IN THE MATTER of the *Insurance Act*, R.S.O. 1990 c. I.8 s. 268 and Ontario Regulation 283/95 thereunder
AND IN THE MATTER of the *Arbitration Act*, 1991, S.O. 1991 c.17

AND IN THE MATTER of an Arbitration

BETWEEN

SECURITY NATIONAL INSURANCE COMPANY

Applicant

and

TRADERS GENERAL INSURANCE COMPANY

Respondent

DECISION

COUNSEL

David van Staalduinen for the Applicant, Security National Insurance Company (hereinafter called "Security").

Hussein Pirani and Andy Smith for the Respondent, Traders General Insurance Company (hereinafter called "Aviva").

INTRODUCTION

This matter comes before me pursuant to s. 268 of the *Insurance Act*, R.S.O. 1980 and Regulation 283/95. The parties retained me on consent to act as an arbitrator in a dispute between these two insurers with respect to which is the priority insurer for statutory accident benefits payable to the claimant arising out of an accident that occurred on July 11, 2022.

On that date the claimant was on an e-bike which was uninsured. He was struck by a vehicle insured by the Applicant, Security bearing policy no. 00131451274. The claimant applied to Security for statutory accident benefits.

Aviva insures the claimant's daughter. On the date of the accident she had a valid policy with Aviva bearing no. 21423326.

Security takes the position that the claimant is principally dependent for financial support on his daughter and accordingly Aviva should be the priority insurer pursuant to s. 268 of the *Insurance Act*.

PROCEEDINGS

There were various pre-hearings and ultimately this matter proceeded to a written hearing and an opportunity for counsel to make some oral submissions. In terms of the written materials, I was provided with the following:

1. Arbitration Agreement dated February 24, 2025;

2. Agreed Statement of Facts dated January 31, 2025;

3. Transcripts of the examination under oath of the claimant dated September 23, 2022;

4. Transcripts of the examination under oath of the claimant's daughter dated June 5, 2024;

5. Notices of Assessment relating to the claimant 2018 to 2021;

6. A paystub relating to the claimant's earnings dated July 16, 2022;

7. An invoice for internet services;

8. Various information with respect to the exchange rate from the Yuan to Canadian funds; and

9. Low income cut-off (LICO) Market Basket Measure (MBM) for the relevant time period and city.

Both counsel submitted case law with their written submissions.

FACTS

The Agreed Statement of Facts is relatively brief. The key facts agreed upon are that the claimant was involved in the accident on July 11, 2022. It is agreed that the claimant was born on January 24, 1957 and was therefore 65 years old on the date of the accident. The parties agree on the coverage available with respect to each of their respective policies. It is also agreed that on the date of the accident the claimant, his wife and his dependent son lived with his daughter and her family in a house located on Strathmore Drive in the city of Markham.

Having carefully reviewed not only the Agreed Statement of Facts but the various transcripts produced and supporting documentation, I find the following facts in relationship to this claim.

While the claimant seems to have lived primarily in China he has also come to Canada and worked in Canada during multiple periods of time. He initially arrived from China in 2017.

Between arriving in 2017 and September of 2019 the claimant, his wife and his eldest son lived

with the claimant's daughter at Bethany Leigh Drive in Scarborough. The claimant's daughter had purchased this home around 2015. The claimant assisted his daughter with a down-payment on this house by providing her with a gift of somewhere between $30,000 and $40,000. When the claimant lived with his daughter at the Bethany home he contributed $800 a month in rent. The mortgage on that home was $1,700.

The claimant's daughter then purchased the home on Strathmore in approximately 2021. The mortgage on this house was $3,100. The average cost for utilities was $500. The claimant did not make any contribution towards this home for rent when he was living there. However, he would spend over $1,000 a month to purchase groceries for the household. In addition, his wife would provide some child care services to the claimant's daughter. She had two children.

In terms of the claimant's employment in Canada, when he was here in 2018 he worked for a company called Italian Noodle. His evidence is that he was paid about $3,000 a month.

However, the claimant returned to China in September of 2019 and remained there until October of 2021. While in China he worked in construction. His evidence is that he would earn somewhere approximately 7,000 Yuan per month.

Counsel provided the average exchange rate for this currency to the Canadian dollar in 2021 and it was 0.1944. Applying this conversion rate, the claimant was there for earning somewhere between $1,300 and $1,500 Canadian per month in China.

The claimant and his family returned to Canada in October of 2021 and moved in with his daughter. He, his wife and disabled son had two rooms in the home. In addition to the claimant and his family, his daughter also had herself, her husband and their two children living in the home. They were therefore a total of seven people residing in the Strathmore residence on July 11, 2022.

On his return from China the claimant secured a new job in starting November 2021 with JIE Cheng Inc. This employment involved the claimant working as a vegetable packer. He earned approximately $3,000 a month and appears to remain employed until the date of the accident. According to a paystub from this business that covered the pay period of July 3, 2022 to July 16, 2022 the claimant worked 42.10 hours at a rate of $17 an hour for a total of $744.33. The year-to-date income as of July 16, 2022 was $20,970.99.

The Notices of Assessment with respect to the claimant were produced and these revealed the following:

Year	Net Income
2019	$23,363
2020	$2,000
2021	$3,776
2022	$28,768

It is important to note that for the years 2020 and 2021 the claimant was back in China and these tax returns do not reflect his earnings in China. If you assume four months of pay in China and apply the applicable exchange rate, this would suggest his earnings in China were approximately $5,500 to $6,300 in Canadian dollars. This would reflect the income of the claimant in China for the four months prior to coming back to Canada. The claimant's evidence on his EUO suggested that he was in fact employed in China from his return in 2019 until he came back to Canada in 2021. This job involved construction for houses for private individuals and his job was to mix cement and pile the bricks. Overall, the claimant's jobs in the two or three years prior to this accident would be considered labouring jobs.

On his EUO the claimant confirmed he did not pay any rent to his daughter. He reported that his wife took care of the grandchildren who at the time were roughly 3 and 10 years old. The claimant did say he contributed about $1,000 to groceries. There was no other contribution by the claimant to expenses in his daughter's home.

On her examination under oath the claimant's daughter stated that in her view her parents did not need her financial support as they had their own savings and their own money. She acknowledged that her father contributed $1,000 towards the groceries but did not contribute anything else. Her evidence was that her father would spend $1,000 more or less at the Chinese supermarket but on top of that she would have to go to Costco to buy food items for her children.

Her evidence also was that her father residing with her was a temporary arrangement as he planned to purchase his own property later on.

POSITION OF THE PARTIES

Security

Security's position is that based on the evidence outlined above it is clear that the claimant was principally dependent for financial support on his daughter. Security points to the mortgage costs of the claimant's home at $3,100 plus the utilities of $500 as well as the internet costs. In addition, Security points out there is no evidence about additional housing costs such as insurance, property taxes, cable or maintenance expenses. Security submits that these costs alone must be well in excess of $3,700 per month.

Security submits that it is clear on the evidence that the claimant did not participate at all in these financial obligations other than the $1,000 toward the groceries.

Security submits that when considering the issue of dependency one must keep in mind that not only was the claimant responsible for providing support for himself from whatever sources he could, but in addition was also responsible for looking after his wife who was not employed and his disabled son. Security submits that I should take this family unit into consideration when looking at the issue of dependency and not just at the claimant himself.

In terms of the appropriate timeframe with respect to reviewing dependency, Security submits that the relevant time is from when the claimant returned from China in October of 2021 up to the date of the accident on July 11, 2022. This is a nine-month period.

Security submits that during that nine-month period the claimant relied on his daughter to cover all of his family needs for shelter, utilities, internet, insurance and additional costs related to their residing in her home in the city of Markham.

Security provided evidence that according to Statistics Canada the Market Basket Measure threshold for a family of three people living in Toronto in 2020 was $43,065. Security submits that this is well above the claimant's income from his vegetable packaging job. Security in their submissions estimated the claimant's total income from July 2021 to July 2022 (which included some allocation for working in China) to be somewhere between $26,400 and $27,200. Security submits that this would be less for that nine-month period that they submit is relevant. Security submits that that amount of earnings would not be sufficient for the claimant to cover the needs of himself and his family based on the Market Basket Measure.

However, Security submits that the mathematical analysis or the statistical analysis is not the best approach in this case. Security submits that I should look at the big picture case. They rely on the decision of Arbitrator Ryan Murray in the recent decision of *TD Insurance v. Certas Home & Auto Insurance* dated April 10, 2023 and the decision of Justice Myers in *Allstate insurance v. ING Insurance*, 2015 ONSC 4020.

Security submits that I should follow Arbitrator Murray who found (see paragraphs 32 and 33) that in recent years courts and arbitrators have shifted away from the 51% rule and the LICO approach and rely now on the more general "big picture" approach. Arbitrator Murray held that in the big picture approach you look at the overall situation of the alleged dependant rather than adhering strictly to the mathematical approach or the statistical approach.

Security submits that, using the big picture approach, it is evident that the claimant did not have the capacity to be self-supporting. He was at retirement age, primarily worked in labouring jobs and his earning potential was limited. Security submits the claimant could not afford to live anywhere other than his daughter's house with his wife and son and provided documents from the Toronto Regional Real Estate Board which indicated that the average cost of a two-bedroom rental apartment or townhouse in Markham in the year before the accident, the rent would be between $2,431 and $2,676. Security submits that if the claimant was only earning $2,204 to $2,271 per month (assuming his income the year before the accident was between $26,445.97 and $27,251.97) that while he may be able to afford the rent, he would have nothing left to pay for groceries, transit or other needs. Therefore, he could not be self-supporting in the year prior to the accident and Security submits that living in his daughter's house was the only option for himself and his family.

Aviva

Aviva's position is that whether you look at the big picture or apply a statistical analysis, specifically the Market Basket Measure, that there is no evidence to suggest that the claimant was principally dependent for financial support on his daughter.

Aviva and Security do agree that the relevant timeframe to consider the issue of dependency is from October 21, 2021, when the claimant returned from China, until July 11, 2022.

Aviva submits that during this time period, if you look at only the earnings of the claimant in Canada he earned $20,970.99 in a nine-month period.

Aviva submits that the claimant was employed and earning an income. His past history shows that while he may have been working in labouring jobs, that he has consistently been capable of being self-supporting.

Aviva also submits that Security is wrong in proposing that I look at the family unit of the claimant, his wife and adult son in order to determine financial dependency. Aviva submits that I should look only at the claimant and his ability to support himself and that to that end the statistical analysis provides the best approach.

Aviva submits that the evidence shows that while the claimant was working full-time, that he paid over $1,000 for groceries in lieu of rent in exchange for the two bedrooms that he and his family lived in with the claimant's daughter and her family.

Aviva submits that the LICO or MMB approach is the appropriate one to follow in this case but even if I choose the big picture approach, that either way the result would be the same.

Aviva submits that at the time of the accident the claimant lived in Markham which had a population of over 300,000 in or around the time of the accident. The LICO cut-off for a three-person household in Markham in 2022 was $31,205. Aviva submitted statistical LICO reports to support this position. If you apply the LICO cut-off for a three-person household in 2022 on a nine-month basis, then that would be $23,403.75. The claimant's income during this time period was well over 50% of that amount. This would therefore indicate that in fact the claimant earned 105.73% of the statistical average needs of an individual in the area where his family resided.

If you apply the MBM threshold for a family in Ontario for a population between 100,000 and just under 500,000 in 2022 then Aviva submits based on the statistics provided that would be $49,290. If you then reduce that to allow for only a nine-month period, then the threshold would be $39,967.50. Considering the claimant's earnings this would mean he would meet 61% of his basic needs.

Aviva relies on the decision of Arbitrator Samis from September 13, 2018 in *Wawanesa Mutual Insurance Company v. State Farm Mutual Insurance Company* where Arbitrator Samis indicated

that use of the statistical data from the Market Basket Measure was a more appropriate way of determining dependency. Arbitrator Samis noted that this focused more on costing the needs of the claimant rather than trying to compile an inventory of various expenditures which is difficult to do and often inaccurate.

Aviva also relies on the decision of Arbitrator Jones from November 1, 2022 *State Farm Mutual Insurance Company v. American Home Assurance and York Fire & Casualty*. In that case Arbitrator Jones found that the person's ability to pay is considered to be a relevant factor. Arbitrator Jones noted the comments from Arbitrator Samis in *Liberty Mutual Insurance Company v. Federation Insurance Company* May 7, 1991 where Arbitrator Samis noted that dependency has to be something more than just a receipt of a financial benefit. In order for someone to be dependent there must be some kind of need on the part of the person alleged to be dependent. For example, a very wealthy person might receive food, shelter or other financial benefits from a family member but he does not have any actual need to receive those benefits and therefore he would not be considered to be dependent.

As to the big picture analysis, Aviva submits that overall, arbitrators and judges have found that the big picture analysis should only be used when there is not sufficient evidence to apply a mathematical analysis or a statistical analysis.

Aviva submits that even if the big picture approach is used the result should be the same noting that it is inappropriate to consider in this analysis the average cost of rent for a two-bedroom rental apartment or townhouse as suggested by Security. Aviva notes that at the time of the accident the Applicant was renting two rooms in a share household in Markham, not an independent condo or town home in Toronto. Further, he earned an income and contributed $1,000 in exchange for these rooms. In addition, Aviva notes that there is no evidence that the daughter provided any financial support to her father other than providing shelter and that the claimant's wife provided child care services in exchange for not paying rent as he had previously at the earlier home.

Taking all this into consideration, Aviva submits that the claimant is not principally dependent on the daughter for financial support and Security is the priority insurer under s. 268 of the *Insurance Act*.

DECISION AND ANALYSIS

I now turn to an analysis of the law in this area, how it applies to the facts of this case and the reasons for my decision that is set out below. The Statutory Accident Benefits Schedule Ontario Regulation 34/10 defines a dependant as someone who is "principally dependent for financial support" at the time of the accident. Therefore, in order for the claimant to qualify as a dependant of his daughter it must be established on a balance of probabilities that <u>he was principally dependent for financial support on her at the time of the accident</u>.

The starting point in any dependency case is the four criteria set down by the Court of Appeal in

Miller v. Safeco 48 O.R. (3d) 451 upheld on appeal to the Court of Appeal: *Miller v. Safeco Insurance Company of America* 1995 Carswell ON 787. The four criteria that the court directs one to look at in determination of dependency are set out below:

1. Amount of dependency
2. Duration of dependency
3. Financial needs of the alleged dependant
4. The ability of the alleged dependant to be self-supporting

The Court of Appeal also made it clear that the standard of living was not a criterion that one looks at in determining dependency.

In this case there is no issue with respect to the duration of dependency. Both parties agree that the appropriate period to examine the question of dependency is the nine months prior to the motor vehicle accident. Counsel agreed that this time period is one that fairly reflects the status of the parties at the time of the accident as the claimant had returned from China and had been living with his daughter for approximately nine months.

With respect to criterion 3 and the financial needs of the alleged dependant, I agree with Aviva that the best approach in this particular case is the use of statistical analysis. I find that there was no real evidence before me as to what the financial needs of this claimant were. There was some very modest information with respect to the overall family expenses such as the mortgage and internet but there was very little detailed analysis with respect to the various expenses needed to run this seven-person household. I reach this conclusion with particular reference to the decision of Justice Myers in *Allstate Insurance Company of Canada and ING Insurance Company of Canada and Aviva Canada Inc.* (*supra*). In that case Justice Myers upheld the decision of an arbitrator who had made a clear choice in adopting an objective statistical approach in order to assess the alleged dependant's needs. Justice Myers noted that the use of government statistics has the benefit of simplicity, low cost and proportionality and is preferred over the mathematical approach.

In this same decision at paragraph 4 Justice Myers points out that math is only a part of the test that has arisen out of the *Miller v. Safeco* decision. He notes that the math that was being performed based on the 50% rule and on the available evidence with respect to needs and expenses was a highly artificial process. Justice Myers also described it as inaccurate.

I pause here to note that Security relied on the decision of Arbitrator Murray in *TD and Certas* (*supra*) in their position that the big picture approach to determining dependency should be used rather than the statistical approach. In reviewing Arbitrator Murray's decision, I note that he suggests (see paragraph 22) that in recent years courts and arbitrators have shifted away from the 51% rule and the LICO approach to a more general "big picture" approach. Arbitrator Murray relies on Justice Myers' decision in *Allstate and ING* (*supra*) at paragraph 4 in support of that decision. While Justice Myers certainly notes that the 51% rule (the mathematical approach) is inaccurate and artificial, he goes on in that decision to specifically find that the statistical analysis

is preferable. Arbitrator Murray does not make reference to that in his decision and simply chooses to follow the big picture approach. I agree with many of my fellow arbitrators who have concluded that the big picture approach should generally be used only where there is insufficient evidence to apply either the statistical approach or the mathematical approach. This is supported by Justice MacLeod in the decision of *Economical Insurance Company v. Desjardins Insurance Company* 149 O.R. (3d) 752. Justice McLeod states:

> "The 'big picture' approach derives from cases in which either there was insufficient evidence to apply a 50% + 1 analysis or in which it simply appeared to be too arbitrary and nuanced a cutoff when viewed against the overall circumstances of the 'big picture'. The need to consider the big picture also takes into account some inconsistency in the case law as to what period of time should appropriately be used to assess dependency."

In the case before me there is no inconsistency with respect to the duration of the dependency as all the parties agree it is nine months.

There is little or no evidence before me that would allow me to apply the 51% (mathematical) analysis and no party has asked me to do so. However, there is more than sufficient evidence of the claimant's earnings in the nine month period prior to the accident as well as appropriate statistics from LICO and MBM government sources for me to apply the statistical approach which in my view is preferable if there is sufficient evidence available for an arbitrator to do so. However, even if I were to apply the big picture approach in this case and to more broadly apply the criteria set out in *Miller v. Safeco*, the conclusion I reach would be no different with respect to the issue of dependency.

Based on the evidence I find that the claimant was not principally dependent for financial support on his daughter on July 11, 2022. This was a gentleman that, despite his age, had been actively employed for a number of years prior to the accident, whether it was in China or in Canada. With specific reference to the relevant time period, this gentleman was fully employed as a vegetable packer, being paid $17 an hour. In the nine-month only prior to the motor vehicle accident, the claimant earned $20,970.99.

We then look at the claimant's needs which in my view should be looked at in terms of the statistical analysis as I have outlined above.

I do not agree with a Security's position that in considering the issue of dependency I should look at the claimant as a family unit (his wife, himself and his disabled son) in determining whether or not the claimant was able to be self-supporting. In my view the appropriate approach is to look at the claimant alone and what his earnings were and what his needs were from a statistical perspective. Unfortunately, no statistical analysis was given to me with respect to an individual in the Markham area either with respect to the LICO statistics or the MBM. What was submitted were statistics for a family/three-person household. However, as Aviva pointed out, even using the statistics of needs for a three-person household, whether one applies LICO or the MBM, the

claimant was still capable of earning well over 51% of his family's statistical needs, let alone his own individual needs.

Therefore, on the statistical analysis, using both the LICO and MBM needs for a three-person household in 2022 and applying the claimant's earnings during that nine month period, I conclude that he was capable of being self-supporting and was not principally dependent for financial support on his daughter.

As I mentioned earlier, even if I apply the big picture analysis, I reach the same conclusion.

Firstly, this was a gentleman who clearly had a reasonable earning capacity. He had been fully employed based on the evidence from 2019 through to the date of the accident whether the employment was in Canada or in China. He was able to contribute $1,000 towards groceries while living in his daughter's home. His daughter's evidence was that her father did not need any help from her as he was quite capable of earning money himself and as well he had some savings. There was no evidence as to what those savings were. There is no evidence that if asked the claimant would not have been able to contribute more to the family expenses based on his available earnings and capacity to earn. For whatever reason, cultural or otherwise, he did not contribute to the household expenses over and above the $1,000 per month for groceries. The choice not to pay and/or not to be asked to pay does not make the claimant a dependant when he clearly had the ability to pay if asked.

I agree with Aviva that even when using the big picture approach it is not appropriate to factor in the cost of rent for a two-bedroom apartment or townhouse as has been suggested by Security. This is not, in my view, the test of dependency whatever approach one uses. Further there was no evidence with respect to what the claimant might be able to contribute towards independent accommodation over and above his salary. Again, we know in 2018 he was capable of giving his daughter $30,000 or $40,000 to help her buy her first home and there was evidence that he had some savings in 2021/2022.

Even when we are considering the big picture approach, the Court of Appeal in *Miller v. Safeco* has made it clear that one cannot consider the general standard of living within the family unit. Some of Security's arguments with respect to the big picture seem to verge on the general standard of living rather than the four criteria that arbitrators are directed to consider in assessing dependency.

Based on the evidence before me, I have no hesitation in concluding that when one looks at the big picture analysis, that this claimant was not principally dependent for financial support on his daughter.

AWARD

Security National Insurance Company is the priority insurer with respect to the statutory accident benefits payable to the claimant arising out of the motor vehicle accident of July 11, 2022.

COSTS

The Arbitration Agreement provides that both the arbitrator's account and legal costs are payable by the Applicant if the Respondent is not found to be wholly or partially responsible for indemnification for the statutory accident benefits payable to the Applicant.

Therefore, I find that as Aviva was entirely successful in this matter, that both Aviva's arbitration costs and Aviva's legal costs and any disbursements are payable by Security National Insurance Company.

While the Arbitration Agreement suggests that the quantum of costs should be fixed by the arbitrator, I leave it in the parties' most capable hands to reach an agreement with respect to costs. If an agreement cannot be reached, the parties can contact me and we will set up a costs pre-hearing to deal with the issue.

DATED THIS 17th day of June, 2025 at Toronto.

_____

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP
Barristers and Solicitors
1700 – 438 University
TORONTO, ON M5G 2L9