IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990, c. I. 8, Section 268 AND
REGULATION 283/95 THEREUNDER

AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c.17

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

SECURITY NATIONAL INSURANCE COMPANY

Applicant

- and -

BELAIR DIRECT INSURANCE

Respondent

DECISION

COUNSEL

Yulia Barsky – TD Insurance Staff Legal
Counsel for the Applicant, Security National Insurance Company
(hereinafter referred to as “Security National”)

Tracy Brooks – Intact Insurance Company
Counsel for the Respondent, Belair Direct Insurance
(hereinafter referred to as “Belair”)

ISSUE

[1] This is an arbitration of a priority dispute relating to payments of statutory accident benefits that the Applicant Security National Insurance Company ("Security National") made to Chemeka Sadler ("Chemeka"). Security National is seeking an Order that Belair Insurance Company stands in higher priority and is responsible for payments of statutory accident benefits on the basis that Chemeka was not principally dependant for financial support on her mother at the time of the motor vehicle accident in question. If found to be dependent, then Security National would stand in priority. If not, Belair would stand in priority.

PROCEEDINGS

[2] The arbitration hearing proceeded on June 7, 2016 and July 4, 2016. It proceeded on the basis of Examination Under Oath transcripts, a joint document brief, the oral testimony of accountants retained by each of the parties as well as both written and oral submissions.

APPLICABLE LEGISLATION

[3] A priority dispute arises when there are multiple motor vehicle liability policies which might respond to a statutory accident benefits claim made by an individual involved in a motor vehicle accident. Section 268 (2) of the *Insurance Act* sets out the priority rules or hierarchy to be applied to determine which insurer is higher in priority and liable to pay statutory accident benefits.

[4] As the claimant was an occupant of a vehicle at the time of the accident, the following rules with respect to priority of payment apply:

> (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 (1), the occupant has recourse against the insurer of the automobile in which he or she was an occupant;*
>
> (iii) *If recovery is unavailable under (1) or (2), 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 (1), (2) or (3), the occupant has recourse against the Motor Vehicle Accident Claims Fund.*

[5] Section 3(1) of the Statutory Accident Benefits Schedule defines "insured person" as:

> (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 dependent of the named insured or of his or her spouse,
>
> (i) if the named insured, specified driver, spouse or dependent is involved in an accident in or outside Ontario that involves the insured automobile or another automobile…

[6] Dependency is defined in the Schedule at section 3(7)(b) as follows:

> (b) a person is a dependant of an individual if the person is principally dependent for financial support or care on the individual or the individual's spouse;

FACTS

[7] Chemeka was injured in a motor vehicle accident occurring on August 29, 2013 (the "accident") while being a passenger on a motorcycle, operated by an uninsured driver. The vehicle, which struck the motorcycle, was insured by Belair.

[8] Chemeka's mother is Leticia Sadler ("Leticia"). At the time of the accident, Leticia's vehicle was insured by Security National.

[9] After the accident, Chemeka made an Application for Accident Benefits to Security National.

[10] There appears to be no dispute as to the validity of the coverage for the relevant Security National or Belair policies.

[11] Chemeka was born on June 3, 1991. She was 22 years old at the time of the accident on August 29, 2013. She is now 25.

[12] At the time of the accident, Chemeka was living in the townhouse rented by her parents, located in North York, municipally known as 35 Brookwell Drive, Apt. 217, North York, Ontario.

[13] Chemeka commenced residing at 35 Brookwell Drive in April 2013. The exact date remains unknown.

[14] At the time of the accident, Chemeka was single and had a three (3) year-old son TreDyan, born on February 8, 2010. She was unmarried. At the time of the accident, Chemeka and TreDyan's father shared custody of and access to TreDyan. TreDyan was with Chemeka every other day and every other weekend.

[15] At the time of the accident and in the time leading up to the accident, TreDyan attended a daycare. The costs of the daycare were fully subsidized.

[16] 35 Brookwell Drive was a four bedroom townhouse, rented by the Sadler family. At the time of the accident, the townhouse housed Chemeka's stepfather - John, Leticia, and Leticia's other two children: Mayo Aroh and Kike Aroh. There was also a roommate staying in the townhouse, who was renting one of the rooms from Leticia. The four bedrooms were occupied by Leticia and John, Mayo, Kike and the roommate, respectively.

[17] Since moving into 35 Brookwell Drive and up to the time of the accident, Chemeka did not have a bedroom to herself and was "staying on a couch". TreDyan did not have a bedroom to himself and was sleeping in a playpen, temporarily placed in Leticia and John's bedroom.

[18] At the time of the accident, Chemeka held part-time employment as a server at Lucky Strike, a bowling alley at Vaughan Mills Mall. Chemeka held this employment for less than three months. According to the Employment File from Lucky Strike, Chemeka's employment commenced on July 23, 2013.

[19] At Lucky Strike, Chemeka was paid minimum wage plus cash tips. During the Examination Under Oath, Chemeka was unable to remember how many hours per week, on average, she worked at Lucky Strike. According to the Accident Benefits file, her gross weekly income from Lucky Strike was $211. During the Examination Under Oath, Chemeka stated she was paid around $8.00 per hour. As such, it appears that, on average, Chemeka was working at Lucky Strike 26 hrs. per week. Chemeka testified that she also received cash tips at Lucky Strike, which ranged from $20 to $80 per shift. She stated that in the summer months, clients mostly wanted to be outside and the tips were mostly on a low end.

[20] Included in the joint document brief was correspondence from Pink indicating Chemenka had a valid Offer of Employment from Pink. Chemeka was offered a full-time position of Category Supervisor at the Victoria's Secret Pink Office, working anywhere between 32 and 40 hrs., with an hourly compensation of $14.00 per hour. The Offer was made available to Chemeka on August 18, 2013 and employment was going to commence "as soon as all required paperwork is completed". During the Examination Under Oath, Chemeka stated that but for the accident, she would have started working at Pink. Chemeka planned to co-ordinate her job at Pink with her job at Lucky Strike and to work the two jobs concurrently.

[21] There are no indications in the documentary record or in the transcripts from the Examination Under Oath that on the date of the accident, Chemeka had any physical disabilities or limitations which would limit her ability to work. Although Chemeka was identified with a

learning disability in grade 6 and required an Individual Education Plan (IEP) for grades 6, 7 and 8, the IEP was removed in grade 9. Chemeka successfully completed high school in 2009. Chemeka returned to high school again in 2011 as an adult learner and successfully completed a grade 12 University English course, which was required in order to pursue opportunities at university, which has been her goal.

[22] At the time of the accident, Chemeka was not accepted to any College or University. She made an application for acceptance into the Psychology program at York University for the fall of 2013, however was denied admission at that time. Chemeka was planning to upgrade her education and re-apply to enter University in January 2014. However, it appears that no applications to any College or University were outstanding as at the time of the accident.

[23] Immediately prior to living at 35 Brookwell Drive in April 2013, Chemeka resided with her boyfriend, Joseph, at his aunt's property in Scarborough. Chemeka was residing at that property for just under one year, until April 2013.

[24] Prior to moving in with Joseph, Chemeka stayed with her friend Lindsay for a couple of months and prior to that, she resided alone with her son for about a year and a half in an apartment at 40 Fountainhead in North York, Ontario. It appears she lived in this apartment for 1½ to 2 years. Chemeka testified that after she had her child in 2010, she moved out from her family home and started to live on her own. Chemeka did not reside with her mother since February 2010 and until April 2013. The evidence would indicate that between February 2010 and April 2013, Chemeka had no relationship or had a strained relationship with Leticia.

[25] Immediately prior to her employment at Lucky Strike, Chemeka worked part-time for minimum wage at a tea shop, "Teavanna". She commenced that employment in November 2012, leaving sometime in May or June 2013.

[26] During the year leading up to the accident, Chemeka was also employed part-time as a retail associate at Guess Clothing store earning minimum wage. The exact dates of employment are unknown. The evidence would suggest she was “let go” from her job at Guess.

[27] Unfortunately, as no employment files from Guess and Teavanna were introduced as evidence, specific details surrounding that employment are unknown.

[28] Between May 31, 2011 and September 26, 2012, Chemeka was employed as a server at Dave & Busters. For the tax year 2012, her compensation (excluding cash tips) from Dave &

Busters stood at $8,920.42. Chemeka testified that she also received cash tips at Dave & Busters, ranging from $60 to $80 for a "bad" shift and from $200 to $300 for a "good" shift. The claimant was dismissed from Dave & Busters after several reprimands for performance deficiencies and/or violations of employee conduct.

[29] All of the above-noted jobs Chemeka held in the year leading up to the accident and they were all part-time positions, for the most part overlapping with one another. Chemeka stated that she tried to have two jobs, effectively having one as a back-up, in case she did not have enough hours or was let go from the other one.

[30] The claimant's CRA Notice of Assessment for 2012, the year before the accident, shows T4 earnings of $9,572. The 2013 Notice shows T4 income of $8,006. These amounts do not include any amount for the tips she was earning in those years.

[31] It was the mother Letitia's evidence that prior to the New Year of 2012, Chemeka and her were not on good terms. Leticia did not have a relationship with Chemeka while Chemeka was staying with Lindsay and Joseph. Letitia testified that her relationship with Chemeka became rocky before Chemeka's pregnancy and then fell apart. Their relationship began to stabilize in 2012 and got closer in 2013. Leticia and Chemeka were still mending fences in early 2013. Around April 2013, Chemeka had a breakdown with Joseph and ended up moving in with Leticia as according to Letitia, she "needed a place to stay".

[32] Leticia's evidence was that she did not provide financial support to Chemeka until sometime into 2013. However, Leticia qualified that prior to moving in with her, if Chemeka was desperate, she would ask Leticia for help.

[33] When Chemeka moved in with Leticia in 2013, Leticia hoped that Chemeka would go to school and would go "back on her feet". She testified Chemeka was independent and "very ambitious to make away".

[34] Chemeka stated that her moving in with Leticia was "to build herself back up and go". She did not plan to stay with her parents for long. Chemeka's evidence was she thought she was staying there temporarily.

Facts with respect to financial dependency

[35] While living with Joseph and Lindsay, Chemeka did not contribute to any household living expenses, such as rent, groceries, bills, etc..

[36] While living with her mother between April 2013 and the accident, Chemeka did not contribute financially to rent, bills, groceries, insurance payments and other household expenses, associated with the family living at 35 Brookwell Drive.

[37] While living with her mother between April 2013 and the accident, Chemeka took part in taking care of home cleaning and maintenance. More particularly, she was responsible for cleaning the dishes, bathrooms and garbage removal.

[38] Prior to moving in with her mother and up to the time of the accident, Chemeka spent her money to cover her personal expenses, such as expenses for clothes, transportation, hygiene, cell phone and entertainment. She would also buy clothes, food and toys for TreDyan.

[39] Chemeka never received child support or any financial assistance from TreDyan's biological father.

[40] Between April 2013 and until the accident, TreDyan attended daycare, the cost of which was fully subsidized and resulted in no out-of-pocket expenses to Chemeka.

[41] Since moving in to 35 Brookwell Drive and up to the time of the accident, Chemeka did not have a bedroom to herself and was "staying on a couch". TreDyan did not have a bedroom to himself and was sleeping in a playpen, temporarily placed in Leticia and John's bedroom.

[42] Leticia paid for the 35 Brookwell Drive household expenses, including rent, cable and internet, and food for the family. Gas, electricity and water were made part of monthly rent charges.

[43] When Chemeka moved in with Leticia, the household expenses grew by just "a little bit" in reference to groceries.

[44] From April 2013 and until the accident, Leticia would also help Chemeka on occasion if Chemeka needed some "spending money". Chemeka's evidence was that Leticia would give her around $20 two to three times per month.

[45] At no time was there was an arrangement in place wherein Leticia would provide a certain sum of money to Chemeka. Leticia's evidence was that she did not give money to Chemeka until Chemeka lost her job at Dave and Busters. At that time, Leticia waited for Chemeka to ask her for help. From late 2012 to April 2013, Leticia would sometimes give funds to Chemeka if she wanted to do something with TreDyan (for example $25.00 for a gift card to a birthday party) or would pick up some personal items for Chemeka, like shampoo. Leticia confirmed that around the end of 2012, beginning of 2013, while having a part-time job at Teavanna, Chemeka was self-supporting for the "majority of things", but Leticia had to step in for things here and there. Leticia stated she paid Chemeka's cellphone bill on a few occasions.

[46] Leticia would spend time and money on TreDyan prior to Chemeka moving in with her, such that Chemeka's move did not impact expenses already incurred by Leticia for TreDyan.

[47] On her Examination Under Oath, Chemeka was able to identify her personal expenses but she was not able to quantify all of these expenses. She paid for her own clothing, public transportation to get to work and entertainment. In addition, she knew that she paid $80 per month for her phone bill and $80 per month for manicures.

[48] As far as the mother’s expenses were concerned, rent was $1,515 per month plus $50 per month for parking. Groceries were approximately $1,000 per month and increased “a little bit” after Chemeka moved in. Car and house insurance was $500 (although Mrs. Sadler-Leatham is unclear whether this is per month or year). Cable and internet was approximately $100 per month.

LAW WITH RESPECT TO DEPENDENCY

[49] The law with respect to dependency was well set out by the parties.

[50] In terms of traditional legal principles, 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.).

[51] 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.

[52] The criteria, identified in Miller v. Safeco appeal were later affirmed by the Court of Appeal in *Liberty Mutual Insurance Co. v. Federation Insurance*, [2000] O.J. No. 1234 and *Oxford Mutual Insurance Co v. Co-operators General Insurance Co*., 83 O.R. (3d) 592 and were further recently applied by Superior Court of Justice in *Royal and Sun Alliance Insurance Co. of Canada v. Axa Insurance Inc.*, 2015 ONSC 217 and *Dominion of Canada General Insurance Co. v. Ontario (Minister of Finance)*, 2013 ONSC 4717.

Duration of Dependency

[53] It has been agreed by arbitrators and judges that momentary snapshot would not yield useful information about time-dependency relationship, therefore choosing the appropriate time frame is critical. The evaluation should be made by examining a period of time which fairly reflects the status of the parties at the time of the accident.

> *Royal and Sun Alliance Insurance Co. of Canada v. Axa Insurance Inc., 2015 ONSC 217, pp. 7-8.*

[54] In the recent Arbitration Decision, dated October 16, 2014 Arbitrator Kenneth J. Bialkowski stated:

> *"Further guidance is found in the decision of arbitrator Robinson in Saskatchewan Government Insurance v. Lombard Canada Inc. (January 23, 2004) where it was held that while transient changes over short periods may not reflect a general change in the nature of a relationship between a dependent and his or her parent, shorter time frames may be appropriate to use provided they yield a more accurate reflection of the circumstances of the person(s) at the time of the accident. Arbitrators must be attuned to the totality of the circumstance and the "big picture" of the claimants' lives".*
>
> *Intact Insurance Co. v. Allstate Insurance Co. of Canada, Award of October 16, 2014, at p. 13,*

[55] While the arbitrator must not determine whether at the time of the accident the claimant's condition was likely permanent or not, decisions with respect to the timeframe of dependency should be made with regard to the whole of the evidence of the circumstances of the claimant within a reasonable time period preceding the accident.

> *Intact Insurance Co. v. Allstate Insurance Co. of Canada, 2015 ONSC 4264 at para 39,*

[56] The true characterization of a dependent relationship at the time of the accident will usually require consideration of that relationship over a period of time, particularly in the case of young adults whose lives are in transition. The parameters of that period will depend on the

facts of the case. The timeframe chosen will also be influenced by the nature of the relationship between the person providing the care and the person receiving the care. The analysis may also consider the degree of care provided to the individual at certain times as well as the individual's need for care.

> *Oxford Mutual Insurance Co v. Co-operators General Insurance Co., Supra at para 26.*

[57] According to *Liberty Mutual Insurance Co. v. Federation Insurance* ([2000] O.J. No. 1234), if an individual is able to meet 51% of his or her financial needs with his or her own earnings, that individual will not be considered principally dependent for the purposes of the SABS.

[58] The mere fact that the person, on whom the claimant was allegedly dependant, provided more than the claimant does not mean that the claimant received more than 50% of the cost of his basic needs from the person, on whom the claimant was allegedly dependant."

> *Royal and Sun Alliance Insurance Co. of Canada v. Axa Insurance Inc., Supra,*

[59] However, in order for an individual to be dependent on another person, the required shortfall of more than 50% of the individual's expenses ought to be covered solely by the person, on whom that individual is alleged to be dependent.

> *Motors Insurance Corporation v. York Fire & Casualty Insurance Company* (Award, dated December 24, 2009), p.8.

[60] In assessing duration of dependency and amount of dependency, each case must be factually driven.

> *Oxford Mutual Insurance Co v. Co-operators General Insurance Co., Supra at para 26.*

[61] In Corporation of British Columbia v. Federated Insurance Co. of Canada, (July 3, 2009 Award) Arbitrator Lee Samis stated:

> "*When looking at resources we …… might also take into account capacity to earn*".
>
> *Corporation of British Columbia v. Federated Insurance Co. of Canada, (July 3, 2009 Award) at p. 9.*

[62] Further, Justice Perell made the following observation in *Royal and Sun Alliance Insurance Co. of Canada v. Axa Insurance Inc*., 2015 ONSC 217:

> "*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".*

<u>"LICO APPROACH"</u>

[63] In the last couple of years a new approach to the analysis of dependency has emerged known as the "LICO approach". In *Allstate Insurance v. ING,* (Award of Arbitrator Vance H. Cooper, dated May 1, 2014), the arbitrator preferred to resort to an alternative approach to determine dependency, namely, to use Low Income Cut-Off measure as a qualifying number in relation to which 51% rule is to be applied (as opposed to using actual expenses of the claimant).

[64] After hearing all evidence including evidence at cross-examinations and re-examinations of the three accountants involved in that case, Arbitrator Cooper noted that all of the accountants who gave evidence and offered expert opinions, acknowledged the inherent difficulty and weaknesses when trying to gather reliable information, documentation and evidence regarding a family's expenditures and individual expenditures in relation to needs.

[65] Arbitrator Cooper deferred to decisions of the Arbitrator Samis in *Coseco v. ING Insurance of Canada* (Award July 21, 2010) and *St. Paul Travelers v. York Fire & Casualty Insurance Company* (Award, dated August 11, 2011). In these decisions Arbitrator Samis explained the intrinsic difficulties of trying to ascertain the needs of the claimant by attributing to the claimant a share of household expenditures. The allocated portion of the household expenditures may be greater than the claimant's needs or lesser than the claimant's actual needs. Arbitrator Samis compared this exercise to looking at the general standard of living in household – the exercise we were directed not to follow by *Miller and Safeco* appeal.

[66] Instead, Arbitrator Samis suggested we should follow a "*more objective valuation of the costs of meeting someone's needs*". The history of family setting may assist in calculating the costs of meeting a person's needs, but is not determinative.

To that end, Arbitrator Samis used Canada LICO threshold statistic numbers as determined by Statistics Canada which he characterized as the "*best and most reliable approach to the evidence respecting one's needs*".

[67] Arbitrator Cooper's decision in *Allstate Insurance v. ING* was appealed to Superior Court on the ground that Arbitrator Cooper did not use the correct methodology. On appeal as reported at 2015 ONSC4020, Justice Mayers found that mathematical calculation or application of 51% rule in relation to needs/means is an important factor, but it is not the only factor. A change in mathematics variable, while can alter a mathematical conclusion on dependency, does not necessarily alter the "big picture". At page 4 Justice Mayers wrote:

> *"A Change in math from 50.0001% dependency to 49.999% dependency may or may not overcome other factors of the actual dependency between the relevant parties".*

[68] Justice Mayers dismissed the appeal after concluding that dividing or allocating estimated gross household spending to determine one's needs is not a "*particularly meaningful proxy*" and "*is no better than looking at government statistics to determine the cost of housing in a locale*".

[69] As jurisprudence currently stands, both the “mathematical” and “LICO” approaches are being applied by judges and arbitrators. Both parties herein have agreed.

ANALYSIS AND FINDINGS

[70] On the basis of the facts aforesaid, the respective experts retained by the parties came to diametrically opposed opinions as to whether the claimant was principally dependent on her mother for financial support at the time of the accident.

[71] Mr. Chris Gray, a forensic accountant retained by the Applicant Security National, concluded that the claimant provided for 65.3% of her own needs using the “mathematical approach” and 67.8% of her needs using the “LICO approach”. Accordingly his opinion was that the claimant was not dependent upon her mother at the time of the accident.

[72] Mr. Gary Phelps, a forensic accountant retained by the Respondent Belair, concluded that the claimant only provided 48.4% of her own needs using the “mathematical approach” and between 44.5% and 46.9% of her needs using the “LICO approach”. Accordingly, his opinion

was that the claimant was dependent on her mother at the time of the accident which, if accepted, would leave Security National as the priority insurer.

[73] Both accountants were of the opinion that the 4.94 month period pre-accident that the claimant was living with her mother was the appropriate time period for analysis. I agree. This is a period of 21.24 weeks or 149 days.

[74] The ultimate finding as to dependency will be dependent on factual findings and a critical analysis of the components used by the experts to support their respective opinions as compared to the factual findings made. Complicating the issue is the fact that the claimant had a dependent child who was only three years old raising the issue as to whether expenses paid on behalf of her son ought be considered as part of the claimant's needs or ought be deducted from the claimant's sources of income for the dependency analysis.

Mathematical Approach

[75] I will first approach my analysis using the "mathematical approach". I must determine whether the claimant's sources of income during the subject 4.94 period while living with her mother were more than the contributions made by her mother toward the claimant's needs. This requires an analysis of both the claimant's sources of income during that period and the contributions made by her mother toward the claimant's needs during that period, such as the value of the accommodation provided, cable/internet, food, toiletries, etc.. As will be seen in the paragraphs to follow this is a tedious and time consuming task.

[76] A comparison of the analysis completed by each expert is set out below:

		Per Davis Martindale (Note 1) 1-Apr-13 to 29-Aug-13	Per PwC 1-Apr-13 to 29-Aug-13
Sources of Income or Financial Support		$	$
Net (After Tax) Employment Income		4,705	4,705
Cash tips		272	543
Income Tax Refund		-	2,214
GST Credits Received		-	335
Total Sources of Income		4,977	7,797
Value of Housing Provided by Mother		5,308	4,149
Total Sources of Income or Financial Support		10,285	11,946
Expenses and Use of Financial Support			
Expenses Paid for by Chemeka		4,977	7,797
Value of Housing Paid for by Mother		5,308	4,149
Total Expenses and Needs		10,285	11,946
Analysis of Chemeka's Dependency			
Value of Needs Provided by Chemeka	**A**	4,977	7,797
Value of Needs Provided by Mother	**B**	5,308	4,149
Value of Total Needs	**C**	10,285	11,946
Percentage Provided by Chemeka	**A/C**	**48.4%**	**65.3%**
Percentage Paid by Mother	**B/C**	**51.6%**	**34.7%**

SOURCES OF INCOME

[77] In dealing with the claimant's sources of income both accountants agreed that her net after tax employment income for the subject period was $4,705.

[78] I will deal with the components where the two accountants did not agree.

[79] One of the components where they differed in their reports was in the amount of cash tips. During the initial portion of the subject 4.94 period, the claimant did not work as a server and only worked at Guess and Teavanna where the evidence suggests there were no tips. The claimant started at Lucky Strike as a server on July 23, 2013 and worked there for about 37 days prior to her involvement in the subject accident. On her Examination Under Oath, the claimant testified she received cash tips of $20 to $80 dollars per shift but that in the summer months tips were at the low end as clients mostly wanted to be outside. The accountant for Security National assumed tips of $100 (51% of employment earnings) weekly whereas the accountant for Belair used a $50 per week number on the basis of the claimant's evidence as to tips being at the low end during the summer months. She was working 26 hours per week which would conservatively be three shifts per week. Using a number near the low end of this scale, say $25 per shift, would still result in tips of $75 per week. I find that the evidence supports a finding that tips were $75 per week during the 37 days she worked at Lucky Strike pre-accident. This in my view is a conservative amount given reference to two newspaper articles in the report of Mr. Gray suggesting that Revenue Canada believes "tips are more likely to be 100% to 200% of wages". I have not placed significant weight on the information contained in the articles as one of the studies was done in St. Catherine's and not Toronto but have considered the information. Such a finding as to the likely level of tips earned by the claimant is also conservative given the tips she was making at Dave & Busters in 2012 where she was receiving cash tips of $60 -$80 on a bad shift and $200 - $300 for a good shift according to her own evidence. During the 37 days she worked at Lucky Strike before the accident, I find that conservatively her tips total $396, based on tips of $75 per week for the 5.285 week period that she worked at Lucky Strike just prior to the subject accident.

[80] Another component where the accountants differed was whether the income tax refund and GST rebate ought be considered a source of income to the claimant. The claimant in the year of the accident received an income tax refund of $2,214 and four GST quarterly payments of $167.25. Mr. Phelps on behalf of Belair had not included such amounts in his calculations. In

cross-examination, Mr. Phelps admitted that the tax refund ought be considered a source of income but felt it ought be allocated to the entire year as opposed to simply the 4.94 month time frame being considered. On that basis, $911 of the total $2,214 tax rebate ought be considered an income source. I agree with this analysis. As for the GST rebate, Mr. Phelps on behalf of Belair admitted in cross-examination that it ought be considered a source of income and that since paid quarterly, it ought also be annualized and not assumed that two quarterly rebates of $167.25 were received during the subject 4.94 month period. I agree as well and find that $276 of GST rebates ought be included in the claimant's income. I find that the claimant's sources of income totalled $6,288.

[81] It should be noted that including tax refunds and GST rebates as sources of income has been adapted in numerous cases including *Co-operators General Insurance Company v. Axa Insurance* (Arbitrator Kenneth J. Bialkowski – August 13, 2015) and *Allstate Insurance Company v. ING Insurance Company and Aviva (Arbitrator Vance H. Cooper – May 1, 2014).* In *Allstate* all three accountants involved accepted that both GST credit and income tax refund ought be viewed as a source of income for the claimant.

[82] By way of summary, I find that the claimant's sources of income in the subject period were:

net after tax income	4,705
tips	396
tax refund	911
GST rebate	276
	6,288

On an annualized basis this represents a net after tax income of $1,273 per month or $15,276 yearly.

EXPENSES PROVIDED BY MOTHER

[83] There was much debate as to the value of expenses provided for by mother. Mr. Gray, on behalf of Security National, calculated the value of these at $4,149 whereas Mr. Phelps, on behalf of Belair, calculated it at $5,308. The differences are bolded and outlined in the schedule below.

	BELAIR (PHELPS)			SECURITY NATIONAL (GRAY)		
			1-Apr-13 to 29-Aug-13			1-Apr-13 to 29-Aug-13
Expenses Paid for by Mother	Monthly	Ms. Sadler's Share	4-94 Months	Monthly	Ms. Sadler's Share	4-94 Months
Rent	1,465	16.7%	**1,209**	977 (2)	20%	**965**
Parking	50	20%	49	50	20%	49
Cable & Internet	150	16.7%	**124**	100 (2)	20%	**99**
Tenants Insurance	4	20%	4	4	20%	4
Private Transportation	899	20%	888	899	20%	888
Groceries	1,350	20%	1,334	1,350	20%	1,334
Household Furniture & Equipment	164	20%	162	164	20%	162
Computer Equipment & Supplies	33	20%	32	33	20%	32
Home Entertainment Equipment	25	20%	24	25	20%	24
Self-Care	60	100%	296	60	100%	296
Other Needs	240	100%	**1,186**	60 (3)	100%	**296**
TOTAL HOUSEHOLD EXPENSES			5,308			4,149

[84] The first difference involves rent, cable and internet. Mr. Phelps, on behalf of the Respondent Belair, allocated the value of rent, cable and internet equally among the six adults and the remaining expense items equally among the five family members. Mr. Gray on behalf of the Applicant Security National assumed that total rent, cable and internet were split equally among mother, father and tenant and on that basis considered for his calculations that mother was providing the claimant with 20% (one of five family members) of 2/3 the total cost of rent, cable and internet. I prefer the approach taken by Mr. Phelps in this regard as I do not believe the rent paid by the tenant should affect the value of the shelter provided to the claimant. This would add $269 to amount calculated by Mr. Gray raising the mother's contributions to $4,418 for the subject period.

[85] The biggest difference outlined in the schedule involves the calculation of "other needs". However, at the end, both accountants agreed that $296 ($60 per month for 4.94 months) for the subject period was the appropriate amount being a contribution by the mother of "$20, two to three times per month" as per the transcript evidence. Mr. Phelps had inadvertently thought the mother was contributing $50 per week to the child's expenses Applying this math, the total contribution by mother during the 4.94 month period pre-accident remains at $4,418.

[86] On the basis of these factual findings, the claimant provided $6,288 towards her needs during the subject period while mother provided $4,418. On a percentage basis, the claimant provided roughly 59% of total expenses and needs using the "mathematical approach" and would not be dependent.

[87] However, the Respondent Belair maintained that the claimant's entire income stream of $6,288 cannot be viewed as hers as much of that was spent on her dependent child. The Respondent Belair maintained that expenses of the child ought not be considered as part of the claimant's income stream or at least be viewed on a reduced basis to reflect the income available to the claimant after deduction of the expenses paid on behalf of her son.

[88] In response, Security National took the position that expenses related to the children of individuals alleged to be dependent should not be included at all in calculations related to dependency and relies on the decision of Arbitrator Samworth in *Motors Insurance Corporation v. York Fire & Casualty Insurance Company (December 24, 2009)* where Arbitrator Samworth states at page 5:

> *"Arguably, in determining the needs of Latonya to assess her dependency or ability to live independently, expenses related to her daughter should not be*

> *included as these reflect Tammtya's needs and dependency, as opposed to her mothers".*

[89] I am advised that this is the only reported decision dealing with the issue of the impact of a dependent child on the analysis of dependency. The approach used by Arbitrator Samworth was to determine the claimant's needs to see if the claimant's income covered at least 50% of those needs. This is somewhat different than the approach used by the accountants in the case before me where they simply compared the claimant's contributions to the claimant's needs as compared to the contributions made to her needs by her mother. Although Arbitrator Samworth did not consider money spent on the child as part of the claimant's needs, a careful analysis of the decision shows that the impact of the child was considered in another way. Arbitrator Samworth chose to reduce the claimant's shelter needs by dividing the household expenses by 7 (including the child) as opposed to 6 (adults living in the home). The effect of this was to reduce the claimant's needs by $753. By so doing the claimant's needs were reduced so that her income formed a higher percentage of those needs. Therefore consideration by Arbitrator Samworth was given for the impact of the involvement of the 3 year-old dependent child.

[90] I am of the view that each case must be decided on its own facts and must take into account the claimant's life circumstances. Arbitrator Samworth did that in the fashion described above. Whether the impact of the child's involvement is considered in that fashion or by reducing the claimant's income stream to reflect the costs of the basic needs of the child leads to the same result on the facts before me.

[91] If one were to use the Samworth approach, the household expense contributed by the claimant's mother would be reduced by well over $500 for the subject period if household expenses were divided by 6 (so as to include the child) as opposed to the 5 adults living in the home. Contributions by the mother would be reduced to at least $3,918 (from $4,418) and the claimant's sources of income of $6,288 would represent 62% of her needs supporting a finding that she was <u>not</u> principally financially dependent on her mother.

[92] Even if one accepts the approach suggested by Belair with the child's basic needs being subtracted from the claimant's income, I am nevertheless satisfied that the claimant's income still exceeded that contributed to by the mother. Belair's accountant Mr. Phelps took the claimant's income, subtracted the claimant's identified personal expenses and then assumed the balance was spent on her son. I do not accept this approach on the evidence before me.

Such an approach would give rise to an unreasonable contribution to cover the child's basic needs when one considers the contributions made by her mother and the father of the child as well as the fact that TreDyan was only with her half of the time. Making the analysis difficult is the fact that there was no expert evidence adduced as to the monthly cost of toys, clothing, diapers and food outside of the home for a 3 year-old in circumstances where the primary necessities of shelter, food inside the home and daycare were paid for by others.

[93] It is a difficult task to determine the amount of those basic expenses on the limited evidence available on the issue. As in so many dependency cases the evidence is far from perfect and that is certainly the case here.

[94] On their Examinations Under Oath, both the claimant and her mother testified that the majority of the claimant's income was spent on her child TreDyan. I have great difficulty accepting as a fact that the claimant spent the majority of her income on her son, let alone for his basic needs. Keep in mind that she shared custody of her son and only was with him every other day and every other weekend. On average, this amounts to 3½ days per week. Furthermore, the evidence of the claimant's mother was that she spent $50 per month on the 3 year-old TreDyan's toys, clothing and outings. In the absence of evidence of impecuniosity, one can assume that some of the child's expenses were also covered by the father who had custody of his son half the time. There was no evidence as to what the father of the child spent on the child's needs nor was there evidence that there were no expenses that he covered. In cross-examination, Mr. Phelps stated on behalf of the Respondent Belair that the needs of the child to be considered were the claimant's purchases of toys, clothing, food when out of the house and diapers. It must be kept in mind that in the present case all of the big ticket expenses such as daycare, shelter and food at home were all paid for by others. Even if one were to assume that during the 75 days that TreDyan was with the claimant during the subject 4.94 month period the claimant spent $100 on toys, $300 on clothing, $300 on food outside the home and $180 on diapers (4 per day, 75 days at 60 cents each) this would only reduce the claimant's sources of income by $880. Counsel also agreed that at age 3 there was only a 50/50 chance that the child would still be in need of diapers. Furthermore, I am not satisfied that the allocation for food consumed by the child outside of the home is a basic need. Even assuming that the claimant spent as much as $880 during the 75 days of the subject period that she had custody the claimant's reduced income stream of $5,408 ($6,288 less $880) would still exceed the mother's contributions of $4,418 by a considerable amount. Money spent on the child's basic needs would have to be $1,870 over the 75 days she had custody of her son over the 21.24 week

period being considered before the mother's contributions to the claimant's needs would exceed 50%. That is not realistic. The available evidence in my view does not support the Examination Under Oath statement by the claimant that she spent the majority of her income on her son when neither the claimant or her mother could identify the expenses paid by the claimant for the son's needs when asked specifically on their respective Examinations Under Oath. Although testifying that she spent the majority of her paycheque on her son, she did not say paycheque plus tips. She could not say what she spent on him on a weekly basis nor could she provide any specifics as to items purchased. On the basis of the evidence overall, it is clear that the family did not live a lavish lifestyle. In fact the evidence supports a modest lifestyle. It is clear they would not have been shopping at Ralph Lauren or Holt's but more likely Walmart or Winners. The evidence in my view simply does not support expenditures for basic needs of a 3 year-old of over $880 over the 75 days the claimant had custody of her son in a situation where housing, meals within the home and a $50 per month expenditure was made by the mother.

[95] In the final analysis, either approach (the Samworth approach or the Phelps approach) leads to the conclusion that the claimant contributed more to her needs than her mother.

[97] I find that using the "mathematical approach", the claimant was <u>not</u> principally dependent on her mother for financial support at the time of the accident.

<u>LICO Approach</u>

[98] Now using the "LICO approach", the experts used information from Statistics Canada for 2013 to determine the low income cut-off before tax for Census Metropolitan Area of 500,000 inhabitants or more. Statistically the needs of an individual in a 1 , 1½ and 2 person household are $23,861, $26,784 and $29,706 respectively. Using the "LICO approach" one must use gross income (before tax) on an annualized basis. The analysis would be as follows:

	subject period	annualized	% of LICO
Lucky Strike	1,058		
Teavanna	3,867		
cash tips	396		
total income	5321	12,924	
tax refund	911	2,214	
GST refund	296	670	
		15,808 (without deduction for child's expenses paid for by claimant)	
1 person household (claimant only)		23,861	66%

[99] Clearly on this analysis, the claimant provided more than 50% of her statistical low income cut-off needs. However, Belair maintained that consideration ought be given for her child's needs for which she would be responsible so consideration should be given to looking at the approach using a two person household for the calculation of needs. However, even using a 1½ or 2 person household, the analysis results in a finding that the claimant was still providing more than 50% of those needs:

1.5 person household (claimant and infant)	26,784	55.%
2 person household	29,706	53%

[100] On all 3 scenarios (1, 1.5 and 2 person households) the claimant's sources of income, including a conservative estimate as to tips received, tax refund and GST rebate, would exceed 50% of the statistical low income cut off (LICO).

[101] An alternative approach would be to subtract an amount representing that reasonably spent for the child's basic needs by the claimant on an annual basis from the claimant's sources

of income then use the I person household statistic. On this basis the claimant's sources of income totalling $15,808 for the year and even if reduced by $2,137 ($178 per month or $880 for the 4.94 month period extrapolated to an annual amount) for a reduced available sources of income of $13,671 for the year which would be 57% leaving the claimant not principally financially dependent on her mother using the LICO approach.

Big Picture Approach

[102] Also supporting my findings with respect to dependency is the fact that the claimant had the capacity to earn more than 50% of her needs. This is a factor that must be considered in light of the *Miller v. Safeco* (supra) decision. At the time of the accident, she was only working three shifts per week. There were no physical or psychological impairments. Her daycare was fully subsidized and she only had TreDyan every other day and every other weekend. She could have worked more. Furthermore, she had been offered a full-time job at Victoria Secrets Pink Office just prior to the subject accident. The documentary evidence would indicate she would have made at least $23,296 gross per year. It was a full-time position as Category Supervisor working between 32 and 40 hours per week at $14.00 per hour. The claimant testified that "but for" the accident she would have started at Pink. Also to be considered is the fact that she had managed to live for several years outside the mother's home prior to returning home after her difficulties with her boyfriend. The claimant testified that "me going back was to build myself back up and go". The claimant did not have a room to herself. She was sleeping on a couch. In my view, the situation was probably temporary. She had lived three years living away from her family before moving back in. During that time she worked at Dave & Busters for 1 ½ years and claimed to have been making $160 per shift in tips alone. Looking at the "big picture" I am of the view that the claimant clearly had capacity to earn more than 50% of her needs thereby supporting the "mathematical approach" analysis and "LICO approach" analysis as well as the "big picture" approach.

[103] Further support for this conclusion is found in the only case referred to me where the claimant had a dependent child. The facts in *Motors Insurance Company v. York Fire & Casualty Insurance Company* (Arbitrator Samworth - December 24, 2009) are strikingly similar to the facts before me. The claimant was 22 years of age and had a 3 year-old child just as the case before me. Shelter was provided by her parents just as the case here. The claimant had

an annual before tax income of $14,071. I have found that Chemeka had an annual before tax income of $15,808. The claimant in *Motors* was found not to be dependent. Arbitrator Samworth wrote at p.8 of her decision:

> *"Clearly Latonia has the ability to be self-supporting. She is a healthy young woman who has shown during the relevant time period an ability to be employed as a cashier. Her hours varied in the relevant time period from a low of 28 to a high of 65 hours, which would translate into 32.5 hr per week. This reflects an ability to be not only part-time employed but full time employed. She was capable of earning at minimum $14,000 per annum and had she chosen to work more hours she could have earned greater than $14,000 per annum […]".*

[104] I am of the view that Chemeka was in the same situation and had the ability to be self-supporting particularly when one considers she only had custody of her son half of the time and had available fully subsidized day care.

[105] I have considered the Respondent Belair's submission that the claimant's employment history was checkered and she had been let go from some of the jobs that she had in the past. However, she always managed to find other work and often worked more than one job at a time. I have considered that she had no savings but do not find this unusual with a young woman in transition. I have considered that being a single mother may have impacted on job opportunities but she only had her son on average of 3 ½ days per week and had available to fully subsidized daycare. I have considered the submission made that the claimant planned on returning to school but a prior application had been denied and no further application had been made as of the date of the accident. Overall, I am satisfied that the claimant had capacity to earn more than 50% of her personal needs.

[106] On the "Big Picture" approach I find that Chemeka was not principally financially dependent on her mother at the time of the accident.

[107] I have considered the comments of Justice O'Brien in *Miller v. Safeco* (supra) that the approach to the interpretation of the legislation ought be remedial in nature so as to expand coverage but the facts here support a clear finding that the claimant was not principally financially dependent on her mother, Security National's insured, whether the "mathematical", "LICO" or "big picture" approaches are used.

[108] In the final analysis, I find that at the time of the accident the claimant was not principally financially dependent on her mother and as a result Belair ought stand in priority.

ORDER

[109] On the basis of the findings aforesaid, I order that Belair:

1) Assume responsibility for payment of statutory accident benefits to the claimant;

2) Reimburse Security National for payments made to date that are subject to reimbursement together with interest calculated pursuant to the *Courts of Justice Act*;

3) Pay Security National its costs of this arbitration on a partial indemnity basis;

4) Pay the costs of the arbitrator.

DATED at TORONTO this 14th)

day of July, 2016.)

KENNETH J. BIALKOWSKI
Arbitrator