. He did not have a rough idea about what he might earn in the job. His brother said maybe $30 or a little more.

His mother's evidence was also equivocal. She said that her sons had told her about this job and that the claimant was looking into it and had just talked to a guy about it and “he said he would have got him in if he wanted to work there, so it was a job offer”.

The father's evidence was that his other son worked for a construction company and “he went in with a day to introduce himself to this company. That was prior to the accident, they were making a decision yes or now whatever, but the accident happened so he never, never got off the ground I guess you could say.”

He also said that if his son had been offered the job he would have “took it in a heartbeat. It was twice, twice the income that he would be as a truck driver.”

There was no written offer of employment placed into evidence. There was no evidence of any clear oral offer of employment that had been made to the claimant. There was no evidence submitted from the alleged potential employer.

POSITION OF THE PARTIES

Before turning to the submissions of the parties it is important to set out the relevant statutory provisions.

The key provision in this matter is the definition of a “dependant” set out in s. 3(7)(b) of the Statutory Accident Benefit Schedule. The section is set out below:

> “A person is a dependant of an individual if the person is principally dependent for

financial support or care on the individual or the individual's spouse."

The other relevant legislation is s. 268 of the *Insurance Act* which provides a hierarchy of insurers who may be obligated to pay statutory accident benefits depending upon the circumstances. Generally s. 268 provides that the first stop in determining priority is to look at whether or not the claimant is an occupant of a vehicle in which he or she is the named insured. If recovery is unavailable under that category then one looks to see whether the occupant would have recourse against the insurer of the automobile in which they were an occupant at the time of the accident.

If someone is a dependant of a named insured then in terms of priority they would fall within the first choice. In this case if the claimant is found to be dependent on his parents then he would be a deemed named insured under their policy and as he was an occupant of the vehicle on the date of loss Intact would be the priority insurer.

If the claimant is not principally dependent for financial support on his parents then he is not a deemed named insured under their policy and priority would fall to TD as he is a named insured under their policy even though he was not an occupant of one of those vehicles on the date of loss.

Intact's position is that the claimant is not principally dependent for financial support on his parents on June 5, 2021 and therefore they are not the priority insurer.

Intact references the four criteria set out by the Court of Appeal in *Miller v. Safeco* 1984 CanLII 2019 Ontario SC (affirmed), 1985 CanLII 2022 (Ontario Court of Appeal). Those four criteria are set out below:

1. The amount of dependency
2. The duration of the dependency
3. The financial needs of the claimant
4. The ability of the claimant to be self-supporting

TD also agrees that those are the four relevant criteria to be examined in determining financial dependency.

In this case Intact relies particularly on criterion 4: The ability of the claimant to be self-supporting. Intact submits that the claimant had the ability to provide for his own basic needs and even though his parents were providing virtually all of his support, that does not constitute a principal dependency for financial support.

Intact submits that the claimant had all the resources needed to meet his own needs but chose not to make use of them. Rather he relied on the generosity and support of his parents and in that context there should not be a finding of fact that he was principally dependent as defined under the regulation.

Intact particularly relies on the decision of Arbitrator Samis in *Federation v. Liberty Mutual* (May 7, 1999 Arbitrator Samis) which was upheld ultimately by the Court of Appeal [2000 OJ No. 1234 (CA)]

In keeping with the *Federation* decision Intact submits that there is more than sufficient evidence to establish that the claimant was capable of being self-supporting at the time of the accident. Intact submits that one considers the claimant's own assets: The home he owned, the two motor vehicles, the ATV, the snowmobile and his prior work history and earnings that he was clearly capable of being self-sufficient. He had access to significant assets. Prior to the accident he had earned $11,631.92 in his employment with Gullwing Lake Resort. His tax returns for 2020 showed a combination of EI and CERB payments of $17,492. These are all clear indicators of an ability to be self-supporting.

Intact also points to the fact that this is not a case where the claimant had medical issues or some form of mental health issues that would prevent him from finding full-time employment. It is pointed out that he was looking for work and in fact had a job lined up that he would have taken but for the accident.

On the issue of the duration of the dependency Intact submits the appropriate timeframe for the analysis of dependency is two years prior to the accident. This, Intact submits, would fairly reflect the claimant's actual circumstances on the date of loss.

Intact's position is that this is not a transition case. There are a number of cases that have been decided where there are individuals who are transitioning from one role to another. Typically this involves a student who has recently graduated and is moving into employment or someone who has been living with their parents and has recently moved into independence but has not quite achieved it yet. Notwithstanding that the claimant was not working at the time of the accident Intact says that the claimant was not a young adult whose life was processing through its various stages but rather was a 44 year-old who owned his own house, had a number of assets and had a lengthy demonstrated ability to earn.

On the issue of the onus of proof it is Intact's position that the onus lies with TD. Intact accepts that the initial onus of proof is with it but once Intact establishes that the claimant is a named insured with TD then the burden shifts to TD to prove there is another policy that is in priority to their own.

Finally Intact spent some time in its submissions going over the various approaches that arbitrators have used in the past in determining financial dependency. Intact makes reference to the mathematical approach, the LICO approach (low income cut-off measure) the Market Basket Measure approach, the plurality approach and finally the big picture approach. Intact submits that in this case the LICO approach is the appropriate one. However, Intact also appears in their factum to endorse the big picture approach (see paragraph 62).

POSITION OF TD

TD's position is that it is clear on the evidence that the claimant was entirely dependent on his parents for all his financial needs in the six months prior to this motor vehicle accident and therefore he was principally dependant for financial support on his parents and therefore a deemed named insured under the Intact policy.

TD's position with respect to the duration of dependency is to look at the six month period prior to the date of loss. TD submits that this is the timeframe that "fairly reflects the status of the parties at the time of the accident" as set out by the Court of Appeal in *Oxford Mutual Insurance Company v. Co-operators General Insurance Company*, 2006 CanLII 37956.

TD submits for at least six months prior to the motor vehicle accident the claimant had no access to any income and had all his needs entirely covered by his parents. TD points to the claimant's bank account in which the last time he had a positive balance was July 24, 2020 and that only lasted for four days. From July 28, 2020 until June 4, 2021 the claimant's account never had a positive balance. On the day of the accident the bank account had a negative balance of $1,787.82.

His income in 2021 was $0 and while his income for 2020 was $17,492, as we approach the end of the year of 2020 (September) the claimant was no longer receiving CERB or EI. He did not have enough insurable hours on September 26, 2020 to be entitled to any ongoing EI.

TD points out that there is no dispute that the claimant's parents paid for the following: His mortgage, his car insurance, his internet and cable, his water and gas, his groceries, his life policy, his personal expenses and his son's personal expenses.

While the claimant was looking for work he had not secured any employment. The evidence of the claimant was that that was due to the pandemic as well as his obligations to his son who was living with him during COVID. TD submits that the only reason the claimant was actually able to maintain an active policy with TD was because his parents paid for his premiums.

With respect to the job offer that the claimant suggested he had through his brother, TD points out that in fact there was never an actual offer. The claimant had not met the foreman. There was no written offer or oral offer made. The claimant did not know what his work hours would be, what his salary would be or even what his job duties were.

TD also points to an argument that the claimant had not been self-sufficient for a number of years prior to this date of loss. TD points out to the physical limitations that the claimant had stemming from the 2017 accident that took him off work in 2018. They point to the fact that the claimant had not worked the minimum yearly amount needed for unemployment insurance benefits for over two years. They point to the bank records that show mortgage payments returned for insufficient funds in July, August, September, October, December 2020 as well as January and February of 2021. If one looked at the claimant's yearly expenses which total $30,014 that means

that the claimant would not have been able to cover those expenses in the year 2019 when he earned $11,631.92 from Gullwing and $1,746 from EI. TD suggests that the claimant's parents may have been helping him out for some period of time.

TD in its submissions also discussed the appropriate approach in analyzing the evidence and to determine dependency. TD argues that the big picture approach is the correct legal principle to apply. TD submits that the evidence is clear that the claimant could not meet his needs, could not meet the needs of his child and was entirely financially supported by his parents. One needs look no further than those facts.

With respect to the onus of proof TD submits that it is the applicant that has the burden of proving on a balance of probabilities that the claimant was not principally dependent on his parents at the time of the accident. TD submits that the onus of proof does not shift to it once it is determined that the claimant is a named insured under TD's policy. TD relies on the case of *Aviva Insurance v. Security National Insurance* (2017) ONSC 4924 where Justice Kristjanson concluded that the applicant has the burden of proof as the applicant is the only insurer with the statutory right to seek an EUO which is a critical tool in developing evidence for use in a priority dispute. Further, Justice Kristjanson held that if there were no burden of proof on either insurer then it could encourage an applicant insurer to simply initiate a priority dispute irrespective of whether it has adequately investigated its case in fact and law. Justice Kristjanson suggests this would not be an economic or an efficient system.

Justice Kristjanson supported the approach found both by myself and Arbitrator Novick in previous decisions where the applicant as the initiator of the process is found obliged to lead evidence to show why the claim in question should not remain with that insurer. The standard of proof is on a balance of probabilities.

ANALYSIS AND DECISION

Over the course of the years and with numerous decisions arbitrators and the courts have set out four key criteria to determine dependency. As both counsel pointed out in their Factums, these four criteria were established by the Court of Appeal in *Miller v. Safeco* (*supra*). I set them out below:

1. Amount of dependency
2. Duration of the dependency
3. The financial needs of the claimant
4. The ability of the claimant to be self-supporting

It is also important to point out that the Court of Appeal in *Miller v. Safeco* specifically concluded that one should not look at the standard of living in order to determine dependency.

I begin my analysis first of all with what the appropriate timeframe is to analyze dependency. Intact submits that it was two years prior to the accident. TD suggested that whether I look at

two years, six months or one year the result is the same and therefore the timeframe may not be overly relevant.

The Court of Appeal in *Oxford v. Co-operators* (*supra*) made it clear that in determining the appropriate time period for examining dependency an arbitrator is obliged to pick the time period that best represents the factual situation on the date of loss. This is in keeping with the definition of dependency which requires financial dependency to be analyzed as of the date of the accident.

I have reviewed numerous cases that were submitted by counsel in which shorter and longer timeframes were set out with respect to the duration of dependency. However each case turns on its own facts and a review of case law only tells us that the timeframe can be as short as three weeks to as long as 18 months. Again this is factually driven.

In this case I conclude that the appropriate timeframe to analyze the duration of dependency is from September 2020 to the date of the accident on June 5, 2021. This is a time period of approximately eight to nine months. During this timeframe the claimant was unemployed and was no longer qualified to receive employment benefits or CERB. He was not working although he was looking for work. I find on the evidence that there was no clear job offer made prior to the accident. During this time the evidence is clear that the claimant's parents provided 100% for all the claimant's needs including his son's needs. I am also cognizant of the fact that the Court of Appeal in *Intact Insurance Co. v. Allstate Insurance Company of Canada*, 2016 ONCA 609 set out that when determining the appropriate timeframe for analysis, that the arbitrator does not need to be satisfied that there is an element of permanency with respect to the timeframe selected. Nor can there be any speculation as to the future of the relationship. To that end, even though this financial relationship between the claimant and his parents was relatively new, there was no requirement for me to determine that it was going to be permanent, nor is it is appropriate for me to speculate whether the claimant might have got a job through the construction company his brother was working with had this accident not happened. The time period of the eight to nine months prior to this accident in my view reflected the claimant’s “new normal” and best reflects the true nature of the relationship at the time of the accident. To enlarge the timeframe to look further back as suggested by Intact would be to distort my analysis and would require me to take into consideration conditions that simply did not exist at the time of the accident. I therefore find the eight to nine months prior to the accident is the appropriate timeframe for my consideration and that fairly reflects the dependency relationship at the time of the accident. To enlarge the timeframe to look further back as suggested by Intact would be to distort my analysis and would require me to take into consideration conditions that simply did not exist at the time of the accident. I therefore find the eight to nine months prior to the accident is the appropriate timeframe for my consideration and that fairly reflects the dependency relationship at the time of the accident.

With respect to the financial needs of the claimant there really was no dispute. His financial needs included essentially all his expenses. This included his mortgage, internet, hydro, car insurance, life insurance, personal expenses and expenses of his son as well as his groceries.

With respect to the amount of the dependency if one accepts the fact that the claimant had no other source of income then clearly his dependency is 100% on his parents. There is some evidence that he may have received a modest amount from Trillium (less than approximately $600). That amount would not even cover his groceries for three months. Therefore on a purely needs analysis and income source analysis the claimant was fully dependent on his parents as indeed all three of them gave evidence at their EUO.

However this is really a case where the argument is that the claimant had the ability to be self-supporting. I agree with counsel for TD that of all the various legal approaches in assessing dependency, that this case is best looked at by the big picture analysis. While we have some fairly clear mathematical numbers with respect to the financial needs of the claimant and what his parents were giving him, that does not really speak to the ability of the claimant to be self-supporting and what figure one might attach to that ability to earn.

The analysis of the ability to earn in the context of priority disputes really came to the fore as a result of Arbitrator Samis's decision in *Federation Insurance v. Liberty* (*supra*). In that case Arbitrator Samis noted that earnings themselves are evidence of capacity. He pointed out that some individuals may not earn up to their capacity. This could be because there was work unavailable or because the individual simply chose not to earn that income. That latter individual could not be considered a dependant. Arbitrator Samis held that dependency needs something more than just the <u>receipt</u> of the benefit. It requires a need to receive the benefit.

As an example Arbitrator Samis suggested that a very wealthy person may get food and shelter and other benefits from someone but that this would not support a conclusion that that individual was dependent. In the case before Arbitrator Samis the claimant was given food and shelter and spending money by his family. He was earning a significant income but was allowed to spend this freely and not required to provide for any of his own basic needs. Arbitrator Samis held that the claimant had a reasonable ability to provide for his own basic needs and therefore was not dependent.

In the decision of *Gore Mutual Insurance Company v. Co-operators General Insurance Company* [2008] OJ No. 3603 (appeal from Arbitrator Jones) the court held that when looking at dependency one must not only look at the actual earnings of the claimant but must look at their capacity to earn.

They noted that this was a factual issue and that a person's earning capacity is the product of their education, talent, physical and mental abilities or disabilities, employment histories and other external factors such as the job market. External factors for consideration would be the supply and demand for labour and the person's prior employment history.

The court went on to say (see paragraph 21) that a person's earning capacity is not simply demonstrated by past occasions or a series of occasions where a person earned money. Each case must be looked at on its own particular facts.

In this case we have a gentleman in his 40s who does have a history of employment and history of self-sufficiency as evidenced by the fact that he owned a house albeit with a mortgage, cars and snowmobiles. However the fact that he owned these assets is not in my view indicative of earning capacity on the date of loss. Rather that speaks to the claimant's standard of living which is not a criteria that the Court of Appeal in *Miller v. Safeco* (*supra*) directs an arbitrator to consider in a dependency analysis. In any event there was no evidence before me as to the value of those assets and what income might be generated if one could sell them off. Again that did not seem to me to be a proper consideration when looking at earning capacity. Selling off one's assets is not earning capacity, at least in the circumstances of this case.

The claimant had not been employed since October 18, 2019. In the last months of 2019 and the first six months or so of 2020 the claimant received unemployment insurance and CERB. His evidence is, and that of his parents, was during this time period and up to the time of the accident the claimant was looking for work. There was however no evidence put before me as to what jobs he applied for, whether he had any interviews, whether he received any offers and declined any offers, how often he was looking for work. The evidence before me was that in at least the eight to nine months prior to the motor vehicle accident the claimant had no source of income and while he was looking for work his ability to secure employment was complicated by the pandemic and the family circumstances of having his son "quarantined" with him during the pandemic. There was no evidence before me that the claimant deliberately chose not to work and to deplete his parents' pension by having them pay all his expenses and his son's expenses for that eight to nine month period prior to the accident.

While there was evidence that the claimant had a workplace injury in 2017 that had him off work in early 2018, in his examination under oath he said he had no physical disability that would prevent him from returning to work. There was therefore no evidence before me that there was any physical or mental disability that would stop the claimant being employed. Similarly, little evidence was presented with respect to his education, training or experience. There was evidence that he had a licence that would allow him to drive a truck and we also know that had he been offered a job driving a truck he would have accepted it. The logical conclusion is that such a job was not offered to the claimant prior to the accident of June 2021.

I therefore find that while the claimant was an individual who was capable of working, that life circumstances in the eight to nine months prior to the accident resulted in him being unemployed and having no source of income. He had no other alternative other than to seek help from his parents. His parents then provided for all the claimant's needs including those of his son.

In all the circumstances the only conclusion is that the claimant was principally dependent for financial support on his parents on the date of loss of June 5, 2021.

I wanted to comment briefly on the question as to whether or not this constituted a transition case and Intact's argument that it was not and therefore one should look at a bigger timeframe

with respect to the duration of dependency and not apply transition case analysis to the dependency issue. I disagree with Intact that transition cases are limited to those involving young people who are transitioning to work and/or back to school. I find that while the majority of transition cases traditionally deal with young people, that it is not exclusive to young people. In this case, the claimant was in transition. He did not have employment. He was not entitled to EI. He was struggling with the pandemic but looking for work. He was hoping to transition to employment as a truck driver. I see no reason to limit transition cases to the more traditional scenario.

With respect to the onus of proof I find that the onus of proof is on Intact on the balance of probabilities as set out by Justice Kristjanson in *Aviva v. Security* (*supra*). Even if I had concluded that the burden of proof shifted to TD as suggested by Intact my conclusions on the issue of dependency would not have changed.

While I applied the big picture analysis in reaching my conclusion in this case I also note that had I applied the Market Basket Measure, the mathematical approach or the LICO that the result would have been the same. The fact is that the claimant had no source of income of his own, was not employed and his parents provided for 100% of his needs.

AWARD

The claimant is principally dependent for financial support on his parents on the date of loss of June 5, 2021 and therefore Intact is the priority insurer with respect to the payment of statutory accident benefits to the claimant.

COSTS

Normally I would award costs to follow the event, both legal costs and arbitration costs. However counsel were not given an opportunity to make submissions on costs. I am hopeful counsel can reach an agreement with respect to both their legal costs and the costs of the arbitration. I will follow up with them in 30 days to see whether we need to schedule a costs hearing.

DATED THIS 10th day of June, 2024 at Toronto.

Arbitrator Philippa G. Samworth
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