CITATION: Royal and Sun Alliance Insurance Company of Canada v. Axa Insurance Inc., 2015 ONSC 217
COURT FILE NO.: CV-14-505877
DATE: 20150112

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
ROYAL AND SUN ALLIANCE INSURANCE COMPANY OF CANADA	)	*Lora Castellucci* for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
AXA INSURANCE INC.	)	*Marni Miller* for the Respondent
	)	
Respondent	)	
	)	
	)	
	)	**HEARD**: January 7, 2015

PERELL, J.

REASONS FOR DECISION

[1] Pursuant to the provisions of the *Insurance Act*, R.S.O. 1990, c. I.8, the Applicant, Royal and Sun Alliance Insurance Company of Canada ("Royal"), and the Respondent, Axa Insurance Inc. ("Axa"), arbitrated a priority dispute about which insurer was responsible for the statutory accident benefits (SABs) of Steven Jobin, a pedestrian injured in a motor vehicle accident that occurred on August 28, 2010.

[2] Royal insured the driver of the vehicle that struck Steven, and Steven submitted a claim for accident benefits to Royal, which it has paid. Royal, however, contends that Axa should be responsible for the SABs, because Axa insured Steven's stepfather, Wayne Holtom, and although Steven was not a named insured under Mr. Holtom's Axa automobile insurance policy, in accordance with the priority rules set out in s. 268(1) of the *Insurance Act*, Axa would be responsible for the SABs - if Steven was "principally dependent" for financial support upon his parents.

[3] The Arbitrator, Kenneth Bialkowski, in an award dated May 7, 2014 decided, however, that Steven was not "principally dependent" on his parents.

[4] Under the Arbitration Agreement between Royal and Axa, a party may appeal without leave, and Royal appeals the Arbitrator's award. For the Reasons that follow, Royal's appeal is dismissed.

[5] On this appeal, Royal's main argument is that: (a) in deciding whether or not Steven was principally dependent, the Arbitrator was deciding an issue of law; (b) in accordance with the standard of appellate review, an Arbitrator must decide issues of law correctly; (c) the Arbitrator's decision was incorrect and not supported by the evidence; and, (d) therefore, the appeal should be allowed and the Arbitrator's award set aside.

[6] Royal's alternative argument is that: (a) if deciding whether or not Steven was principally dependent is an issue of mixed fact and law, then in accordance with the standard of appellate review, an Arbitrator must decide the issue reasonably; (b) in this case, however, the Arbitrator's decision was unreasonable and not supported by the evidence; and (c) therefore, the appeal should be allowed and the award set aside.

[7] On this appeal, Axa's counterargument is that the Arbitrator's decision about principal dependency was an issue of mixed fact and law and the appeal should be dismissed because the Arbitrator's decision was reasonable and supportable on the evidence.

[8] Before getting into the details of these arguments, I can say that I disagree with Royal's arguments and I agree with Axa's counterargument.

[9] I disagree with the premise of Royal's main argument that an Arbitrator's decision about dependence is an issue of law that must satisfy a correctness standard.

[10] Provided that the arbitrator applies the appropriate legal test, the jurisprudence about priority disputes on the issue of dependency establishes reasonableness as the standard for appellate or judicial review of an arbitrator's decision. See: *Oxford Mutual Insurance Co. v. Co-Operators General Insurance Co.* (2006), 83 O.R. (3d) 591 (C.A.) at paras. 22 and 23.

[11] In *Security National Insurance Co. v. The Wawanesa Mutual Insurance Company,* 2014 ONCA 850 at para. 4, the Court of Appeal stated that the issue of principal financial dependency is a question of fact and, absent palpable and overriding error, the finding is entitled to deference on appeal.

[12] For the purpose of determining SABs and who is responsible for paying them, an arbitrator's decision about dependency is entitled to deference, unless the arbitrator's decision is unreasonable: *Oxford Mutual Insurance Co. v. Co-Operators General Insurance Co., supra*; *The Dominion of Canada General Insurance Company v. MVACF*, 2013 ONSC 4717 at paras. 17, 25; *Jevco Insurance Company v. Gore Mutual Insurance Company*, 2014 ONSC 3741 at paras. 32, 36; *Gore Mutual Insurance Co. v. Co-Operators Insurance Co.* (2008), 93 O.R. (3d) 234, (S.C.J.).

[13] In reviewing the decisions of tribunals, issues of law are subject to a correctness standard and decisions of mixed fact and law are subject to a reasonableness standard: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. In *Dunsmuir* at para. 47, the Supreme Court explained that a "reasonableness" assessment is one that determines "whether the decision falls within a range of possible, acceptable outcomes, which are defensible in respect of the facts and the law."

[14] In the arbitration and on this appeal, there are some undisputed legal and factual issues, but there is also a major dispute about Steven's earnings and his earning capacity at the time of the accident and about his dependency on his mother and stepfather.

[15] The Arbitrator heard evidence from: (1) Steven; (2) his stepfather, Mr. Holtom; (3), Steven's mother, Tracy Jobin; and (4) Karim Nathoo, owner and operator of a landscaping

business, known as KT City, which had employed Steven from time to time. Highly disputed matters were the extent of and durations of Steven's intermittent employment with KT City.

[16] There is, however, no doubt that Steven was paid in cash in payments made off the business's books and without documentation.

[17] The Arbitrator also had the transcript evidence from Steven's discoveries in two civil personal injury actions, which evidence was read into the record.

[18] The Arbitrator also had two forensic reports. In the report of LBC International Accounting, the expert's opinion was that Steven's financial needs were $22,451 and that his financial resources were $11,450, making Steven principally dependent on his parents.

[19] In the report of Janet Olson of H & A Forensics, which had been retained by Axa, Ms. Olson's opinion was that Steven's financial needs were $17,237 annually and that his yearly financial resources were $17,409 and, thus, Steven was not principally dependent on his parents.

[20] From a legal perspective, it is not disputed that under s. 2(1) of the *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996*, an "insured person" includes the dependent of the named insured or his or her spouse and a person is a dependent of another person if the person is principally dependent for financial support on the other person or the other person's spouse.

[21] In terms of legal principles, it is also not disputed that criteria for determining dependency for the purposes of the SABS were established by the Court of Appeal in *Miller v. Safeco* (1986), 48 O.R. (2d) 451 (H.C.J.) aff'd 50 O.R. (2d) 797 (C.A.).

[22] In *Miller v. Safeco,* the Court held that the relevant criteria are: (1) amount of dependency; (2) the duration of dependency; (3) the financial and other needs of the alleged dependent; and (4) the ability of the alleged dependent to be self-supporting. See also: *Security National Insurance Co. v. The Wawanesa Mutual Insurance Company,* 2014 ONCA 850, reversing 2013 ONSC 7589. In the case at bar, Arbitrator applied these criteria in reaching his decision.

[23] As a factual matter, it is not disputed that on August 28, 2010, Steven, who was born on April 7, 1988, was injured in a motor vehicle accident. At the time of the accident, Steven was 22 years of age, single, without dependents, and living at the rented home of his stepfather and his mother, Tracy Jobin, in Richmond Hill, Ontario. Steven's brother Shay and their sister's son, Isaiah, also lived in the home.

[24] Steven's highest level of education was Grade 9, and at the time of the accident, Steven was not attending school. In his Application for Accident Benefits, Steven stated that he was unemployed. There are other documents, including his Ontario Works file, that indicate Steven's unemployment, and there was evidence that for a time, he was receiving social assistance benefits. In any event, he had no savings and no property to speak of, and although there was evidence that he borrowed money from his family, there was also evidence that he, albeit irregularly, contributed to the family's meagre financial purse.

[25] Steven certainly had what might be described as an irregular employment history, and he made an irregular and sporadic contribution to the household's expenses when he was living at home.

[26] For the period after Steven left school, the evidence established that he worked irregularly as a labourer for some landscaping companies, most particularly for Mr. Nathoo, who would pick up Steven, who does not drive, and take him to work. There was a period in which Steven worked as a labourer in British Columbia.

[27] The Arbitrator concluded that Steven was, in fact, employed at the time of the accident and was being paid off the books by KT City.

[28] The heart of the Arbitrator's Decision is found on pages 8 and 9 of his Reasons for Decision, where he stated:

> The first issue I will deal with is whether Steven was working at the time of the accident in August of 2010. Steven and his mother both claim that he was working for KT [City]. Karim Nathoo, operator of KT, testified that he did not work in 2010. The stepfather indicated that he did not know or could not recall as to whether Steven was working in 2010 but did state that Steven was keeping up with his rent of $100 per week. The accident benefits documentation and medicals indicate that he was unemployed. I find that the claimant was working at the time of the accident as he had in previous summers. I prefer the evidence of Tracy and Steve[n] Jobin to that of Karim Nathoo. It should be noted that Mrs. Jobin made a most persuasive witness whose evidence I fully accept.
>
> I am satisfied that Steven was working under the table for cash at KT at the time of the accident and that both he and Karim Nathoo were happy with that arrangement, as the absence of records likely mutually benefitted them for tax purposes. A problem likely arose after the motor vehicle accident when Nathoo was probably approached to document the claimant's income. I strongly suspect that Nathoo did not want to get involved in the process for fear of alerting Revenue Canada. I strongly suspect that there was a special relationship between Steven and Nathoo whereby Steven wanted to protect Nathoo. Keep in mind that Nathoo testified that Steven was like a son to him. I believe that it was decided that Steven would say that he was unemployed and collect a non-earner benefit instead. That way, Steven would not have to explain why he was not declaring his income for tax purposes and face exposure to back taxes and at the same time protect Nathoo who wanted everything off the record for what I suspect were tax purposes.
>
> Having found that Steven was working at the time of the accident, I must now determine how much he was likely earning on an annual basis. Having rejected the evidence of Karim Nathoo, for the reasons set out above, I look to the evidence of Steven and particularly his mother as being the most reliable. On whole, I am satisfied that Steven was working full-time during the summer months, part-time spring and fall with some snow removal work in the winter but at a higher hourly rate. I am satisfied that he made enough to pay his rent and food after his personal needs. I do not accept Steven's testimony that he was never paid more than $3,000 annually by KT as I believe this was merely and attempt to cover for Mr. Nathoo. Such a statement is inconsistent with the description of the hours typically worked by Steven as described by his mother and Steven himself in his testimony under oath.
>
> I find that conservatively he was making:
>
> Summer - 4 months at $400 per week - $6,880
>
> Spring and fall - 5 months at $100 per week - $2,150
>
> Winter - 3 months at $100 - $300 per week - $1,290- $3,870
>
> Total - $10,320 - $12,900
>
> I find that his annual income was more than 51% of his basic needs of $18,500.

> Regardless of his actual earnings he had the capacity to earn more than 51% of his basic needs. There was no evidence before me that he had a physical or mental disability to negatively impact his earning capacity. There was no evidence before me that he had a pre-accident alcohol or drug addiction. Even at near minimum wage he could earn $20,000 a year.

[29] Thus, the Arbitrator concluded that Steven's yearly resources were between $10,320 and $12,900, and his yearly basic needs were $18,500. Thus, Steven's resources were more than 51% of his yearly needs, and he was found not to be principally dependent on his parents.

[30] The Arbitrator applied the appropriate legal principles, and in his factual determinations, he did not mistake or ignore relevant evidence. He made findings of fact based on his assessment of the evidence and the credibility of the witnesses without any palpable or overriding error or any apparent error.

[31] There were inconsistencies in the evidence about Steven's dependency, but the Arbitrator found some evidence worthy of credit and other evidence not worthy of credit. The Arbitrator's factual inferences appear reasonable and are based on his assessment of all the evidence. His decision, of what is an issue of mixed fact and law trending toward an issue of fact, is entitled to deference.

[32] For the above reasons, Royal's appeal is dismissed.

[33] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Axa's submissions within 20 days of the release of these Reasons for Decision, followed by Royal's submissions within a further 20 days.

Perell, J.

Released: January 12, 2015

CITATION: Royal and Sun Alliance Insurance Company of Canada v. Axa Insurance Inc., 2015 ONSC 217
COURT FILE NO.: CV-14-505877
DATE: 20150112

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ROYAL AND SUN ALLIANCE INSURANCE COMPANY OF CANADA

Applicant

– and –

AXA INSURANCE INC.

Respondent

REASONS FOR DECISION

PERELL J.

Released: January 12, 2015