

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I.8.as amended, s. 268 and ONTARIO REGULATION 283/95

AND IN THE MATTER OF THE ARBITRATIONS ACT,
S.O. 1991, c.17;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

PEMBRIDGE INSURANCE COMPANY

Applicant

- and -

AXA INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Tricia J. McAvoy for the Applicant

Jamie R. Pollack and Amanda M. Lennox for the Respondent

BACKGROUND :

Chad Carpenter (“Chad”) was involved in a motor vehicle accident on October 28, 2006, three days after his twentieth birthday. He was a named insured on an automobile policy issued by Pembridge Insurance Company (“Pembridge”), covering a Pontiac Sunfire he had been given by a relative. At the time of the accident, however, he was driving a Ford pickup truck owned by his parents and insured by AXA Insurance Company (“AXA”).

Chad submitted an Application for Accident Benefits to Pembridge. Pembridge has paid benefits pursuant to the *Statutory Accident Benefits Schedule (“SABS”)*, but takes the position that Chad is principally dependent for financial support on his parents and that AXA is therefore in higher priority to pay his claim by virtue of section 268(5.2) of the *Insurance Act*. AXA initially raised a preliminary issue, asserting that the priority scheme outlined in section 268(2) of the *Act* requires the insurer of a named insured under a policy to pay the claim, regardless of any other circumstances. The parties filed written submissions on this issue, and I rejected this argument in a preliminary decision dated September 16, 2008.

The parties then pursued the question of whether Chad was financially dependent upon his parents. Chad and both of his parents were examined under oath, and a transcript of their evidence was relied on at the hearing.

ISSUE:

1. Was Chad Carpenter principally dependent for financial support or care upon his parents at the time of the motor vehicle accident ?

RESULT:

1. Chad Carpenter was not principally dependent for financial support or care upon his parents during the relevant period, and AXA is therefore not obligated to pay his accident benefits claim.

RELEVANT PROVISIONS:

Insurance Act

- 268(5.2)** *If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant.*

Statutory Accident Benefits Schedule

- 2(6)** *For the purpose of this Regulation, a person is a dependant of another person if the person is principally dependent for financial support or care on the other person or the other person's spouse.*

EVIDENCE:

The parties agree on the following relevant facts: Chad finished high school in Minden, Ontario in June of 2004. He worked at the Bonnieview Inn in Haliburton over the following summer, and began a two-year program in culinary arts at Georgian College in Barrie that September. Prior to attending college he had lived at his parents' home, but while he was attending school in Barrie he lived either in residence or in a house with roommates. Chad participated in a co-op program during the summer of 2005, and worked (and lived) at the Emerald Lake Lodge in Field, British Columbia. He then

returned to Barrie for his second year of college in September 2005, and worked part-time at Garraway's Bistro in Barrie through most of that academic year.

Chad graduated from Georgian College in April 2006. At that point he left the Barrie area and moved back into his parents' home. He worked again at the Bonnieview Inn from June through early September 2006, earning between \$11 and \$12 per hour, plus a share of tips. He also worked as a landscaper with a company called Earthscapes Landscaping, from late May to late June 2006. There is some evidence to suggest that he was paid as a subcontractor for this work. Chad was unemployed for most of September and October. On October 25, 2006, three days prior to the accident, he began a full-time job as an assistant to the head chef at the Old Country House in Haliburton, earning \$11 per hour.

Chad's tax return for 2006 indicates total declared earnings of \$5,256, although the amounts indicated as having been paid to him on the four Employer's Confirmation of income forms (OCF 2) for the period total \$6,929. No explanation was provided for this discrepancy.

Chad and both of his parents were examined under oath prior to the hearing, as mentioned above. Their evidence was generally consistent, and established that Chad's parents had paid his tuition fees and most of the cost of his books and supplies while he was away at school, but that he had covered his own living expenses. He also received a student loan from OSAP to assist with paying tuition, but when he missed the application deadline for the second academic year his parents loaned him \$2,000. The evidence was clear that he was expected to pay that back, and that he had in fact repaid the full amount by the time of the examinations.

Chad did not pay any rent to his parents after moving back into their home in April 2006. However, he testified, and his parents confirmed, that they had begun to discuss the issue shortly prior to the accident, and had agreed that as he had secured full-time work, he would begin paying rent in November 2006. While Chad did not recall any set amount

having been agreed to, his mother suggested that it would have been approximately \$200 per month.

Chad cooked dinner for the family once or twice each week, and paid for the groceries on these occasions. He was also responsible for doing his own and his parents' laundry, and either cutting the grass or shoveling snow, as required. Chad estimated that he spent approximately three hours each week performing these household chores, and stated that he did not get paid for doing them.

The evidence also indicated that Chad paid for his own car-related expenses, including insurance and gas, as well as for his cell phone, clothing, personal care and recreational expenses. He had approximately \$1200 in savings in a bank account, at the time of the accident.

Finally, Chad testified that although he had started working full-time at the Old Country House shortly before the accident, he had also been offered a job with Jamie Kennedy Kitchens in Toronto, and had planned to move there at some point with a friend.

Janet Olson of H&A Forensic Accounting examined the relevant financial documentation and prepared a report detailing her findings, at AXA's request. Ms. Olsen focused on the six-month period from April 29, 2006, the day Chad returned from Barrie and moved back into his parents' home, to October 27, 2006, the day before the accident. She concluded that Chad was not principally dependent for financial support upon his parents, as his financial needs were less than twice his financial resources during that period.

I note that Ms. Olsen's report overstates Chad's earnings during the relevant period by almost \$1500. She also estimates that Chad required approximately \$682 monthly to cover his accommodation needs, which is in contrast to the evidence that he lived rent free at his parents' house during the period she studied. As well, the list of monthly expenses prepared does not include any amounts for recreational activities or

entertainment, despite Chad's evidence that he golfed regularly and went out with friends to concerts and movies.

ARGUMENTS & ANALYSIS:

The parties agree that if Chad was principally dependent for financial support upon his parents, AXA would be the priority insurer in this case, given my earlier findings regarding the application of section 268(5.2) of the *Insurance Act*. If he is not determined to be dependent upon them, Pembridge would continue to be responsible for paying benefits. The relevant case law establishes that in order for someone to be considered to be principally dependent for financial support upon a parent, that parent must provide more than 50% of the financial support required to meet their needs.

The first step in the analysis is to determine the appropriate time frame to focus on. While a few different periods were suggested in the course of the parties' submissions, counsel agreed that the six-month period from late April to late October 2006 - being the point at which Chad finished school and moved back into his parents' home until the date of the accident - was the most appropriate. I note that during that period Chad worked part-time at a few different places, was then unemployed for six or seven weeks, and then began working full-time. I find that those six months accurately reflect the period of transition he had just emerged from at the time of the accident, as he shifted from the student phase of his life to the beginning of a career in his chosen field, and I agree that it is the most appropriate time frame to focus on.

Counsel for Pembridge submitted that when the details of Chad's earnings and expenses provided at the examinations are examined closely, it is clear that he was financially dependent upon his parents during that period. She reviewed the information obtained from Chad and both of his parents, and calculated that the total of his expenses over the period exceeded the figure for twice his earnings. She submitted that that meant Chad was chiefly dependent upon his parents for more than 50% of his needs, and accordingly met the definition of dependency.

Counsel for AXA disagreed. While he acknowledged that some of the figures in the accounting report were inconsistent with the numbers provided by the Carpenters in their evidence, he noted that the net effect of these inconsistencies – namely, overstating Chad’s monthly accommodation expense, not including the \$1200 in savings that Chad had in the bank at the relevant time, and not attaching a monetary value to the weekly chores Chad performed – result in the report being flawed in Pembridge’s favour. In other words, if the report was amended to take these amounts into account, the new calculation would indicate even more clearly that Chad was not financially dependent upon his parents during the period in question.

Mr. Pollack also urged me to draw an adverse inference from the fact that Pembridge did not file a responding expert’s report refuting the method or conclusion reached by the H & A report. He suggested that I be wary of accepting counsel’s calculations, and contended that they were not a substitute for expert evidence.

I have reviewed the H & A accounting report in detail, and find it to be of limited assistance in my analysis. Some of the assumptions underlying the figures used to arrive at the conclusion that Chad was not financially dependent upon his parents are simply inaccurate. As stated above, the figure used to represent his earnings over the relevant period is approximately \$1500 higher than what the Employer Confirmation of income forms indicate was paid to him (Earthscapes Landscaping income is overstated by \$758, Bonnieview Inn earnings overstated by \$718). While at first glance that may not seem to be a significant amount, the amounts in question are not large, and \$1500 represents close to 25% of his earnings over the period.

I have a similar concern with the expense figures used in the H & A calculation. A monthly “accommodation expense” figure of \$681.92 is included in the list of Chad’s monthly expenses, with the accompanying note explaining that it was derived from an estimate based on information obtained from Statistics Canada. Given the Carpenters’ evidence that Chad did not pay any rent to his parents during the relevant period, and that

they had discussed him paying rent in the range of \$200 per month as of November 1st, this figure is not accurate. Average estimates from Statistics Canada and Toronto Public Health were also relied on to obtain expense figures for food, personal care and medical expenses. These “general estimates” make up about half of the figures on the list of expenses, and are not consistent with the evidence provided by Chad and his parents.

As well, Chad testified that he played golf once or twice each week over the spring and summer, and also went out with his friends to movies and concerts. Ms. McAvoy estimated, and I agree, that based on his evidence of the costs of those pursuits, that this would add approximately \$500 to Chad’s monthly living expenses.

When the “estimated” figures above are removed and the figures provided by the Carpenters are “plugged in” to the calculation, the same result is reached. Deducting the \$682 monthly accommodation expense used by H & A from the list, and adding \$500 to reflect the recreation and entertainment expenses not included in the original list, a six-month expense figure of \$8,124 is obtained. On the earnings side, the total of the three OCF2 amounts over the period in question (Bonnieview Inn, Earthscapes and Old Country House) amounts to \$4,771. When that figure is doubled, an amount of \$9,542 is obtained. Applying the accepted formula, I am led to the conclusion that Chad was not financially dependent upon his parents for the period in question, as his earnings exceeded more than half of what he incurred in expenses.

As stated above, the evidence regarding Chad’s earnings over the period in question was inconsistent. He testified that he had declared all of his earnings in 2006, and the tax returns filed for that year show total earnings of \$5,256. However, when the OCF 2 amounts for the full year (the three employers referred to above, as well as Garraway’s Bistro in Barrie, where Chad worked part-time while in school from January to April 2006) are added together, an amount of \$6,929 is arrived at. Chad was not able to explain this discrepancy. Ms. McAvoy submitted that the income figure reported on the tax returns should be used in our analysis, as there was some evidence to suggest that Chad was paid as a subcontractor by Earthscape Landscaping, and that he would have therefore

incurred business expenses which would have reduced his net earnings. I do not accept that theory, as the only supporting evidence for that argument is a notation on the Employer's Form that seems to reference only one of the weeks that he worked.

Two other figures must be taken into account – the \$2,000 loan that Chad obtained from his parents that he claimed he had repaid by the time of the examinations, and the \$1200 in savings he had in a bank account. While it is not clear whether any part of the loan was repaid during the six-month period that is the focus of my analysis, I note that even if it was all repaid at that time so as to 'wipe out' his \$1200 of savings and add \$800 to the expense side of the ledger, the figures would still support the conclusion that Chad was not principally dependent upon his parents for financial support, and I so find.

While each case is based upon its particular facts, and the analysis is largely 'number-driven', I find that the evidence before me relating to the more general nature of the parties' financial relationship also supports the conclusion that Chad was not principally financially dependent upon his parents during the period in question. Although he lived in their home on a rent-free basis during those six months, that was about to change. His contributions toward the household's expenses were not insignificant – he bought groceries once or twice each week, and completed chores like laundry and grass cutting or snow shoveling on a regular basis. He was otherwise self-supporting, and was able to accumulate \$1200 in savings, just a few months after graduating from his college program. He was also able to repay the loan his parents had extended to him, when he missed the OSAP application deadline. Finally, and perhaps most importantly, he had just begun working full-time in his chosen field, and had a longer-term plan to move to Toronto and work for one of the most prominent organizations in the food and restaurant sector. In my view, these are all strong indicia of someone who is either financially independent, or at least, not dependent to the point where he relied upon his parents to provide for most of his needs.

Accordingly, I find that Chad was not financially dependent upon his parents at the relevant time, and that Pembridge is therefore the priority insurer and remains obligated to pay him any benefits that he is entitled to under the *SABS*.

In accordance with my finding above and the parties' Arbitration Agreement, AXA is entitled to claim costs of the proceeding from Pembridge. If counsel cannot agree on the quantum of costs payable, please contact me and I will hear submissions on that issue.

DATED at TORONTO, ONTARIO this _____ DAY OF SEPTEMBER, 2010.

Shari L. Novick
Arbitrator