

**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:

RBC INSURANCE COMPANY OF CANADA

Applicant

- and -

ROYAL and SUNALLIANCE INSURANCE COMPANY

Respondent

AWARD

COUNSEL:

Aldo Picchetti for the Applicant

Karina Kleiner-Frost for the Respondent

ISSUE:

1. Was Mohamad Khazaal principally dependent for financial support upon his father, Abdul Hassan Khazaal, at the time of the accident and therefore an “insured person” under his father’s Royal and SunAlliance policy?

RESULT:

1. No, the Claimant was not principally dependent for financial support upon his father at the relevant time. RBC Insurance is therefore the priority insurer and shall continue to adjust the claim.

BACKGROUND:

Mohamad Khazaal was injured when the vehicle in which he was an occupant was involved in an accident on January 17, 2008. He was nineteen years old at the time. The vehicle was being driven by a friend, and was insured by RBC Insurance Company of Canada (“RBC”). Mr. Khazaal submitted an application for payment of accident benefits to RBC, and they have been paying benefits to him and on his behalf.

RBC claims that Royal and SunAlliance Insurance Company (“Royal”) is in higher priority to pay the claim in accordance with subsection 268(2) of the *Insurance Act*. Royal issued an auto policy to Abdul Hassan Khazaal, the Claimant’s father, which was in effect at the time of the accident. The Claimant was not a listed driver on the policy, but RBC alleges that he was principally dependent for financial support upon his father, and that he was therefore an “insured person” under the Royal policy.

Royal denies that the Claimant was dependent upon his father, and contends that RBC is in priority to pay the claim.

RELEVANT PROVISIONS:

Insurance Act - Section 268(2)

(2) The following rules apply for determining who is liable to pay statutory accident benefits:

1. In respect of an occupant of an automobile,

i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,

iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,

iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.

Statutory Accident Benefits Schedule –

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

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

(i) if the named insured, specified driver, spouse or dependant is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or

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.

EVIDENCE:

The Claimant provided a sworn statement to RBC in early February 2008, a few weeks after the accident. He was also examined under oath in the context of this proceeding in December 2011. Various documents were obtained through the Claimant's counsel as a result of that process. These documents and transcripts of the evidence provided at the examination were filed at the hearing and relied on by the parties. Finally, the Claimant and his father, Abdul Hassan Khazaal, also testified at the arbitration hearing.

The above evidence discloses the following facts: The Claimant graduated from high school in January 2007, approximately one year prior to the accident in question. He was living (and still lives) with his parents and brother in an apartment in a community housing complex in Windsor, Ontario. He estimated that the rent for the apartment, including all utilities, was \$300 per month. Mr. Khazaal worked part-time during his last two years of high school, and the documentation filed indicates that he earned approximately \$2600 per year in each of those years.

The Claimant began a one-year "pre-nursing" program at St. Clair College in September 2007. He testified that in the nine months between graduating from high school and starting this program, he worked at Tim Horton's on a part-time basis. He was paid \$8.25 per hour, plus tips, and his hours varied between fifteen and thirty-two hours per week. He continued to work part-time when he started his courses at St Clair College, and his T4 slip for 2007 indicates earnings of approximately \$5,200 from that job.

In the statement provided in February 2008, Mr. Khazaal explained that his father had been laid off from his job, and was collecting Employment Insurance benefits. He understood that they would expire in two months. His mother was not employed outside of the home. He stated that he contributed between \$150 and \$200 per month to the household towards his room and board, and that he paid another \$50 per month for the internet service on the family's home computer. He also stated that he paid for his own clothing and entertainment expenses.

When questioned in greater detail about this at the examination under oath in December 2011, the Claimant explained that there had not been a formal arrangement with his parents about his contributions to the household, and that the amount he paid each month depended on how much he earned. He agreed that during the year before the accident, he did contribute \$150 or \$200 per month “more often than not”. He explained that his parents paid for the household groceries, but that he paid all expenses related to his cell phone, clothing, entertainment, personal grooming and fitness club membership. He estimated that these expenses totalled approximately \$2300 per year.

At the arbitration hearing, Mr. Khazaal testified that in addition to his job at Tim Horton’s, he had also worked occasionally at his brother-in-law’s store before the accident. The store was called Body Max Nutrition, and sold nutritional supplements to weight lifters. He explained that he was sometimes paid in cash, and other times received free protein supplements in exchange for the time he put in. His recollection of the hours worked at the store and the money he earned was unclear, but he estimated that he worked six Saturdays during the summer of 2006, and was paid approximately \$50 per day. He also recalled that he had worked six days per week at the store for two months, at a rate of \$7 per hour, at some point in 2007 when his brother-in-law went to Dubai to find a job.

Based on this evidence, Mr. Khazaal would have earned approximately \$2900 in 2007 from his hours worked at Body Max. He stated that he did not declare this income, and it does not appear on his tax return. He also stated that he did not contribute any of this money toward his family’s household expenses.

Mr. Khazaal also testified that he had received an OSAP loan in October 2007 to cover the cost of his tuition fees and living expenses while at St Clair College.

As noted above, the parties received copies of the Claimant’s bank records for the relevant period. They indicate various transactions for relatively low amounts, and rarely

indicate a bank balance over \$500. There are no regular monthly withdrawals of \$150 or \$200, the amount that Mr. Khazaal stated that he contributed toward the household expenses. When he was asked why the bank statements did not evidence these regular withdrawals, and indicated a low balance throughout the period in question, the Claimant stated that he would often cash his paychecks, and was in the habit of carrying large amounts of cash around as opposed to leaving it in the bank.

Mr. Khazaal's father also testified at the hearing. He initially stated that he had worked during the summer of 2007, but was laid off from his job after the summer. He stated that he had collected approximately \$600 to \$700 per month in EI benefits while he was laid off, and that he had accumulated some savings from previous employment. Upon further questioning about his earnings during 2007, he stated that he had only received EI benefits.

The Claimant's father testified that the family paid \$380 per month in January 2008, at the time of the accident, for rent and utilities. He estimated that they spent approximately \$600 per month on groceries. He confirmed that the Claimant had contributed between \$150 and \$200 per month since he had started working, including the time that he was attending school.

When asked whether his older son also contributed to the household expenses, Mr. Khazaal stated that he may have purchased some groceries for the family during the period in question, but that he had not otherwise contributed financially to the household as he was attending university in the United States and was required to save his money in order to pay the high tuition fees charged.

ARGUMENTS & ANALYSIS:

The first issue to determine in a financial dependency case is the appropriate time frame to consider when analyzing a claimant's earnings and expenses related to those of the person upon whom he or she is alleged to be dependent. In the case of a young person in transition between school and work, or commencing college or university after a brief

period of post-high school employment as is the case here, the choice of time frame to consider will often dictate the result. In this case, RBC contends that it is appropriate to go back one or two years prior to the accident, in order to get an accurate picture of Mr. Khazaal's circumstances. Counsel for Royal submits that the Claimant's circumstances changed significantly in September 2007 when he began full-time studies, and that the few months between September 2007 and the accident in January 2008 is the appropriate 'window' to consider.

Mr. Khazaal finished high school in January 2007, one year prior to the accident. He testified that he worked part-time at Tim Horton's for approximately nine months, and then started a "pre-nursing" program at St Clair College in September 2007. He continued to work part-time hours at Tim Horton's after he started school. He testified that he could not recall whether his hours of work changed after starting school. In the circumstances, I find that the appropriate time frame to consider is the year preceding the accident, namely January to December 2007. While the focus of his life may have shifted once he began his pre-nursing studies in September, it appears that (unlike in most other cases), his earnings and living arrangements did not change significantly.

The documentary evidence filed discloses that the Claimant earned approximately \$5300 from his part-time job at Tim Horton's in 2007. He also testified that he earned approximately \$2900 in cash from filling in at Body Max Nutrition, while his brother-in-law was in Dubai. If that evidence is accepted, the Claimant's total earnings for 2007 were approximately \$8200.

On the expense side, the evidence indicates that the monthly rent (including utilities) for his family's apartment at the relevant time was \$380. While the Claimant testified that the family paid \$300 per month, Mr. Khazaal's father, who actually paid the rent, stated that it was \$380 per month, and I accept his evidence on this point over that of the Claimant. His father also testified that the family spent approximately \$600 per month on groceries. The Claimant testified that the monthly internet fee was \$50, and that his father paid for the phone, which I estimate to be another \$50 per month. When those amounts

are added together and split equally among the four people living in the apartment, a monthly amount of \$270 per person for household expenses is reached. Estimating Mr. Khazaal's other expenses at \$200 per month (he testified the various items amounted to \$2300 per year), I estimate his total living expenses to be \$470 per month, or \$5640 per year.

I also accept that the Claimant contributed between \$150 and \$200 per month toward his room and board, and paid \$50 per month for the household internet charges.

Counsel for RBC submitted that the Claimant's evidence at the hearing regarding his earnings from his brother-in-law's store should not be accepted. He submitted that Mr. Khazaal did not mention this income in the statement he provided within a few weeks after the accident, nor at the examinations under oath held in 2011. When asked at the hearing why he had not referred to these earnings earlier, Mr. Khazaal responded that no one had asked him about it, and that all of the questions about his earnings concerned his Tim Horton's job.

Having heard the Claimant's testimony at the hearing, I am prepared to accept his evidence that he worked on a casual basis at his brother-in-law's store during the relevant period. He answered all questions put to him in a straightforward manner, and has no motivation to lie about having earned extra cash for the hours he worked at Body Max. He was frank about the fact that he was paid in cash (or nutritional supplements) and that he did not declare the income. I do find it difficult, however, to definitively determine the amount of his earnings from the store.

In the end, I find that the amount of the Claimant's earnings at Body Max do not affect the ultimate outcome. Counsel for Royal submitted that the sole focus should be on whether Mr. Khazaal was principally dependent upon his father for financial support during the relevant period, and that RBC has not met the onus it faces to prove that. I agree. Simply put, RBC must show that the Claimant's father contributed more than 51% per cent toward Mr. Khazaal's expenses during the relevant period. On the evidence

before me, it has not done so. The Claimant's earnings from Tim Horton's during 2007 were approximately \$5200. As calculated above, his expenses for the year were \$5640. On that analysis alone, his earnings cover over 90% of his expenses. If his Body Max earnings are added to the analysis, his total earnings for the year would exceed his expenses.

Counsel for RBC contended that annual earnings of \$5200 are not sufficient for anyone to live independently, and that the only way Mr. Khazaal was able to manage financially was because he lived in his parents' home and benefitted from their assistance and services. This may well be so. While he clearly derived a benefit from living with his family, and it would often be accurate to state that earning just over \$5,000 per year would not be enough to support oneself, the evidence in this case indicates that the Claimant's expenses were also fairly modest. The rent for the apartment shared by the family was only \$380 per month, and Mr. Khazaal's other expenses were fairly low.

In any event, the dependency test that I must apply is *whether or not his father contributed more to his expenses than he did himself*. The test is a relative one, such that the actual amounts earned by a claimant are less important than the relative contributions between himself and his father.

Comparing the household expenses to Mr. Khazaal's contributions, it appears that his monthly payments of \$150 to \$200 covered between half and three-quarters of the expenses apportioned to him (\$270, as calculated above). He also testified that he paid for all of his other expenses himself, and that his father neither contributed nor gave him any spending money. This is not surprising, given that his father was unemployed for a large part of the period in question, and collected only \$600 to \$700 per month in EI benefits.

It is clear from the evidence before me that the Claimant's father did not contribute more toward his needs and expenses than he did himself.

While I agree with counsel for RBC's contention that his mother's non-monetary contributions of cooking, cleaning the apartment and doing the laundry provided a benefit to Mr. Khazaal, the monetary value that should properly be assigned to these tasks would not be such that the final outcome would be altered.

Consequently, I find that Mr. Khazaal was not principally dependent for financial support upon his father, Royal's insured. Pursuant to section 286(2) of the *Act*, RBC is therefore on higher priority to pay his accident benefits claim.

The arbitration is hereby dismissed against Royal.

COSTS:

In light of my findings above, RBC shall indemnify Royal for its legal costs related to the arbitration, on a partial indemnity basis. If counsel cannot agree on the quantum of costs payable, please contact me in writing and I will either solicit written submissions on the issue or convene a teleconference to discuss it.

I also find that RBC is liable to pay the arbitration fees and disbursements related to the hearing held. I will forward my account to counsel for RBC's attention in due course.

DATED AT TORONTO, ONTARIO, THIS DAY OF OCTOBER, 2012.

Shari L. Novick
Arbitrator