

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:

ALLSTATE INSURANCE COMPANY OF CANADA

Applicant

- and -

ALLIANZ INSURANCE COMPANY OF CANADA

Respondent

AWARD

Introduction

This matter comes before me as arbitration pursuant to the *Arbitrations Act 1991*.

The Applicant and the Respondent are automobile insurers carrying on business of automobile insurance in the Province of Ontario. The dispute between the insurers arises as to which insurer ought to be paying no fault accident benefits in the circumstance of this claim and they have asked me to decide this issue in accordance with the statute, regulations, and case law applicable to these issues.

The parties have selected me as arbitrator on consent and the matter proceeded to a hearing on these issues in Thunder Bay, Ontario, on February 28, 2005.

Legal Framework

The dispute between the insurers arises out of the need to determine which insurer has the obligation to pay Statutory Accident Benefits in the context of this case. The Statutory Accident Benefits are an elaborate regime of no fault, first party, benefits that are available to persons who are injured in motor vehicle accidents in the Province of Ontario. Those benefits are described in Regulations under the *Insurance Act* and in particular under Regulation 403/96, as amended. For the purpose of making those no fault accident benefits broadly available to people who are injured in car accidents, the Regulations widely define the individuals who may be entitled to benefits from any one insurer. In particular, an insurer has obligations, with respect to accident benefits, to a named insured, a spouse of a named insured, a dependant of a named insured, or an occupant of a vehicle, or a person involved in an accident with a vehicle that is insured. This broad brush approach to making available these benefits necessarily

means that any individual who is injured in a car accident might have the status of being an "insured person" under more than one contract of insurance.

The *Insurance Act*, in s.268, sets out priority as between the insurers. The priority scheme is intended to sort out these various obligations so that insurers can have some certainty about their obligations, and injured accident victims can be clear about which insurer they should approach for payment of these benefits. The rules set out under s.268 of the *Insurance Act* indicate that a person should claim benefits first from the insurer of a policy where the person is the named insured, the spouse of the named insured, or a dependant of the named insured or spouse. If there is no recourse to coverage under such a policy, then the individual should claim benefits from the insurer of the vehicle in which he or she was an occupant.

In this case, we need to address the issue of whether or not Joe Burgess is obliged to claim his Statutory Accident Benefits from Allianz, or from Allstate. Allianz is the insurer of Joe Burgess' mother and stepfather, Angela and Gerry Huetler. Benefits would be payable by Allianz if Joe Burgess was, at the time of the accident, a dependant of Angela and/or Gerry Huetler. Otherwise, the benefits are payable by Allstate.

The parties executed an Arbitration Agreement for the purpose of having this dispute determined by me in accordance with the procedures agreed upon, or as ordered by me.

Factual Background

The underlying facts of this case indicate that Joseph Burgess was injured in a motor vehicle accident on or about August 4, 2003. The accident took place near Red Lake, Ontario and in the accident, Joseph Burgess was seriously injured. The Statutory Accident Benefits in this case are important because of the nature of the injury sustained by Mr. Burgess. Presently those benefits are being paid by Allstate Insurance Company. In accordance with the provisions of Regulation 283/95, Allstate, as the first insurer to receive a completed application for benefits, is paying the benefits and claiming reimbursement from Allianz. The statutory scheme which calls for the first recipient of an application to pay benefits is entirely arbitrary and no inference should be taken from the fact that Allstate is paying the benefits nor do I ascribe any particular onus of proof to Allstate in these circumstances.

Joseph Burgess, the injured young man, is the natural son of Angela Huetler and is the stepson of Gerry Huetler. He did not live in their household for many years prior to this accident. He did receive some indirect assistance from the household in the form of some temporary shelter. He was not extensively employed and had little in the way of independent means. It falls to me to determine whether or not he was a dependant of Mr. and Mrs. Huetler at the time of the accident.

The Issue

Pursuant to s.268(2) of the *Insurance Act*, a series of rules are to be applied to determine who is liable to pay Statutory Accident Benefits. In respect of the occupant of an automobile (such as Joseph Burgess) it is prescribed that:

(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.

Section 268(5) provides specifically as follows:

“(5) Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or same-sex partner or a dependant, as defined in the Statutory Accident Benefits Schedule, of a named insured, the person shall claim Statutory Accident Benefits against the insurer under that policy.”

Clearly, if Joe Burgess is considered to be a dependant of the named insured under the Allianz policy, then the Statutory Accident Benefits are payable by Allianz. In accordance with the definitions found in s.2(6) of the Statutory Accident Benefits Schedule, we find the following:

“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 or same-sex partner.”

Accordingly, the parties, in their Arbitration Agreement, have framed the question appropriately as follows:

“As of August 4, 2003, was Joseph Burgess principally dependent for financial support on Angela Huetler and/or Gerry Huetler?”

If the answer to that question is yes, then Allianz is the insurer responsible to pay the Statutory Accident Benefits. Otherwise, Allstate Insurance Company is responsible for the payment of the Statutory Accident Benefits.

The Record

The record in this matter consists of:

1. The Arbitration Agreement between the parties;
2. The Joint Statement of Agreed Facts dated February 22, 2005, marked as Exhibit 1 to this proceeding;
3. The Document Brief of Allstate Insurance Company of Canada, marked as Exhibit 2 to this proceeding;
4. The Document Brief of Allianz Insurance Company, marked as Exhibit 3 to this proceeding;
5. Psychological Report of Bob Smith, marked as Exhibit 4 to this proceeding.

With respect to the documents submitted as parts of Exhibits 2, 3 and 4, the parties agreed that these documents could be received in evidence from me to take any inference that I choose from the documents and the submission of these documents is not to be taken as agreement as to the truth of their contents.

Various witnesses testified before me at a hearing in Thunder Bay, Ontario on February 28, 2005.

The Evidence in This Proceeding

Agreed Facts

The Joint Statement of Facts entered into by the parties indicates that this matter arises out of a motor vehicle accident that occurred on August 4, 2003. Joseph Burgess is the involved individual who suffered a serious injury. He was born January 24, 1983 and thus was twenty years of age at the time of the motor vehicle accident.

It is the status of Joseph Burgess *vis à vis* his family that is highly relevant to these proceedings. Joseph Burgess is the biological child of Angela Huetler and Joseph Granstrom. Evidently, the biological parents of Joseph Burgess separated when Joseph Burgess was quite young. Following that, Joseph Burgess lived with his mother and stepfather, Gerry Huetler. He lived with them until approximately age 17, at which time he moved out of the family home.

In the months preceding the accident, Joseph Burgess lived together with Shawn Gagne in a building located at 39 Goldshore Road, Red Lake, Ontario. The Goldshore Road building is owned by Gerry Huetler. The Goldshore building had heat and hydro, but no running water. The building had a lock. Mr. Burgess has been provided with the key to the lock by Gerry Huetler. Both Gerry Huetler and his brother, Rudy Huetler, were also using the workshop.

According to the Agreement Statement of Facts, Joseph Burgess was unemployed and appears to have last worked some five months before the motor vehicle accident of August 4, 2003. Joseph Burgess had no discernable assets apart from his personal effects at the time of the accident. He was not on social assistance and he was not receiving any other public funding.

Since the time of the separation of his biological parents at a young age, Joseph Burgess has not received any financial assistance from Joseph Granstrom.

Significantly, the parties have agreed that the injuries sustained by Joseph Burgess render him unable to offer any useful evidence to this proceeding.

I was advised that Shawn Gagne died in this motor vehicle accident.

In the hearing in this matter, we heard from three witnesses that had evidence to offer on the issue of the financial dependency, or otherwise, of Joseph Burgess.

Testimony of Liane Marion

The first witness was Liane Marion who is the twenty-year-old former girlfriend of Joseph Burgess. They started dating about one year prior to the accident, commencing their relationship in or about the summer of 2002. Ms. Marion lives in Cochenour, which is a short distance from Red Lake. She saw Joseph Burgess just about every day.

The evidence supports the fact that they were in a strong and close relationship. Liane Marion was in a good position to have an appreciation of the financial circumstances and activities of Joseph Burgess in the year leading up to the accident.

I found her to be an honest witness. She was directly responsive to the questions put to her and she answered in a forthright manner. I was impressed with her testimony and I believe it to be an honest and perceptive recounting of the circumstances of Joseph Burgess prior to the accident.

This witness testified in some detail about the close relationship between the deceased, Shawn Gagne, and Joseph Burgess. Other witnesses corroborated the very close relationship between these two young men. They lived together at various locations and they were living together at the time of the accident. The evidence indicated that Shawn Gagne may well have been the source of some support for Joseph Burgess, particularly with respect to the supply of food. There was an indication that Shawn Gagne had some employment income, and also that Shawn Gagne's parents were located very close to where Shawn Gagne and Joseph Burgess lived in the months leading up to the accident. One can infer that it is entirely likely that Joseph Burgess benefited indirectly from his relationship with Shawn Gagne. It seems likely that Shawn Gagne from time to time provided food which was consumed by Joseph Burgess.

Ms. Marion also gave some testimony about the history of where Joseph Burgess had lived in the year preceding the accident. She indicated that in the summer of 2002, he lived at 175 Howey Street, in Red Lake. He lived there with Shawn Gagne. Ms. Marion never saw them paying any rent with respect to this location and she does not think that they were paying rent. She believes that the owner of the building had left the area and had told them to take care of the house in his absence. She observed that they did not follow his wishes and did not take care of the house but they did stay there until they were evicted by the Town authorities.

At some point subsequently, Joseph Burgess moved in with his cousin, Blake Keesick. In this location, she was never aware of Joseph Burgess paying rent either. Joseph Burgess knew that Blake Keesick would take care of him. After a while, both Blake Keesick and Joseph Burgess were evicted from their accommodations for failing to pay rent. The timing of this is somewhat uncertain but it was the witness' estimate that this took place in the spring of 2003.

Soon after that, Joseph Burgess moved into the workshop owned by Gerry Huetler. Not long after, Shawn Gagne moved into the workshop as well. The witness said that she was at that location almost every day. She described it as a woodworking shop which included a wood stove. It had electricity. There was a lock on the door. It had no running water, however. All that was available for the plumbing needs of the occupants was to use "the bush".

There was an arrangement made between Shawn and Joseph, and Joseph's mother and stepfather that they could stay in this workshop in exchange for being responsible for the yard work.

The workshop was just that, a place to do some carpentry work and keep tools. It was not equipped as a residence. It had no indoor plumbing. It had no cooking facilities or refrigerator. The young men slept on air mattresses on a wooden floor. There was a wood stove and hydro, but otherwise, no utilities.

This location was about a ten minute walk away from the Huetler home in Red Lake, Ontario. Ms. Marion testified that Joseph Burgess would go to the Huetler home occasionally to do

laundry and to have a shower. According to this witness, Joseph Burgess had a key to the home but it appears that Gerry Huetler was not a consenting participant with this.

Much of the testimony in the hearing confirmed that Gerry Huetler and Joseph Burgess did not get along at all. Indeed, they were described as hating each other.

Ms. Marion also testified as to her knowledge of Joseph Burgess and his employment prior to the accident. According to her description, Joseph did not have trouble finding and keeping a job because he never tried to find a job. She described him as having a lifestyle and attitude where money was not important. He was content with his lifestyle without having money. The absence of money did not bother him at all. As portrayed by Ms. Marion, Joseph Burgess had limited employment by his choice.

She testified as to his relationship with a great uncle, Mike Desmeules who made available work for Joseph from time to time. It was clearly indicated that cash was paid for much of the work that he had, with no reports made for tax purposes, although some of the work was paid by cheque. Ms. Marion testified that if Joseph found that he needed money, he would go to work and get the money. He would work when he needed to.

She also testified that he worked for Rubicon. She also indicated that this was on a cash basis

It was difficult for this witness to testify as to how much he worked and when, but she did recall that on the day of her birthday prior to the accident, February 27, 2003, he was working. Up into 2003, she describes him as working off and on. It is possible that he worked as much as a week per month at some point. However, she could not recollect him working after February of 2003. She did remember that he helped to build a garage at some point but thought that he might have been paid with a case of beer.

She believed that Shawn Gagne was working and paying for food that they were both eating. She did not have any hesitation in suggesting that Shawn would have been assisting Joseph if he was able to.

The witness also was asked about circumstances where Angela Huetler may have bought food to Joseph. The witness thought that she might have brought food about four times in the preceding year. It was leftovers, not groceries.

Ms. Marion also testified about the local circumstances in the Town of Red Lake in the summer of 2003. Apparently the economy was good. There was a new mineshaft being put in by Gold Corp and a lot of associated economic activity. Various witnesses mentioned that it was difficult to get rental accommodation in the Town with this increased activity.

In general, Liane Marion described Joseph Burgess as not having a lot, but that he was happy with what he did have. He would go to work if he wanted something.

She described him as a physically strong young man, 6"2" tall and weighing 180-190 lbs.

She also testified as to her belief that Joseph Burgess, at the time of the accident, was on his way to apply for work at the Placer Dome Campbell Mine. It was alleged he was on his way to this mine location to apply for a job, when the accident occurred. Allegedly, Gerry Huetler had arranged this introduction to someone at the mine.

The witness confirmed that there was work available for Joseph Burgess in the Red Lake area prior to the accident. She simply believed that he was not interested in working and that this was a lifestyle choice of his. He was content to have the subsistence level of the life that he was leading.

Testimony of Angela Rose Huetler

Angela Rose Huetler is the 42 year old natural mother of Joseph Burgess. She lives in Red Lake, Ontario. Since she married Gerry Huetler in 1989, she has been living with him.

She identified Joseph Granstrom as Joseph's biological father. Evidently, there has not been much in way of a relationship between Joseph Granstrom and Angela Rose Huetler or between Joseph Granstrom and Joseph Burgess. However, Ms. Huetler described Joseph Burgess as the "carbon copy" of Granstrom. In particular, she paints a picture of a man who was not interested in gainful employment and does not take up work on a regular basis.

Ms. Huetler was formerly the editor of one of the local newspapers and was able to offer us some interesting insight into the general state of things in the Town of Red Lake. She describes it as a conglomeration of several small towns, closely located within a ten to fifteen minute drive of each other, with a total population of about 5,000 people. She indicates it is a gold mining community with two operating mines. Additionally, there are one hundred or more mining exploration companies. She says that the Town is in the middle of a second gold rush.

She started work as an editor in February of 2003 but prior to that, she was doing some sewing out of her home.

She is married to Gerry Huetler who is a fork lift operator at the Placer Dome Campbell Mine, having worked there for twenty-five years.

She testified that Joseph Burgess is a full status native of the Wabauskang Band. As such, Joseph had independent access to various benefits including medication, dental, glasses and braces. He had a "status" card.

Joseph Burgess moved out of the family house where he had lived with his mother and stepfather at age 16. He returned briefly and then moved out again at age 17. When he moved out at age 17, he was told he would not be allowed to come back into the home. He did not get along with his stepfather. It was clear that he would only be allowed to visit his mother on occasions when the stepfather was not at home. According to Angela Huetler, he might have come to the house about once a month.

Angela Huetler gave considerable evidence about Joseph Burgess and his ability to earn income. He had worked extensively as a guide for fly in fishing camps. He had also worked ancillary to the mining business "cutting lines" and had worked frequently for her uncle, Mike Demeules, who operated a company called "Top Notch". She also confirmed that he worked for a company called Abitibi Geophysics and also worked for Rubicon. She also reported that he worked for a company called Dynatech where he was trained to be a driller but he did not work there very long. There is some suggestion that he was fired from that job and various references to his unreliability as an employee.

In terms of support from her or her husband, there was no financial support ever provided to Joseph Burgess once he left the home. They did not give him money for food, for clothing, or for

any of his shelter. The only thing that the family ever did for him was, in mid 2003, after he had been out of the home for a number of years, they allowed him to stay in the workshop with his friend, Shawn Gagne. This was done in exchange for the promise to take care of the yard work. The commitment to do the yard work was not kept for long, but that was the understanding with respect to the arrangement.

In the summer of 2003, Joseph and Shawn were seeking accommodation. They needed someplace to go and the workshop presented a temporary opportunity. They knew they had to be out the workshop in September. The arrangement was that they were only going to be able to use the workshop as a place to sleep for the summer months. It is not an insulated facility. It is not suitable for someone to live in during the colder weather. Gerry Huetler had made it clear that they would not be allowed to remain in this location after September.

During the summer, Shawn and Joseph would see Mrs. Huetler at the newspaper to find out about the classified ads, to see what space was available to rent. She would regularly inquire as to how he was doing and his response was always "fine". He never indicated to her that he had any lack of work. She does not know how he paid for his things or how he got food. She assumes that when he needed money, he found a job and did it.

He was very interested in physical work. He always worked outdoors.

She testified about the job opening at the Placer Dome Campbell Mine in August 2003. She reported that she was on the phone talking to Joseph, who had phoned her. During the course of the conversation, her husband, Gerry Huetler, mentioned that there was a job opening at the Campbell Mine that would be appropriate for Joseph. It would have paid about \$17.00 or \$18.00 per hour. She believes that he was on his way to apply for this job when the accident took place.

She was questioned about the history of the various places where Joseph had lived prior to the accident. She agreed that he was probably evicted from a number of places for not paying the rent.

She gave some testimony about the economic arrangements with respect to the workshop. This workshop apparently was owned by Rudy Huetler, Gerry Huetler's brother. He did not want it anymore so Gerry Huetler bought it from him. Rudy continues to pay the Hydro which is estimated to be a cost of about \$10.00 per month. She did confirm that Gerry Huetler had given Joseph Burgess a key to the place.

However, it was generally denied that Joseph Burgess had a key to the Huetler home. There was some contradictory evidence about the issue of Joseph Burgess returning to the home in the month prior to the accident. While Liane Marion testified that he probably went to his parents' home about once a week and let himself in with a key, but the parents denied that there was any key and also indicated, that during the summer months, Joseph's nine year old stepbrother was at home in the house with a babysitter and therefore, he would not have been able to come into the house to have a shower or do laundry during that time frame.

I found Angela Huetler to be a helpful witness in the circumstances. She is obviously in a difficult family situation because of the tension between her husband and her son. This led to a situation where she had to chose between her husband and her son and her son left the family home.

She was in touch with him on an irregular basis when he was outside the home. She seems to have been satisfied that he was getting by. She did not think that he was losing weight. She was satisfied that he was "fine" based on her encounters with him but he clearly was not extensively employed and he did not have any significant material assets.

Testimony of Gerry Huetler

Gerry Huetler testified in the Arbitration Proceeding. He is the spouse of Angela Huetler and the stepfather of Joseph Burgess. He is also the father of nine year old Justin. He confirmed the evidence which had been offered by previous parties. Indeed, some of the evidence offered by Mr. Huetler was simply hearsay of what he had been told by his wife, Angela.

However, he did testify as to a few aspects of the relationship which were of interest.

He unequivocally confirmed that he had excluded Joseph Burgess from returning to the house at age 17 and that nothing was done of a financial nature whatsoever towards support of Joseph Burgess until the summer of 2003. In the summer of 2003, he agreed, at his wife's request, to allow Joseph Burgess and Shawn Gagne to temporarily stay in the workshop. They had no other place to go. It was part of the agreement that they would take care of the yard work around the workshop while they stayed there. They may have done it once or twice, but they did not keep to the agreement.

He described the history of having purchased the shop from his brother. It was a woodworking shop. Both he and his brother continued to use it. Importantly, there was no income associated with the shop. It was not rented to anybody. It was not used for accommodations by anybody. It was used to store lawn mowers and do some woodwork.

Gerry Huetler confirmed the booming economy in the Red Lake area and the shortage of affordable housing. He was asked about his knowledge about Joseph Burgess' finances. As far as he knew, Joseph Burgess never had any money. He had some general knowledge of the kind of work that Joseph had been doing and he thought that Joseph had done a roofing job not long before the accident. Gerry Huetler said he did not know how Joseph paid for things and he did not know how he got money. He was adamant, however, that Joseph Burgess did not get money from him.

He confirmed that the arrangement with respect to the use of the workshop as a place to stay was entirely temporary and that it was clearly understood by Shawn and Joseph that they would have to be out of the workshop at the end of the summer.

He also testified about the episode with respect to the possible job at the Placer Dome Campbell Mine, at the beginning of August. He had heard of this opportunity doing core cutting. He says it would have been a pretty good job and it was something that was appropriate for Joseph because he had related experience. Gerry Huetler said he wanted Joseph to be more responsible. There was some information offered as testimony in this case that on the day of the accident, as Joseph was on his way to the job interview at the Placer Dome Campbell Mine, the possibility of him gaining that employment was jeopardized by the fact that he alcohol on his breath at that time.

Gerry Huetler did confirm that he was aware that Joseph had been coming to his house to do laundry and shower without his knowledge. He should not have been able to get in because he

did not have a key, but he acknowledged coming to the house one day and finding a bag of laundry so he was able to confirm that this was happening to some extent.

He also gave some testimony about a problem that arose out of a stereo that had been purchased by Joseph. Apparently, Joseph had acquired the stereo from a local store on some plan that did not require any payment to be made for six months. When it came time for payment, it seems that the store was looking to Angela Huetler for the payment. Somehow, the commitment to pay for the stereo fell upon her. Ultimately, Gerry Huetler paid off the bill for this stereo.

Documentary Evidence

The documentary evidence put into the record by the parties provides some useful corroboration of the picture painted by the witnesses who testified.

Exhibit 3 contains income tax returns filed on behalf of Joseph Burgess. These income tax returns and the attachments thereto tend to indicate that Joseph Burgess did not earn any income that was reported for tax purposes after the middle of 2002. However, I am mindful of the fact that it was repeatedly alleged that he had income that was paid "under the table" which would not have appeared on the income tax returns.

Exhibit 2 includes information in the form of statements transcribed from the parties who were various witnesses. Again, this is confirmatory of the evidence given by the witnesses at the hearing, with a few additional details. It is of interest that Angela Huetler's statement at Tab 3 of Exhibit 2 indicates that previously they had paid \$40.00 per week to other youths to do general work and maintenance on the workshop property. To some extent, this quantifies the monetary value of the services that were expected of Shawn and Joseph in exchange for being allowed to stay at the workshop during the summer of 2003.

Analysis

The unusual facts of this case challenge me to find whether or not Joseph Burgess was, in August of 2003, principally dependent for financial support on his mother and/or stepfather.

The family circumstances were disjointed. The evidence of the parties was clear in some aspects. Joseph Burgess did not live in the family home. He was not welcome at the family home. He was expected not to return to the family home for any purpose other than occasional visits with his mother.

He was not provided with any financial support by either of his parents. He was not provided with shelter until the last months of his life and his parents did not provide him with any other necessities of life.

He was however provided with shelter for the last two months before the accident. The shelter was very basic. It was not habitable living accommodation. There was no plumbing. There was no household furniture. They were sleeping on air mattresses on the wooden floor in an uninsulated workshop that had no plumbing. Additionally, this "shelter" was not given to them free of charge but they were obliged to perform services that might have had a value of about \$40.00 per week, in terms of the yard work.

Angela Huetler may have provided the odd meal by way of "leftovers" for her son, but that it is overwhelmingly clear that there was no other support of any substance provided to Joseph Burgess from the time he left the home at age 17 until the accident in August of 2003.

There was ample evidence that Joseph Burgess was a physically capable person, perfectly capable of performing heavy labour and in fact he had experience in doing various kinds of jobs. He had worked in business associated with mining. He had experience with line cutting and core cutting, but there was ample evidence that his work habits were poor. He was clearly disinterested in employment. Some parties described him as unreliable. There were suggestions, albeit hearsay, that he had been fired from some employment. In total the evidence about Joseph Burgess's employment is quite unclear. How much he worked, when, where, and for what remuneration, is not established with any certainty. Tax returns were filed, but much of his income was "under the table".

He had lived in a series of accommodations, from which he was evicted for non-payment of rent. He lived off the generosity and kindness of friends and acquaintances to some significant degree.

The people who knew him best indicate that he had no initiative and was not interested in employment. Most importantly, in my view, he was content with this lifestyle. He chose to live this way.

Every witness confirmed that he was capable of doing work and that there was work available in the community if he chose to take it. He did not often choose to take the work. His financial status on the date of the accident was as a result of his indifference as to having money. He was content to live without money and live a very basic level of existence.

It may be that he derived some support from his very good friend, Shawn, who apparently was employed, and may have provided food. It appears clear that at various times he derived some indirect support from his cousin, Blake, his girlfriend, Liane Marion, and in the last weeks, was provided with access to a workshop to sleep in at night, by his stepfather, Gerry Huetler. He had access to benefits from the band, but there was no evidence that he ever accessed any of this. The evidence suggested that he did not access social assistance or any other government supports.

There was ample evidence that he was capable of earning significant income. He had the experience and the physical capability to do work that was readily available in the community. He could have derived income of more than \$100.00 a day from this activity. For the most part, he chose not to.

The law is clear that the relevant dependency is principal dependency. Joseph Burgess can only be considered a "dependent" on Angela and/or Gerry Huetler if they were his principal source of support, more than any other sources. When looking at sources of support we need to carefully consider Joseph Burgess' capacity to meet his own needs.

Amounts received by a person, and the personal expenditures of the person may be useful evidence of dependency, but it is not a complete analysis in every case.

In my view, this case turns on this issue of the unexercised capacity to earn income. The Respondent relies on the previous award given by me in the case of *Federation Insurance*

Company of Canada v. Liberty Mutual Insurance Company. The *Federation v. Liberty* case did raise directly the issue of a young person who was not working to his full capacity. In that decision, I referred to the earlier Ontario Court of Appeal decision in *Miller v. Safeco* and held as follows:

"On appeal, the Court of Appeal agreed with all of these criteria with the exception of the general standard of living within the family unit. In my view this is compelling authority for the proposition that the "ability" to be self-supporting must be taken into account in measuring dependency.

Thus, when considering Mr. Sebastian's dependency, I consider his earnings as well as his reasonable capacity to earn. He was an able bodied man. His skills were such that he was gainfully employed, earning \$13.00 per hour on a regular basis. This suggests that Jonathan's reasonably exercised capacity was to earn something like \$450.00 per week."

The *Federation v. Liberty* case very clearly applied the *Miller v. Safeco* precedent to analyse dependency in terms of a person's capacity to earn income, not only their actual earnings.

Furthermore, in a discussion weighing the benefits received against the needs of the individual, the same decision concludes that the mere fact that someone is receiving assistance does not mean that he is a dependant for that assistance. If the person has the means or resources to provide for himself from his own earnings or capacity, the fact that a family member is generous to him does not make the person "dependent" on the family member.

These principles are important when we are considering Joseph Burgess' circumstances. I point out that the *Federation v. Liberty* case was appealed to the Ontario Superior Court and upheld. The decision was further appealed to the Ontario Court of Appeal and again upheld. These principles are firmly entrenched in the law of Ontario as applicable to determining principal dependency for financial support in the context of priority disputes between insurers.

Consideration of Actually Received Support and Needs

Aside from an examination of the capacity to earn, it is very challenging to determine whether somebody is "principally" dependent for financial support when they receive only a small amount of assistance. In this case, the benefit that Joseph Burgess received from his parents was limited to sharing a workshop to sleep in for a few months, and in exchange for that, he committed to providing services in terms of yard work. Clearly, the net value of what he was provided with by his family was very minimal. Counsel for Allstate argues that shelter would be a very significant component of meeting the needs of Joseph Burgess, because his other needs were so minimal. Furthermore, there was ample evidence before me that accommodations in the Red Lake area are costly. Therefore, doing an analysis of what it would cost an individual to live independently in the Red Lake area would yield a cost of living that would require significant income to meet. However, Joseph Burgess had a proven track record of being able to live very inexpensively with minimal income and negligible external support from family.

On a review of the evidence as a whole, and reviewing the economic circumstances of Joseph Burgess as portrayed by the evidence in the record in this case, I am not satisfied that providing shelter for the two months prior to the accident made Joseph Burgess principally dependent for financial support on Mr. and Mrs. Huetler.

If I were to examine only the time frame that Joseph Burgess lived in the workshop, during those two months of the summer of 2003, it is possible that the greatest external support received, in

money's worth, would be the shelter provided in exchange for the yard work commitment. It is very difficult to quantify this because it is a low value shelter. Similarly, we have a paucity of evidence as to his actual needs for other essentials. It is difficult to measure the value of the needs provided by Mr. and Mrs. Huetler as opposed to the value of other needs in order to determine whether the Huetlers are providing the "principal" support for his needs.

Certainly, if we look at any time frame larger than the summer of 2003, the contribution of the Huetlers is correspondingly less and the independence of Joseph Burgess is greater.

However, the evidence was unequivocal that the arrangement to remain in the workshop was merely a temporary arrangement. There were only a few weeks left for this arrangement to continue. Shawn Gagne and Joseph Burgess knew that they had to leave. Gerry Huetler was adamant that they would be put out.

The evidence of Angela Huetler confirmed that Shawn Gagne and Joseph Burgess were setting about to find new accommodation. There was evidence that Joseph Burgess was seeking out available employment. There was ample evidence that employment was widely available and that Joseph Burgess was well suited to much of the available employment, were he willing to make the commitment to pursue that employment diligently.

From the point of view of examining appropriate time frame for determining Joseph Burgess' dependency status, the circumstances are such that it is most appropriate to look at his status from about the end of February 2003 up until the time of the accident. His circumstances in this interval are most closely relevant to understanding his status on the date of the accident. This corresponds with the last known time in which he had employment. Circumstances in his personal life may have led him to be depressed or unhappy about this time and might have led him to an attitude of apathy towards employment.

In this period he clearly lived on a minimal basis. He obtained accommodation by the good graces of others, and by failing to meet the commitments which he made in exchange for being provided accommodation, whether it was rent or services. We do not know how he got his food. He did not get it from his mother or his stepfather. He may have had meals and food provided by Shawn Gagne or Shawn Gagne's family. It may be that he had worked occasionally in exchange for food or for small amounts of money which he used to buy food. The record is certainly far from complete as to what was actually going on with Joseph Burgess in the months prior to the accident. He is unable to testify. Shawn Gagne is deceased. Liane Marion, who seems to have been in the best position to understand what was going on in Joseph Burgess' life, characterized him as a person who worked when he had to, that when he needed something, he would find work and earn some money. While we do not have any particulars or evidence to support any other income, that does indeed seem to have been the habit of Joseph Burgess. I do not find that the contribution of temporary, shared, use of the workshop as a place to sleep, in exchange for services, is sufficient to render Joseph Burgess principally dependent for financial support in this period.

Consideration of Joseph Burgess' Ability to be Self Supporting

However, most importantly, in the context of the case law in Ontario, it is abundantly clear that Joseph Burgess did indeed have the ability to earn income and to be self-supporting. In the years prior to the accident, he demonstrated the fact that he lived without assistance from his mother and stepfather, whatsoever. The contribution that they gave to him in the last weeks

before the accident was quite minimal. He was capable of doing physical work and there was much physical work available, which was very remunerative.

In my view, the evidence in this case overwhelmingly points to the fact that Joseph Burgess had little employment and little income by choice. He was content to live a lifestyle with very little money. However, he had the capacity to earn money and he lived in an environment where those opportunities were available to him. In my view, he had the ability to be self-supporting. Indeed, he had the ability to have a very comfortable living with higher than average income, if he so chose.

In addition, I am not satisfied that the contribution made by Gerry Huetler providing access to a woodworking shop, without kitchen, without furnishings, and without plumbing, was a sufficient contribution to Joseph Burgess' needs so as to render him principally dependent for financial support upon Mr. or Mrs. Huetler. It is indeed a very small contribution when compared to the evidence of Joseph Burgess's ability to be self supporting if he chose to work.

On both analyses, I conclude that on August 4, 2003, Joseph Burgess was not principally dependent for financial support upon Angela Huetler and/or Gerry Huetler.

Conclusion

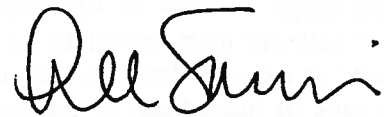
The question posed by the Arbitration Agreement is as follows:

"As of August 4, 2003, was Joseph Burgess principally dependent for financial support on Angela Huetler and/or Gerry Huetler?"

The answer to this question is: No.

The parties have agreed that costs should follow the event. The parties further agree that the quantum of costs should be \$5,000.00 plus disbursements. Therefore, I award Allianz its costs in the amount of \$5,000.00 plus disbursements.

Dated at Toronto, Ontario, this 7th day of March, 2005.



Lee Samis