IN THE MATTER of the *Insurance Act,* R.S.O. 1990, c. I.8, as amended, section 268, Regulation 38/10 and Regulation 283/95;

AND IN THE MATTER of the *Arbitration Act,* S.O. 1991, c. 17;

AND IN THE MATTER of an arbitration;

B E T W E E N:

SECURITY NATIONAL INSURANCE COMPANY

Applicant

-and-

ALLSTATE INSURANCE COMPANY

Respondent

DECISION

COUNSEL

Anju Sharma, counsel for Security National Insurance Company (hereinafter called "Security").

Oliver Gorman-Asai, counsel for Allstate Insurance Company of Canada (hereinafter called "Allstate").

BACKGROUND

This matter comes before me pursuant to s. 268 of the *Insurance Act*, R.S.O. 1980 c. I8 and Regulation 283/95.

This is a dispute between two insurers as to which insurer stands in priority for payments for statutory accident benefits to the claimant arising out of an accident that occurred on May 6, 2021.

On the date of loss, Security insured the vehicle that the claimant was a passenger in. The vehicle was being operated by her uncle.

Allstate insured the claimant's father. The Applicant applied to Security for statutory accident benefits. She submitted an OCF-1 to Security on May 31, 2021. Security takes the position that the claimant is principally dependent for financial support on her father and accordingly Allstate is the priority insurer.

This arbitration was commenced by Security by notice dated February 1, 2023. The parties on consent selected me as their arbitrator pursuant to Regulation 283/95.

PROCEEDINGS

Various pre-hearings took place and ultimately counsel agreed that this matter could be set down for a written hearing. The parties filed a Joint Document Brief which included:

1. The examination under oath of the claimant dated August 29, 2022;

2. An Application by the claimant to OSAP: full-time application for the year 2020 to 2021 to York University for a Bachelor of Arts;

3. A paystub from XCEL Solutions for the claimant for the pay period March 30, 2021 to April 29, 2021;

4. The undergraduate fall/winter dates for York University;

5. Table 2.2: Market basket measure for economic families and persons not in economic families for 2020;

6. Two applications for accident benefits, one dated May 17, 2021 and one dated May 31, 2021;

7. Written statement of the claimant dated June 23, 2021;

8. Notices of Assessment from Canada Revenue Agency for the claimant 2019, 2020 and 2021;

9. Claimant's Employment Confirmation of Income form OCF-2 from XCEL dated June 11, 2021;

10. Paystubs from XCEL Solutions July 2021 to August 2021;

11. Scarborough population LICO April 26, 2024; and

12. Toronto Census of Population 2021.

Each party also provided written submissions and case law.

There was no oral evidence.

FACTS

I set out below the facts as I have found them taken from the Document Brief, the contents of which I have noted above.

The claimant was born on January 15, 2000 making her 21 on the date of loss. She is single. She has never been married. At the time of the accident she was living with her mother and three siblings. Her father was living abroad at the time possibly due to COVID and had been there for approximately 10 months. Both parents were unemployed and relied on social assistance. No evidence was sought from either parent either via an examination under oath through a statement or calling any oral evidence at the hearing.

The claimant was just completing her first year at York University when the accident of May 6, 2021 occurred. She started full-time university in the fall of 2020. She was in the English and Professional writing program. There was no evidence offered with respect to the details of the claimant's courses, whether they were online or in person, or how many hours per week she was required to either attend classes or complete university-related work.

For the 2020 to 2021 school year the claimant received student loans through OSAP. She received $2,607 as well as $14,136 in student grants from the Ontario Student Grant and Canada Student Grant Program for full-time students. The tuition for the 2020-2021 school year was $9,192. The claimant's evidence was that she paid for her schooling and related expenses through her student grants and OSAP.

At the time of the accident the claimant had a G1 licence. However, she did not own a vehicle of her own. She did not have regular access to a vehicle. She was not a listed driver on any other policy of insurance.

With respect to the claimant's study program, her projected date of completion was April 28, 2024.

Commencing on February 1, 2021, the claimant commenced work as a full-time bookkeeper for XCEL Solutions Inc. She claimed she worked 40 hours a week, Monday to Thursday.

The Employer's Confirmation of Income Form notes that her work-related duties included computer-related work, filing and doing regular office chores. For the 14 weeks prior to the accident, the claimant earned $425 a week for a total of $5,825. It is notable that the OCF-2 is signed by an individual who has the same last name as the claimant. This individual is described as the owner/president. There was however no evidence offered as to whether these individuals were related, how the employment came about, nor were any questions asked with respect to the claimant's intentions in terms of continuing with this employment. The claimant was also not asked any questions about how she managed to balance a 40 hour week full-time job Mondays and Thursdays and as well manage her full-time program at York University.

The evidence does show that after the accident the claimant did try to return to work at XCEL briefly in July and August of 2021.

The Notices of Assessment that have been produced relating to the claimant show no earnings

in 2019, $2,500 of earnings in 2020 (this is believed to be something to do with a student loan) and in the year of the accident 2021, her income was $6,900. She had no earnings in 2022. The evidence was that the bookkeeper job was the claimant's first employment. There was no evidence to suggest that the job at XCEL was temporary or seasonal.

With respect to the household expenses, the claimant's evidence was that her parents paid for everything. They purchased groceries, paid utilities, cable, internet, the cost of the claimant's phone and rent. The claimant's evidence was that once she started work she would buy her own clothes but prior to that time her parents would purchase them for her.

The claimant's evidence on her EUO with respect to the money she earned from XCEL was that while she may spend it on some expenses such as a Spotify subscription or Amazon Prime subscription and some social outings, that the remainder of the money went into a savings account. No bank statements were produced as part of this hearing. She estimated she had saved $2,000.00 prior to the accident.

The evidence was clear that the claimant did not make any contributions to the family expenses for room or board, internet or cable. Her parents provided her with most of her meals.

Prior to obtaining employment at XCEL, the claimant's evidence was that she might receive $20 to $30 per month from her parents for social outings. She would occasionally run errands for her parents such as buying groceries and if so they would provide her with their credit card.

In her sworn statement dated June 23, 2021 the claimant advised, "At the time of this accident my salary covered all my bills and personal expenses. I was not financially dependent on anyone before this accident."

RELEVANT STATUTORY PROVISIONS

The key provision in this matter is the definition of "dependant" set out in s. 3(7)(b) of the Statutory Accident Benefits Schedule. That section is reproduced 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 spouse."

The key legislation that directs this priority dispute is s. 268 of the *Insurance Act*. This provides a hierarchy of insurers who may be obligated to pay statutory accident benefits to an individual depending on a variety of circumstances.

Section 268 generally provides that the first rung of priority to look at is whether or not an individual is an occupant of the vehicle in which they are a named insured. In this case the claimant is not.

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. This provision thus brought the claimant to make the claim against Security.

However, if an individual is a dependant of a named insured, then that policy would rank in priority to the policy of insurance covering the vehicle of which an individual is an occupant. Therefore in this case, if the claimant is found to be principally dependent for financial support on her father, the parties agree that s. 268 of the *Insurance Act* provides that the Allstate policy - would rank in priority to the Security policy.

I now turn to the submissions of the parties.

POSITION OF THE PARTIES

Security

It is Security's position that the claimant was principally dependent for financial support on her father on the date of loss. Security submits whether the mathematical approach, LICO approach, Market Basket Measure or big picture approach is taken, that the result is the same. The claimant is dependent on her father/parents.

Security submits that this is one of those cases that have been described as "transitional". The claimant had no work history. The job with XCEL was her first job. She was attending full-time university. She was living at home and her parents paid all her room, all her board and almost all her meals.

Security submits that the fact that the claimant was able to earn $425 a week from February 21 up until the date of loss represents an artificial financial picture of the claimant. Security submits that the amount earned in 2021 is not reflective of actual financial independence or an ability to be financially independent.

In terms of the claimant's earnings, Security points out that while the Notice of Assessment shows the claimant earned $6,900 in 2021, that $1,500 of that was attributable to post-accident earnings and therefore the claimant's actual earnings that should be considered in terms of dependency are only $5,400.

Security argues that the OCF-2 submitted includes an employer's name that suggests the employer may be a family member. Security submits that this shows that the claimant was not an independent individual who sought out employment autonomously. Further, Security submits that the fact that the claimant was enrolled in York University in English and Professional writing is important as it has absolutely no relationship to her employment as a bookkeeper.

Security makes arguments with respect to long-term goals. Security suggests that it is clear the job at XCEL was not the claimant's intended long-term goal. Security also suggests that I should consider whether the claimant would be able to maintain her full-time employment as well as

continuing to attend school.

Security also submits that there was no evidence that the claimant was intending to move out of the home nor any evidence to suggest she was going to start making contributions towards the family expenses. This supports the notion that she was and continued to be dependent on her family.

It is Security's position that the proper time period for me to consider with respect to the duration of dependency per *Miller v. Safeco* (1986) 48 O.R. (2d) 451 is two years. Security submits that a two year period pre-accident is the most accurate reflection of the claimant's true financial relationship with her parents and her true status in terms of dependency on the date of loss. Security notes that of the 24 months to be considered in that two year period, for 21 of those there is no doubt the claimant was dependent on her parents as she was not employed and not earning any money.

With respect to the various approaches that arbitrators use in determining dependency, Security had submissions in each category.

With respect to the mathematical approach, Security submitted that it is inappropriate in these circumstances as the claimant was unable to provide particulars with respect to any monthly household expenses. In fact, there is no evidence with respect to the amount of expenses.

With respect to either LICO, or MBM, Security submits that the claimant would be found to be financially dependent. However, this analysis is based on considering one or two years for the purpose of the analysis. Security does various calculations and concludes that the claimant's earnings in the two years pre-accident would fall short of the 51% cutoff for the purposes of determining no dependency.

Under the big picture approach which Security says is appropriate, they submit that whether you look at one or two years pre-accident, that the evidence supports that this is an individual in transition with no history of earnings, just having started work and when looking at the bigger picture over the one or two years prior to the accident, the conclusion is clear that the claimant would be dependent on her family.

Allstate

The Respondent takes issue with the Applicant submissions primarily on the use of the big picture approach and the timeframe that should be used to determine dependency.

Turning first of all to the timeframe, it is Allstate's position that three months is the appropriate timeframe to use. Allstate relies on a series of cases which conclude that an arbitrator must pick the time period that best represents the factual situation on the date of loss. This can vary from case to case. See *Intact Insurance Company v. TD General Insurance Company*, Arbitrator Samworth, June 10, 2024 and *Economical Insurance Group v. State Farm Mutual Insurance*

Company, Arbitrator Bialkowski, January 13, 2014. Allstate submits that the three month period should be used as it commences on the date when there was a transition in the claimant's employment status. This is when she began to work full-time with XCEL.

Allstate submits that while it is true that this was the claimant's first job, the fact was that she had worked there for over three months at the time of the accident. There was no evidence that it was seasonal or temporary. There was no evidence to suggest she would have not continued to work there full-time and any attempt to forecast how long she may work there and/or how her employment and attending full-time school might work into the future was entirely speculative.

In fact, Allstate submits the evidence is that the claimant worked at XCEL for most of her winter semester through her exams and into her summer semester which was when the accident took place. The evidence that she attempted to return to work post accident is consistent with an intention of continued employment.

Allstate submits that when the claimant began working full-time earning her own money that this represented a significant change in her financial situation and began the "new normal". She was now earning enough money to cover her personal expenses she had saved approximately $2,000 by the time of the accident.

Allstate submits that if I reject Security's suggestion of one or two years and accept the three month period, then there can be no dispute with respect to the argument that the claimant was no longer principally dependent for financial support on her father.

These submissions are in keeping with Allstate's position that the "big picture" approach should not be applied in this case. Here, Allstate argues, there is sufficient evidence available to determine what the claimant was able to earn ($5,200 prior to the accident) and what her statistical needs were based on either LICO or MBM. Allstate relies on another decision of Arbitrator Bialkowski in *Dominion of Canada General Insurance Company v. Allstate Insurance Company of Canada* (January 25, 2023) wherein Arbitrator Bialkowski held that using the "big picture" approach is inappropriate in cases where the available evidence makes it clear that the claimant was in a position to provide for at least 51% of her statistical needs. Allstate submits that that is the case here.

Allstate further submits that the "big picture" approach is not appropriate here as in fact this was not a transitioning case. The claimant was not transitioning from school to full-time work or from work to full-time school. In fact, the claimant in this case had already transitioned to working both full-time and attending school and no evidence was led that she intended to quit or change that arrangement.

Allstate submits that the annual MBM for a person who is not in an economic family in 2021 in a large urban population with 500,000 people is $22,153. Over a three-month period, the MBM would therefore be $5,788.25 ($22,153 per year divided by 4). Allstate notes that the claimant's

employment income during the three months prior to the accident of $5,400 is well over 51% of $5,788.25. Therefore, the claimant cannot be found to be principally dependent for financial support using the MBM. The same is true, Allstate submits, if one used the LICO measure.

ANALYSIS AND FINDINGS

Over the course of the years there have been numerous decisions from arbitrators and the courts with respect to the issue of financial dependency. One of the key tenets that has continued to be supported and remains a keystone of this analysis is the four criteria that were established by the Court of Appeal in *Miller v. Safeco* (*supra*). These are set out below:

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

It is always important to remember that the Court of Appeal specifically directs that one should not look at the standard of living in order to determine dependency.

In this case, the first starting point must be the appropriate timeframe to analyse dependency. The timeframes put forward by the parties each generate different results in terms of dependency.

If one were to pick two years then as pointed out by the applicant, for 21 of those 24 months the claimant was not earning any money and was dependent on her parents.

However, if one picks the three-month period prior to the date of loss, the evidence is the claimant was earning sufficient money in order to meet her statistical needs if one takes the Market Basket Measure approach.

I have carefully reviewed the case law provided by the parties and the facts in this case. I pause to point out that the facts were somewhat limited. However, I agree with Allstate that when I look at the timeframe that best reflects the claimant's status on the date of loss, there is no doubt in my mind that that would be the three month period prior to the accident.

As of May 6, 2021, the claimant had established a work history, albeit short but consistent. She worked 40 hours a week Mondays to Thursdays providing bookkeeping assistance to XCEL. Whether this was or was not a family member is not relevant. In any event, that issue is speculative as there was no evidence before me one way or the other. The OCF-2 and the tax returns supported employment from February 1, 2021 up to the date of loss at $425 per week. I agree with Allstate that there is no evidence put forward as to whether the claimant would or would not continue with this employment, whether it was temporary and whether the claimant struggled to maintain her employment as well as marks at school. None of this was covered in the EUO or in any statement.

I am also mindful of the most recent appellate decision of the Court of Appeal in *Intact Insurance Company v. Allstate Insurance Company of Canada*, 206 ONCA 609. This decision provides some considerable analysis and guidance as to how to determine the appropriate timeframe. The court points out that there does not need to be an element of permanency with respect to the timeframe selected. Further, they direct that an arbitrator must not speculate with respect to the future. While that case involved spousal relationships, the direction remains true with respect to what an arbitrator must look at in determining the appropriate timeframe. Rather, the arbitrator must look at what timeframe fairly and most accurately reflects the status of the parties "at the time of the accident" and there need not be any element of permanency with respect to that relationship and/or status of the parties. In Arbitrator Bialkowski's decision of *Aviva Canada and State Farm, Commonwealth Mutual Insurance Group and Chubb Insurance Canada* (May 11, 2021) Arbitrator Bialkowski provides an excellent analysis of the decision from the Court of Appeal and how to some extent it has changed the approach of arbitrators in looking at and determining the appropriate timeframe.

Therefore in this case I am left with the simple fact that this claimant started what can only be described as full-time employment effective February 1, 2001 and was maintaining and continuing that employment on the date of loss and in fact made an effort to return to work after the motor vehicle accident at the same employment. She also continued to attend full-time school. The fact that someone is at school does not mean they are either in transition or that they must be dependent on someone.

I find it would be a distortion of the facts for me to take either the one year or two year period for the purposes of the timeframe to analyse the dependency. The claimant's circumstances were dramatically different during those time periods. She was not working. For one of those years she was not at university. I conclude that the timeframe that most fairly and clearly reflects the factual situation on the date of loss is three months.

Dependency

As might be expected, having chosen to the timeframe of three months I therefore conclude that the claimant was not principally dependent for financial support on her parents/father on the date of loss.

I agree with Security that this is not an appropriate case to conduct a mathematical analysis. That approach is becoming somewhat of an anachronism in any event. While I have available the information as to the claimant's earnings, I have absolutely no information with respect to the claimant's expenses or the household expenses.

As to the big picture approach, I agree with Allstate that this is not a case that needs the big picture approach. I conclude that the claimant is not an individual who is in transition. At the time of the accident she had already transitioned to both full-time university and full-time employment. As counsel for Allstate put it, this was an established "new normal".

The claimant struck me, at least through the written materials, as an individual who had chosen to work full-time during their studies. There was no evidence that that was going to change. There was no evidence that her position at XCEL was temporary or at risk because of problems with completing university courses. She continued to work through XCEL during York's exam period as evidenced by the documents before me (OCF-2 and York's dates for fall and winter).

I agree with Allstate's submissions that at the time of the accident the claimant had transitioned from a dependent student living at home to a self-sufficient woman working full-time while pursuing her studies.

One of the criteria that *Miller v. Safeco* directs an arbitrator to look at is the ability of an individual to be self-supporting. That does not mean that there has to be evidence that the claimant has an ability to move out and live independently on their own and be self-sufficient. The case law suggests that you look at their capacity to earn (see *Federation Insurance Company v. Liberty Mutual Insurance Company*, Arbitrator Samis, July 3, 2009: upheld by the Court of Appeal). The claimant here earned $5,300 in the three months prior to the motor vehicle accident and using the now preferred statistical analysis for circumstances such as this based on the MBM for a single person not in an economic family, she clearly was earning well over 51% of her statistical financial needs. ($5,400 earnings 51% of three months of statistical needs $2,952)

Security had the burden of proof in this matter to establish that the claimant was principally dependent for financial support on her father on the date of loss and I conclude that that burden of proof has not been met. I find the claimant was <u>not</u> principally dependent for financial support on her father on May 6, 2021.

RESULT

As I found that the claimant was not principally dependent for financial support on her father, it follows that Security is the priority insurer with respect to the claimant's statutory accident benefits for the date of loss of May 6, 2021 pursuant to s. 268 of the *Insurance Act*.

COSTS

The Arbitration Agreement confirms that whichever party is found to be responsible for the payment of the statutory accident benefits is responsible for the arbitrator's account and therefore I conclude that Security is responsible for paying the arbitrator's fees.

The agreement also provides for the same result with respect to the costs of the arbitration. Because Allstate was wholly successful in this matter, I order that the costs of Allstate be paid by Security.

I leave it up to counsel to discuss the appropriate quantum of costs but if they are unable to agree, I can be contacted to schedule a cost hearing.

DATED THIS 12th day of December, 2024 at Toronto.

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Arbitrator Philippa G. Samworth
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