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Ontario

RECONSIDERATION DECISION

Before: D. Stephen Jovanovic, Associate Chair

Date: May 30, 2019

File: 17-006910/AABS

Case Name: M.H. v. Aviva Insurance Canada

Written Submissions By:

For the Applicant: Edward Se Kim, counsel

For the Respondent: Ramandeep Kaur Pandher, counsel

OVERVIEW

[1] This decision deals with a request by the respondent for reconsideration of a decision of the Tribunal dated July 16, 2018 wherein the adjudicator found that the applicant was entitled to a death benefit in the amount of $10,000.00 plus interest.

[2] The applicant's 48 year old son, D.H., was a diabetic and had been diagnosed with a mental disability when he was four or five years old. He died as a result of injuries sustained in an accident in October 2014 when, as a pedestrian, he was struck by a motor vehicle.

[3] Although D.H. had lived on his own since 1987, the applicant sought a death benefit under the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*") on the basis that he was principally dependent on her for financial support and care. The adjudicator concluded that the applicant "principally satisfied D.H.'s needs for care" and that, accordingly, there was no need to conduct an analysis as to whether D.H. was financially dependent on the applicant.

[4] The respondent in its request for reconsideration submits that the adjudicator made significant errors of law and fact and in particular failed to give consideration to the definition of "principally" dependent.

[5] For the reasons that follow, the request for reconsideration is allowed, the decision is cancelled and a new hearing is ordered.

ANALYSIS

[6] The adjudicator's analysis of the law dealing with dependency is set out at paragraph 19 of his decision where he wrote the following:

> The *Schedule* is silent on what factors to consider when analyzing dependency for care and the parties relied on previously decided decisions for guidance. *Miller v. Safeco* is the pivotal case on dependency and outlines that I must look beyond the dependent's financial independence and also consider the ability to provide for one's own basic needs. This is expanded on in the private arbitration decision of *Intact and MVACF* where the Arbitrator wrote that key factors to consider include social and emotional support, companionship, protection, and services such as feeding, clothing, cleaning, and transportation. *Harris & Liberty Mutual* also addresses dependency in the realm of care and considers two main factors: the nature of emotional and physical care provided and whether in fact the dependent was principally dependent on the applicant for care having regard to the amount and duration of the dependency for care, the needs of the claimant and the ability of the claimant to be self-supporting [citations omitted].

[7] The respondent does not take issue with the above statement but submits that the adjudicator failed to consider the definition of "principally." The respondent cites *Oxford v. Co-operators,* 2006 CanLII 37956 (ON CA) where the Court of Appeal accepted, as an uncontested legal principle, that "principally" dependent meant "chiefly", "mainly" or "for the most part." The Court also noted that "care" dependency could not be determined with the same mathematical precision as "financial" dependency.

[8] The question of whether D.H. was principally dependent on the applicant is one of mixed fact and law. The respondent submits that the adjudicator made errors of both fact and law.

[9] The adjudicator wrote the following at paragraph 21 of the decision:

> D.H. was mentally disabled, was diagnosed with type II diabetes, and required support for various aspects of life as a result. The applicant was the principal provider of social and emotional support for D.H. The applicant regularly spoke with D.H. on the telephone throughout the day to provide social and emotional support. The applicant testified that D.H. would call the applicant several times a day – after waking up, during the day, upon returning back to the apartment where D.H. resided, and before going to bed.

[10] The respondent submits that there was no evidence of any social or emotional support being provided by the applicant and that the calls were simply for D.H. to advise the applicant where he was, at which point she would say "okay, that's fine" and end the conversation. The respondent also argues that the provision of social and emotional support during these phone calls was not an inference that could be drawn under the circumstances.

[11] The applicant was asked if her son called her and she gave the following answer found at page 22 of the transcript:

> Q. Did he call you?
> A. Oh, yeah. He called me about seven or eight times a day because he always wanted to let me know where he was at the time. So, if he would go out and then if he would – wherever there was a phone where he could phone me, he would phone me and let me know that he was okay and I'd say, 'Okay, that's fine,' and then at the end of the night, after he got home, I had made a rule that he always had to call me before he went to bed so I knew he was home safe and sound, because he walked a lot around the city at night, going home from the curling club. I was always afraid that somebody might attack him or something. Anyways, we talked, we did that.

[12] I agree with the respondent that the adjudicator appears to have made a factual error when he wrote that "[t]he applicant regularly spoke with D.H. on the telephone throughout the day to provide social and emotional support." Although it might have been a reasonable inference to make that a 45 year old son with a mental disability would call his mother for support, even just from hearing her voice, the adjudicator did not state that he was drawing such an inference, but appeared to misstate the evidence.

[13] The respondent next submits that the adjudicator made errors of fact in various findings about the assistance provided by the applicant to D.H. with everyday chores. The adjudicator wrote the following at paragraph 23 of his decision:

> The applicant's initial and ongoing involvement with Avenue II indicates that D.H. was dependant on the applicant for services such as feeding, clothing, cleaning and transportation. While the evidence shows that Avenue II provided D.H. with support in the form of organizing social outing and assistance with personal care, such as shaving, it was the applicant who either provided or assisted with the bulk of D.H.'s assistance in the realms mentioned above. The applicant would help D.H. with required household chores such as cleaning, vacuuming, mopping, maintaining a clean bathroom, changing and cleaning linens and laundry because D.H. lacked the capacity to understand the importance of these needs. The applicant was also responsible for ensuring D.H. maintained a healthy diet to help D.H. met diabetic needs. The applicant's assistance with purchasing and supplying healthy food was important because D.H. had a tendency to rely on a diet of less nutritious fast food or pub fare. D.H. was able to move about town either by walking or by transit, however, this ability would only arise after the applicant had taken two or three trips with D.H. to learn the route.

[14] The respondent is correct in its submission that D.H. was not principally dependent on the applicant for feeding. D.H. ate at McDonald's once a week while he worked there. He paid for meals supplied by Meals on Wheels four times per week. The applicant did visit D.H. about once per week to check on and provide some of his food supplies, but D.H. did not require assistance with feeding, contrary to the finding of the adjudicator. He certainly did not require such assistance from the applicant while she was out of the country two months of the year.

[15] A review of the evidence also establishes that D.H. was not dependent on the applicant for transportation. He had been living on his own for 27 years and was managing his own transportation needs, whether going to work, including at the Fort William Curling Club, or on social outings. In the words of the applicant, D.H. rode the buses "a lot." While the applicant did at some times go with D.H. to show him routes to new destinations, he was mostly independent in circulating around the city. At page 38 of the transcript of her cross-examination, the applicant acknowledged that D.H. did not require assistance with transportation.

Accordingly, the adjudicator erred in concluding that D.H. was dependent on the applicant for transportation.

[16] The respondent submits that it was an error of law on the part of the adjudicator when he failed to consider the appropriate time frame for assessing dependency. This submission appears to relate to the adjudicator's finding that D.H. was dependent on the applicant for transportation and accordingly has been dealt with above.

[17] The respondent submits that the adjudicator failed to conduct an assessment of the quantitative and qualitative aspects of the care needed by D.H. and provided by the applicant as "required" and thereby committed an error of law. It cites *Intact Insurance Company and HMQ* (unreported) for support. In that case, however, that the arbitrator wrote "[s]ometimes the circumstances require an assessment of both the quantitative and qualitative aspects of care." I do not read that as making the assessment a requirement as a matter of law or that the failure to do so constitutes an error of law. It is nevertheless preferable that such assessments be conducted.

[18] The arbitrator in *Intact* wrote the following:

> In every case, however, the emphasis is upon the need for care that is required to ensure the dependent is able to maintain a reasonable level of function in his or her daily life. In my opinion Benjamin Park was not a person in need of care in that way. In any case, the evidence is clear in my opinion that he was certainly more than capable of providing for more than 50% of his own care needs, and he was not reliant upon his parents for more than 50% of his care needs.

[19] The adjudicator did not conduct such an analysis, or if he did, it is not evident from his decision. Given the evidence before him, this analysis should have been carried out.

[20] There was a considerable amount of evidence as to the independence of D.H. At page 102 of the transcript, the applicant testified as follows:

> …I had gone to meetings with some other family members that had children that were handicapped and social workers were there and they said it would be better if we could get him independent now, at that age, and I think he was 21 at that age…..He became independent so that was good.

[21] In her cross-examination the applicant testified that D.H. paid his rent, utilities, for his bus pass, telephone and cable television bills himself. He participated in the Special Olympics at least one year in Alberta, which the applicant did not attend. She testified that he did not require overnight supervision and that she did not attend his family doctor's appointments with him. Further, she would spend one month each year visiting her daughter in Alberta and another month with a friend

in Arizona. In my view, it cannot be said that D.H. was principally dependent on the applicant during these two months of the year.

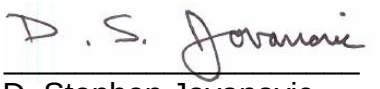
[22] The respondent submits that the adjudicator erred when he concluded, at paragraph 27 of his decision, that while D.H. was able to travel out of province to participate in sports he "did not travel independently but rather traveled with adults capable of providing the requisite supervision for D.H." The respondent is correct that there was no evidence that D.H. required any level of supervision, let alone care, while he was out of the province. In any event, the issue before the adjudicator was whether D.H. was principally dependent on the applicant for care, not on others.

[23] The applicant's position on the reconsideration request is that the adjudicator made no errors and that the respondent's request seeks to reweigh the evidence. The applicant does not otherwise deal with the errors of fact or law alleged by the respondent. In my view, the adjudicator did make errors as set out above that require that the decision be cancelled.

[24] The adjudicator appears to have made factual errors in reaching the conclusion that the applicant principally satisfied D.H.'s needs for care, and did not deal with the issue of financial dependence. Accordingly, a new hearing is required to decide if D.H. was principally dependent on the applicant for financial support and care.

CONCLUSION

[25] Pursuant to the Tribunal's rule 18.4(b), the decision and order of the Tribunal dated July 16, 2018 is cancelled and a rehearing is ordered as set out above.



D. Stephen Jovanovic
Associate Chair
Tribunals Ontario – Safety, Licensing Appeals and Standards Division

Released: May 30, 2019