

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, 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:

MOTORS INSURANCE COMPANY

Applicant

- and -

COACHMAN INSURANCE COMPANY

Respondent

AWARD

COUNSEL:

J. Claude Blouin for the applicant

Kenneth J. Gerry for the respondent

ISSUES:

1. Was Mr. Ju Ok Yoon a dependent of his son and daughter in law at the time of the motor vehicle accident and who is responsible to pay accident benefits to or on behalf of Mr. Yoon?

ORDER:

1. Mr. Ju Ok Yoon was a dependent of his son and daughter in law at the time of the accident and accordingly Coachman Insurance Company is responsible for paying accident benefits to or on behalf of Mr. Yoon.

HEARING:

1. The arbitration hearing was held in the city of Toronto in the province of Ontario on June 28, 2004.

FACTS AND ANALYSIS:

This dispute arises out of a motor vehicle accident which occurred on January 22, 2001. On that day, Mr. Ju Ok Yoon was a pedestrian when he was hit by a motor vehicle insured by the applicant, Motors Insurance Company (“Motors”). Mr. Yoon did not have a motor vehicle liability policy and a completed accident benefit application was forwarded to Motors as the insurer of the striking vehicle. Motors, as required by the Insurance Act, commenced paying accident benefits to Mr. Yoon, however, it subsequently served Coachman with a Notice of Intention to Dispute, claiming that Mr. Yoon was dependent for financial support upon his son and daughter in law and accordingly Coachman should pay the accident benefits.

THE LAW:

Pursuant to section 268 (2) of the Insurance Act, the insurer of an automobile in respect of which the non-occupant is an insured has priority and is liable to pay. As Mr. Yoon had no motor vehicle liability of his own, the only way that Mr. Yoon can be considered a named insured is if he can be considered a dependent of a named insured pursuant to section 268 (5) of the Insurance Act. That section states that:

“despite sub section (4) if a person is a named insured under a contract evidence by a motor vehicle liability policy or the person is the spouse or same sex partner or a dependent, as defined in the statutory accident benefits schedule, of a named insured, the person should claim statutory accident benefits against the insurer under that policy.”

Section 2 (6) of Bill 59, the applicable statutory accident benefits schedule, provides that a person is a dependent of another person if the person is principally dependent for financial support or care on the other person or the person’s spouse or same sex partner.

It is the contention of the applicant that Mr. Yoon was principally dependent upon his son and daughter in law for financial support at the time of the accident.

The courts have interpreted of the issue of financial dependency on many occasions. The guiding principals have been set out by Mr. Justice O’Brien in Miller vs. Safeco 1985 50 O.R. (2nd, 797) and approved by the Court of Appeal. The criteria to be considered are:

1. the duration of the dependency
2. the amount of the dependency
3. other financial needs of the alleged dependent
4. the ability of the alleged dependent to be self supporting

While these criteria were initially applied to earlier legislation, they have been held to apply Bill 59 on numerous occasions.

Having set out the criteria to be applied, it now remains to turn to the facts of this case. At the time of the accident Mr. Yoon was approximately sixty-three years of age. He had immigrated to Canada and had been residing with his son, Sung Ku Yoon, and daughter in law, Young Soon Yoon, since 1992. Their two children, then aged fifteen and nine lived in their home as well.

In some cases, the issue of what time frame should be used to determine the issue of dependency arises. In this case, that issue is relatively straightforward. Mr. Yoon's living and financial arrangements had been quite stable for quite some time. He had an initial stroke in 1998 or 1999 which briefly affected his work and income situation and a second, more significant stroke, in or about October 2000. By the time of the accident, which occurred on June 22, 2001 Mr. Yoon had re-established a fairly stable living and working pattern. Accordingly by early 2001 his situation was such that his monthly income and expenses fairly accurately reflected his financial situation.

In my view the major issues in this case revolve around his level of income and expenses. I will deal first with the issue of income.

It was the evidence of Mrs. Yoon, who testified at the hearing, and Mr. Sung Ku Yoon, whose examination for discovery transcript was filed at the hearing, that Mr. Yoon Sr. had worked for his son in the son's landscaping business for many years prior to the accident. Mr. Yoon Sr. did such things as cut the grass, and in the winter, shovel snow from sidewalks. Prior to his second stroke, Mr. Yoon Sr. worked essentially full time and according to Mr. and Mrs. Yoon Jr. received \$350 a week for his work. After the second stroke Mr. Yoon apparently worked 3-4 days per week. The second stroke had left him with some minor deficits. I have no difficulty in finding that Mr. Yoon Sr. was employed prior to the accident. This was the evidence not only of Mr. and Mrs. Yoon but also confirmed by a number of letters filed as the exhibits from various persons who wrote that Mr. Yoon Sr. had cut their lawns, etcetera.

The real issue, however, is the amount of income that Mr. Yoon Sr. made from this work prior to the accident.

The evidence of Mr. and Mrs. Yoon Jr. was that Mr. Yoon Sr. made \$350 per week and had been doing so since the early 1990's. The evidence was that he was paid cash by his son for this work. This is not a totally unusual situation, especially in small, family-run operations. It does, however, make it more difficult to determine what Mr. Yoon Sr.'s income was prior to the

accident. While it was the evidence of Mr. and Mrs. Yoon Jr. that he made \$350 per week, this evidence cannot necessarily be accepted at face value. Mr. Yoon applied for income replacement benefits from the accident benefit carrier and accordingly, if Mr. Yoon Sr. was found to have had a higher pre-accident income, he would receive a higher income replacement benefit. Accordingly, it is important to look at the available documentary evidence with regard to Mr. Yoon Sr.'s income.

Tax returns for Mr. Yoon Jr. were filed at the hearing going back to 1998. In 1998 the business had a declared income of \$40,550 but no deduction for employee salaries, wages or benefits. In 1999 revenue from the business was \$44,589. 27 but again there was nothing shown for salary, wages or benefits. There was, however, \$4,255 shown for casual labour which may or may not have covered Mr. Yoon Sr. In 2000, Mr. Yoon Jr.'s business income was \$46,090, again with no salaries but casual labour of \$5,625. This matches the income that Mr. Yoon Sr. declared in his 2000 income tax return. In 2001, the year of the accident, Mr. Yoon Jr.'s business declared \$42,979 of revenue and \$10,300 of salaries, wages and benefits.

I note, before leaving Mr. Yoon Jr.'s income tax returns, that his after expenditure business arranged were \$12,718 in 1998, \$13,486 in 1999, \$14,833 in 2000 and \$10,092 in 2001. Clearly Mr. Yoon Jr. could not have offered to pay his father \$350 a week based on the revenue that he revealed to Revenue Canada. When questioned why he did not declare his father's salary as an expense, and therefore a deduction on his income tax, Mr. Yoon Jr. stated that he did this on the advice of his accountant. I note that the accountant was not called as a witness and this explanation did not enhance Mr. Yoon's credibility,

Mrs. Yoon Jr. testified at the trial that her husband paid Mr. Yoon Sr. paid \$350 a week cash. She also testified that her father in law paid her \$250 per week for room and board. She stated that on some occasions she would put this money into her savings account. While she did produce a transaction register for his chequing account, she did not produce any record of her savings account.

Before leaving this issue, I also note that after Mr. Yoon Sr.'s accident, he was not replaced by a full time worker, but rather by Mr. Yoon Jr.'s son who worked only 2 to 3 days per week.

I am prepared to accept that persons do not always declare all their income, especially in small businesses and the courts and arbitrators have acknowledged income for accident benefit purposes well beyond what is declared. However, in this instance, I am not satisfied based on the evidence presented, that Mr. Yoon Sr.'s income was more than the \$5,625 declared in his 2001 income tax return.

Counsel for the respondent submitted that I should deem Mr. Yoon Sr. to have had the capacity to earn a higher income if I found that he in fact was not paid the \$350 per week. He relies in part on the decision of Liberty vs. Federation [2000] O.J. No. 1234 (O.C.A.) and Co-operators vs. Her Majesty the Queen [unreported decision of Arbitrator Jones, August 2001]. In Liberty Arbitrator Samis stated:

Earnings are evident of capacity. But individuals may not be earning up to their capacity... on the other hand, a person who could earn significant income, but simply chooses not to, can't be regarded as dependent in the sense that a need for financial support is imposed on the person.

In that case an able bodied young man was not working, but Arbitrator Samis found that he had the capacity to earn \$300 per week and was therefore not dependent upon his parents.

While I am in agreement with the Liberty decision, I do not think that it is applicable to this situation. Mr. Yoon Sr. was a person with somewhat limited physical abilities working an indefinite number of hours at a declared rate of pay. I am of the view there are simply too many unknowns to apply the Liberty approach in this instance.

EXPENSES:

As mentioned above, Mr. Yoon Sr. was living with his son, daughter in law, and their two children at the time of the accident. It was the evidence of Mrs. Yoon that Mr. Yoon Sr. paid her \$250 per week for room and board. I have some reservations in accepting this as Ms. Yoon did not produce her savings account register to show any such deposits nor did the register for the other account, which she did produce, show any such deposits. I am prepared to accept that it is possible that she could have simply used the cash to pay for groceries and other expenses. My discomfort with this assumption is increased, however, by the fact that Mr. Yoon Jr. seems somewhat unaware of these weekly transactions. When questioned at the examination for discovery Mr. Yoon Jr. stated as follows:

“Q: I see. And did he pay you and your wife to live at your house?”

“A.: He didn’t pay to me or to my wife but he gave sometimes money to my children for pocket money.”

Later in the discovery he stated:

Q: “Alright. Aside from giving money to the kids and not calling it money to live, did your father give any money to your wife or yourself on a weekly basis or a monthly basis?”

A: “Not regularly.”

A.: “Uh, yeah.”

Q.: “Okay, how often would he give you money?”

A.: “I don’t know – I don’t recall he paid us I don’t think so.”

In light of Mrs. Yoon’s position that she received \$250 per week from Mr. Yoon Sr. for household expenditures and board, I find her husband’s lack of knowledge of these supposed weekly transactions surprising.

Based on the evidence provided to me at the hearing, the joint monthly family expenses can be summarised as follows:

<u>ITEM</u>	<u>AMOUNT</u>
1. Mortgage payments	\$1,026.00
2. Property taxes	\$160.28
3. Gas	\$140.12
4. Water	\$47.39
5. Hydro	\$73.00
6. Telephone	\$42.00
7. Cable	\$36.04
8. Pontiac motor vehicle	
Gas	\$120.00
Maintenance	nil
Loan	\$279.00
9. Safari van	
Gas	\$160.00
Maintenance	\$83.00
Car Insurance	\$172.10
10. House Insurance	\$27.16
11. Groceries	\$1,000.00
12. Entertainment	\$500.00
TOTAL	\$3,866.09

While there was some limited information with regard to other expenses, the information regarding them was insufficient and too vague to properly assess them and include them in the overall calculations.

The courts and arbitrators have held, in numerous cases, that it is appropriate to put a value to the room, board and other items received when considering the issue of dependency (see: Co-operators vs. Her Majesty the Queen (unreported decision of Arbitrator Jones, August 2001)).

I find that this is an appropriate approach to use in this case. In arriving at the above calculation I have excluded anything from it that would be considered an expense for just one of the parties and not all, as they do not all benefit from it. I have also excluded from this figure those expenditures which are exclusive to Mr. Yoon Sr. as they would not be shared expenses for our purposes.

If the total joint family monthly expenses are \$3,866.09, this figure must be divided by five, being the number of family members in the household, for a person monthly expense of \$773.21.

One must then add those expenses which are attributable only to Mr. Yoon Sr. The evidence led at the hearing reveals the following such expenses:

Clothes	\$150.00
Medication	\$42.00
TOTAL	\$192.00

The joint and exclusive expenditures attributed to Mr. Yoon Sr. are therefore \$965.21 per month. There was some evidence led as to what activities Mr. Yoon Sr. did in the household and what other members of the household did for him. The amount of work done, or benefit received did not amount to so much that it should, in my view taken into account when determining the issue of financial dependency.

In order to be financially dependent, one's needs must be more than twice the claimant's resources. In this case, Mr. Yoon's needs were \$965.21 per month. His income was \$5,625 or \$468.75 per month. This is less than half his needs and therefore Mr. Ju Ok Yoon was a dependent of his son and daughter in law.

ORDER:

Mr. Ju Ok Yoon was a dependent of Mr. Yoon Jr. and therefore Coachman Insurance Company is responsible for payment of accident benefits to or on behalf of Ju Ok Yoon.

COSTS:

In the event that the parties are not able to agree upon the issue of costs, I may be spoken to.

Dated this _____ of September, 2004 in the city of Toronto.

**M. Guy Jones
Arbitrator**