

**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990,
c. I. 8, SECTION 268 and REGULATION 283/95**

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ECHELON GENERAL INSURANCE COMPANY

Applicant

- and -

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Chris T. Blom for the Applicant

Mark K. Donaldson for the Respondent

ISSUE IN DISPUTE:

A hearing was convened on April 15, 2011 in Toronto, Ontario. The following issue was put before me for determination:

1. Is Geshom Chikosa principally dependent for financial support or care upon his mother, Ruth Chikosa, State Farm's named insured ?

RESULT:

1. Mr. Chikosa is principally dependent upon his mother for care, and consequently State Farm is in priority to pay his accident benefits claim.

BACKGROUND:

Geshom Chikosa was injured when he was struck by a motor vehicle as he walked a bicycle across Kipling Avenue in Toronto, on November 26, 2008. Mr. Chikosa does not drive a motor vehicle, and was not a named insured on any auto policy. The vehicle that struck him was insured by Echelon General Insurance Company ("Echelon"). He submitted an application for payment of accident benefits under the *Statutory Accident Benefits Schedule* to Echelon, and they have paid benefits to him.

Mr. Chikosa was thirty-two years old at the time of the accident, and lived with his mother and brother. He suffered from schizophrenia, and was developmentally delayed. His mother drove a vehicle that was insured by State Farm Mutual Automobile Insurance ("State Farm") at the relevant time. Echelon contends that Geshom was either financially dependent or dependent for care upon his mother, Ruth and that State Farm is therefore in higher priority to pay the claim.

THE EVIDENCE:

No *viva voce* evidence was called at the hearing. Counsel had conducted examinations under oath of both the Claimant and his mother prior to the hearing, and referred to excerpts from the transcripts in their submissions. They were also able to obtain various documents relevant to the issues discussed, which were also referred to.

None of the relevant facts are in dispute. Geshom Chikosa immigrated to Canada from Zambia in 1997. His mother was his sponsor for immigration purposes, and he has lived with her since his arrival. One of his brothers had been living on his own, but moved back in with Geshom and his mother a few months before the accident. The three of them shared a three-bedroom apartment, in a subsidized housing complex in Etobicoke.

Geshom was diagnosed with schizophrenia a few years before the accident. He was also identified as being developmentally delayed. As a result of his disability, he initially qualified for a monthly pension from the Canada Pension Plan. In early 2008 he qualified for the Ontario Disability Support Program, and has received monthly payments of \$789 from the program since then. He also receives drug and dental coverage under that program.

Geshom takes medication daily to control his condition. His mother purchases the medication for him, and stated that she reminds him each evening to take his medication, as he has a tendency to forget.

Prior to the accident, Geshom participated in an “incentive earnings program” at Corbrook Awakening Abilities, a facility providing supported employment programs. He did ‘piece work’ on a casual basis, a few days each week, if work was available. The records from the facility show that he worked there throughout 2007 and for a few months in 2008. Any money Geshom earned at Corbrook was deducted from his ODSP payments. His mother said that he worked at Corbrook when “he feels better, when he was okay”.

The Corbrook file refers to various difficulties Geshom experienced during the period of time that he participated in the program, including appearing for work while under the influence of alcohol and/or marijuana, and having to appear in court as a result of being charged with drinking on public property. The counsellor noted that Geshom had been manipulated by “so called friends” into stealing beer. It appears that the charges were dropped or dismissed, but that he was placed in a Court Diversion Program, requiring him to attend a court-supervised program daily and meet with his community support worker twice each week.

Counsel were able to obtain a copy of Geshom’s file from the Ministry of Community and Social Services. It indicates that Ruth was appointed as Geshom’s “trustee”, meaning that she receives the monthly ODSP payments on his behalf, and is responsible for administering the money. The reason provided for her being appointed trustee was that Geshom was found “likely to use his financial support otherwise than for his own benefit”. Geshom and his mother have a joint bank account, into which she deposits his ODSP cheques. It was agreed that Ruth does all of Geshom’s banking, and makes any financial decisions required.

Geshom contributes \$550 each month from the above payment toward his room and board. He also has a daughter in Zambia, who at the time of the accident was 11 years old. He would send money on a monthly basis to her mother in Zambia, to assist in her support. The amounts sent varied between \$50 to \$200 per month, and the money transfers were facilitated by Ruth.

Ruth worked on a full- time basis as a machine operator at the relevant time. She advised that she made all of the meals at home, and did all of Geshom’s laundry. They would usually do the grocery shopping together. He did some cleaning and vacuuming around the house, and shovelled snow in the winter. Ruth advised that Geshom was able to stay home alone, but that she would regularly call to check up on him and he would call to let her know if he was going out. He would occasionally go to a neighbourhood park to

watch soccer games being played, or go to the mall to play video games. If he wanted to go anywhere else Ruth would drive him if she were able to, or he would take the bus.

Finally, Ruth reported that while she was involved in decisions relating to Geshom's health care, she did not have power of attorney over decisions relating to his personal care. When asked whether she thought Geshom would be able to live on his own, she responded that she felt that he could, but that he would need supervision.

Counsel for Echelon asserted that Geshom was not capable of living on his own. He filed a report from Sandra Vellone, a Rehabilitation Consultant and Certified Life Care Planner, who reviewed various medical reports, the COMSOC file and transcripts of the examinations under oath held. Ms. Vellone provided the opinion that Geshom was unemployable, requires supervisory oversight and frequently exercises poor judgment in keeping with the behaviour generally displayed of people with developmental disabilities of the type he suffers from. Ms. Vellone also opined that given the quantum of supervision provided by his mother, Geshom would be unable to live on his own. She likened the supervision provided by his mother to a model of care known as "Family Associate Care" or "Family Home Share", both of which are programs that can be provided through agencies in circumstances in which people do not have family members to provide support. She estimated the annual cost of this type of support to be \$37,000.

The parties agree that on a straight calculation of his ODSP earnings and his share of household expenses, Geshom does not meet the test of financial dependency on his mother, i.e. the \$9,468 he receives annually from ODSP exceeds his share of the household expenses. However, Echelon submits that the supervisory care and oversight that Ruth provides should be quantified as above, and included in the equation.

RELEVANT PROVISIONS:

Statutory Accident Benefits Schedule – Section 2(1):

“insured person”, in respect of a particular motor vehicle liability policy, means,

(a) the named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured and any dependant of the named insured or spouse, if the named insured, specified driver, spouse or dependant,

(i) is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or

(ii) is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse’s dependant,

In order for Geshom to fall within the above definition of an “insured person” entitling him to claim benefits from the State Farm policy issued to his mother, Ruth, he would have to be a “dependant” of hers. The *Schedule* defines that term as follows:

Section 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.

ANALYSIS and FINDINGS:

In order for Geshom to be a “dependant” of his mother’s, he must be determined to be principally dependent upon her for either financial support or care. A person is considered to be principally dependent for financial support on someone else if the cost of meeting their needs is more than twice the amount of their own resources. Put another

way, if a claimant has the financial ability to fund more than 50% of his or her financial needs, he or she is not considered to be principally financially dependent upon someone else. The analysis is “numbers-based”, and requires a claimant’s earnings or resources to be calculated, and compared to their expenses.

A different type of analysis is required when considering the issue of whether someone is dependent for care. The term “care” is not defined in the *Schedule*, and there have not been very many arbitration or court decisions in which the issue has been considered. Arbitrators have found that the assessment of dependency for care is more of a qualitative analysis, that should not take financial considerations into account. It requires a consideration of the Claimant’s physical, social and emotional needs, and the social and emotional support he or she receives from the person in question. As is often true, each case in which dependency for care is alleged must be considered on its own facts.

Counsel for State Farm contended that the assessment of a claimant’s financial dependence and his dependence for care should be conducted separately, and that the use of the word “or” in section 2(6) of the *Schedule* requires a ‘disjunctive’ analysis. I agree with this view, and consider each scenario separately below.

Is Geshom financially dependent upon his mother?

I was advised that Geshom receives \$789 per month in ODSP payments, totalling \$9,468 per year. When the household’s living expenses are calculated and divided among Geshom, his mother and his brother Andrew, Geshom’s share would be \$6,983 annually. Echelon concedes that these figures do not support a finding that Geshom is principally dependent upon his mother for financial support.

However, counsel for Echelon submits that the amount of \$37,000 should be added to the list of Geshom’s expenses, representing the cost of care provided by Ruth, as quantified by Ms. Vellone. Counsel for State Farm disputes this, and argues that the test for dependency for care must be analysed separately from that of financial dependency. There is no dispute that if this amount is added to the list of Geshom’s expenses, Geshom

would meet the test for financial dependency, as the cost of meeting his needs would then be more than double the amount of his resources.

I find that Geshom is not principally financially dependent upon his mother, as defined in the regulation. I do not accept that the estimated value that Ms. Vellone ascribes to the level of care that Ruth provides to Geshom should be included in the analysis. This is at best a notional figure: it is essentially an estimate of the cost of a program that an agency working with people with developmental disabilities would provide, if they were involved in managing Geshom's care. The reality is that Geshom lives with Ruth and she provides the care that she does, without receiving any compensation for her efforts. I find that the financial dependency analysis should not factor in the estimated monetary value of services or care, such as parental care and oversight, provided to Claimants by family members or other people they may be close to.

In my view, the more germane question is whether the level of care that Ruth provides is such that a principal dependency for care is created. I turn next to that analysis.

Is Geshom dependent upon his mother for care?

As stated above, the focus of this analysis must be on what the Claimant's physical, emotional and social needs are, and the extent to which the person in question provides for these needs. Counsel cited various cases in their submissions, many of which involve very different fact scenarios or consider the issue in a different context, such as whether someone qualifies for a death benefit under the *Schedule*.

There is one case that I find particularly relevant to this analysis. In *Lloyd's of London Insurance Company v. Wawanesa Mutual Insurance Company* (unreported decision of Arbitrator Jones, released March 2004), the arbitrator considered the amount of care provided to the Claimant, who suffered from Parkinson's disease, by a Mr. Hales, a long-time friend and fellow Anglican minister who had moved into the Claimant's condominium six years prior to the accident. The Claimant also received approximately ten hours of care each week from a home care agency.

The Claimant in that case was seventy-three years old at the time of the accident, and had been suffering from Parkinson's disease for almost 15 years. The degree of care he required varied each day. He was able to dress himself, but often required assistance with bathing. Mr. Hales estimated that he provided care to his friend on average between two and four hours per day. He prepared most of his meals, did the grocery shopping and occasionally helped to feed him if he was having a bad day. He occasionally assisted him with bathing, and regularly went for walks with him. He also helped him review bills and paperwork, and took him to the bank.

Arbitrator Jones determined that the Claimant could not have lived on his own, and that he was principally dependent upon Mr. Hales for care. He found that Mr. Hales provided physical care, as well as "emotional support and help" to the Claimant to the extent that he should be considered a "dependent" under the *Schedule*.

Wawanesa appealed the decision. Justice Rady upheld the arbitrator's findings, stating –

...Arbitrator Jones correctly concluded that the assessment of dependency for care cannot be determined on the same basis as financial dependency. As he said, "it is not capable of simple mathematical calculation". The issue requires both a quantitative and qualitative analysis. Qualitative factors will include social and emotional support.

One of the most significant qualitative factors influencing Arbitrator Jones' decision was the fact that ...[the Claimant] could not have lived on his own without significant support. Aside from the physical support from Mr. Hales and the other service providers, Mr. Hales provided social and emotional support. Mr. Hales undoubtedly provided ...[the Claimant] with companionship and a sense of security that someone was close by in the event help was needed.

...there was a sufficient evidentiary basis to conclude that Mr. Hales provided significant physical support in terms of meal preparation, dressing, housekeeping and for personal errands such as banking.

In my view, it is the cumulative effect of both the quantitative or qualitative factors that justify Arbitrator Jones' decision.

When the evidence regarding Ruth's contributions and involvement in Geshom's life are considered with these comments in mind, I conclude that Geshom is principally dependent for care upon his mother. While Geshom can dress and bathe himself, Ruth prepares his meals, and does most of his laundry and housekeeping chores. She purchases his medication, and ensures that he takes it daily. She drives him to places that he needs to go when she can, and attends medical appointments with him, often making decisions about his medical care. Significantly, she has complete control over his finances, administering and depositing his ODSP cheque and giving him money when he needs it. These concrete tasks can be considered 'quantitative factors'.

Turning to a consideration of the 'qualitative factors', it seems that unlike the situation described above, Ruth does not fulfil many of Geshom's social needs (not surprisingly, given that she is his mother). However, it is clear that she provides supervision or a level of oversight that is critical, given the poor judgment he has often exercised in the past, as a result of his illness or developmental deficits. While there was some evidence to suggest that his schizophrenia was well controlled by his medication, the Corbrook records contained various references to Geshom abusing alcohol or drugs, and being exploited by others. While Geshom is able to remain at home unattended, his mother calls at least once each day to check in on him. When he goes out of the house on his own, he will always tell his mother where he is going. I find that Ruth's presence and involvement in Geshom's life is analogous to the 'sense of security' provided by Mr. Hales and noted by the court in the case referenced above.

When all of the above factors are considered, I find that despite Geshom's ability to participate in a supported employment program at Corbrook, or go out and spend part of a day on his own while his mother is at work, he is reliant on his mother to the point where he should be considered to be principally dependent upon her for care, as defined in the *Schedule*. She not only provides assistance to him in many 'concrete' or quantitative ways, but also administers his medication, and directly manages his finances. Most importantly, her presence in his life provides him with the security and supervisory

oversight that allows him to go out into the community, knowing that she is always available to assist, if required.

For all of the foregoing reasons, I find that Geshom Chikosa was principally dependent for care upon his mother Ruth Chikosa at the relevant time, and that he is accordingly “an insured” under the State Farm policy issued to her. In accordance with the ‘priority scheme’ set out in section 268(2) of the *Insurance Act*, State Farm is in higher priority to pay his accident benefits claim, and should reimburse Echelon General for all benefits reasonably paid out to date, and take over adjusting the file.

I remain seised of this matter if the parties experience any difficulties in implementing the decision. If counsel cannot agree on the quantum of costs payable by State Farm to Echelon, they may advise me in writing and arrangements for a further discussion will be made.

DATED at TORONTO, ONTARIO this _____ DAY OF JULY, 2011.

Shari L. Novick
Arbitrator