2007 CarswellOnt 3254
Financial Services Commission of Ontario (Arbitration Decision)

Vanden Berg-Rosentha v. Motor Vehicle Accident Claims Fund

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Justin Vanden Berg-Rosentha, Applicant and Motor Vehicle Accident Claims Fund, Insurer

J. Rogers Member

Judgment: May 14, 2007
Docket: FSCO A07-000417

Counsel: Mr. David R. Neill, for Mr. Vanden Berg-Rosentha
Mr. Robert W. Kerkmann, for Motor Vehicle Accident Claims Fund

***J. Rogers Member*:**

Issues:

1 The Applicant, Justin Vanden Berg-Rosentha, was injured in a motor vehicle accident on September 12, 2004. He applied for and received statutory accident benefits from Motor Vehicle Accident Claims Fund ("the Fund"), payable under the *Schedule*. [1] The parties disagree on his entitlement to home modifications, under section 15 of the *Schedule.* They were unable to resolve their dispute through mediation, and Mr. Vanden Berg-Rosentha applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

2 A pre-hearing was held on March 26, 2007. Mr. Vanden Berg-Rosentha served a motion for an interim order, returnable at the pre-hearing. The motion requested an order requiring the Fund to continue to pay rent for the house where Mr. Vanden Berg-Rosentha and his family currently reside, until the arbitration is resolved. Although the Fund had agreed to pay the rent in the past, it opposed the motion, taking the position that rent is not a benefit payable under the *Schedule*. I informed counsel that the arbitration hearing could be scheduled within weeks and asked whether there was any reason that the hearing could not proceed. They advised that there was none. I ruled that, in those circumstances, I would not be inclined to hear a motion for an interim order. Instead, the alleged urgency requiring an interim order could be addressed by scheduling the arbitration at counsels' earliest convenience.

3 The only benefit claimed in the application for arbitration is expenses for home modifications, pursuant to section 15 of the *Schedule*. The amount is not specified. The Fund concedes that Mr. Vanden Berg-Rosentha is entitled to home modifications to accommodate his accident related impairments. The application and response identify two areas of dispute:

> 1. Is the residence on Queen Street South, Mr. Vanden Berg-Rosentha's "existing home" within the meaning of section 15 of the *Schedule*?
>
> 2. Is the Fund required to pay, in addition to the cost of renovations, the cost of remedial work (e.g. plumbing, electrical, structural and mould removal) without which the proposed renovations cannot proceed?

4 At the pre-hearing, it became apparent that Mr. Vanden Berg-Rosentha is not currently in a position to specify an amount for the benefit claimed because it is impractical to obtain an estimate for all of the proposed work. Rather, he seeks at this time only to have the disagreement in principle resolved. The parties agreed that the disagreement in principle could resolved by way

of this preliminary issues hearing, on the basis of written submissions. If factual disputes arose, suggesting that an oral hearing was required, the pre-hearing would be resumed to reconsider the process.

Result:

5

1. The residence on Queen Street South, is Mr. Vanden Berg-Rosentha's "existing home" within the meaning of section 15 of the *Schedule*.

2. The Fund is not required to pay, in addition to the cost of renovations, the cost of remedial work (e.g. plumbing, electrical, structural and mould removal) without which the proposed renovations cannot proceed.

Evidence and Analysis:

6 The hearing was conducted by written submissions only. The facts critical to my decision are not in dispute. Justin Vanden Berg-Rosentha was 12 years old when the accident happened on September 12, 2004. He was seriously injured and his family was devastated. The accident happened while his mother, Shirley Vanden Berg, was driving the family's 2004 Buick Rainier. Justin's brother Marcus, his sister Natasha and his father Johannes, were also passengers. Natasha and Johannes died as a result of their injuries. The others survived. Justin required a lengthy period of hospitalization and rehabilitation. He was discharged on June 30, 2005.

7 The property which is the subject of this dispute is located at 46 Queen Street South in Streetsville. The family owned it for many years prior to the accident. They did not live there. It was rented out. It is alleged that all tenancy agreements had been terminated and the family was in the process of moving in, at the time of the accident. The Fund disputes that allegation. Because of the conclusion I have reached on the meaning of "existing home", I find it unnecessary to resolve that dispute.

8 The family has not moved into the property at 46 Queen Street. After Justin's discharge from the hospital, they moved into the adjacent building they own at 44 Queen Street, a garage that had been converted into office space. They found it unsatisfactory and stayed only briefly. The parties then negotiated an agreement in which the Fund undertook to pay the rental cost of a home in the area for a year, ending December 31, 2006, with the payments deducted from the cost of any home modifications the Fund was ultimately liable to pay. The family continues to reside there. The agreement to pay rent was extended. The Fund had paid the rent up to the month of the pre-hearing and agreed to a further extension, at the pre-hearing.

9 The applicant's position is that the property at 46 Queen Street in uninhabitable, requiring mould removal, structural repairs and electrical and plumbing repair and upgrades. That position is based on a report authored by David Wallace of Adapt-Able Design, dated December 2, 2005. [2] Mr. Wallace estimates the cost of required modifications at $187,700 to $260,900. That amount includes an unspecified amount for structural repairs under the heading of "interior renovations". It also includes $8,000 to $27,000 for plumbing and electrical repairs. It does not include an estimate of the cost of mould removal or further structural, electrical and plumbing repairs that might be necessary. Mr. Wallace indicates that those estimates would require significant destructive testing and that the cost would be considerable.

10 The Fund disputes the allegation that the property is uninhabitable. Its position is based on a report prepared by Kathy Pringle, an occupational therapist it retained to assess Justin's requirements. [3] In her report, dated November 24, 2006, she notes that the property appears much different from the way Mr. Wallace described it, having been recently emptied, cleaned and disinfected. She indicates that Justin's mother told her that it was habitable with minimal additional work. Ms. Pringle also disagrees with Mr. Wallace on the extent of the work required specifically to accommodate Justin's impairments. Her estimate of the cost of that work is $34,161. Nevertheless, the Fund presented its submissions on the assumption that work the applicant proposed, might be required.

11 In his submissions, the applicant alleged that the growth of mould was caused by flooding from water pipes that burst while he was in the hospital. He further alleged that the water pipes burst because the heat and hydro were cut off and that the

heat and hydro were cut off because he was unable to move into the property as planned, as a result of the accident. He alleged that the growth of mould was therefore caused by the accident. The Fund disputed the allegations of fact and disagreed with the applicant's position on causation. Not knowing whether I would accept the factual allegations, the Fund requested an oral hearing to resolve the factual dispute. The applicant then withdrew the allegations.

Existing Home

12 Section 15 of the *Schedule* requires an insurer to pay for reasonable and necessary measures undertaken by an insured person for the following specified purposes:

1. To reduce or eliminate the effects of any disability resulting from impairment as a result of an accident, or;

2. To facilitate the insured person's reintegration into his or her family, the rest of society and the labour market.

13 Section 15(5)(i) provides that, for the above purposes, the insurer is required to pay for home modifications and home devices, including communications aids, to accommodate the needs of the insured person. Section 15(5)(i) also provides that the insurer is required to purchase a new home if it is more reasonable to purchase a new home to accommodate the needs of the insured person than to renovate the insured person's existing home.

14 Section 15(8) provides that the amount of the rehabilitation benefit for the purchase of a new home shall not exceed the value of the renovations to the insured person's existing home that would have been required to accommodate the needs of the insured person.

15 There is no definition of "existing home" in the *Schedule*. The term is only used in sections 15(5)(i) and 15(8). There is only one decision addressing what the term means. In *Cole v. Allstate Insurance Co. of Canada*[1997 CarswellOnt 1243 (Ont. Insurance Comm.)] [4] , the issue was whether the house in which the insured lived at the time of the accident was her "existing home", despite the fact that she had no ownership interest in it. Although decided under the 1994 *Schedule*, I find Arbitrator Blackman's comments instructive. He noted as follows:

> The *1994 Schedule* does not indicate the point in time to which the word "existing" refers. The term may mean an insured's home at the time of the accident, at the time of the hearing, or some other point in time. An insured may potentially have more than one "existing home" over time. Which home is the insured's "existing home" depends on the particular facts of the case.

[5]

16 The current *Schedule* also does not note the point in time to which the word "existing" refers. Also, like the 1994 *Schedule*, the current *Schedule* requires mandatory payment towards home modifications, not a single payment on a particular home. The only limitations are the policy limits and section 15(8).

17 Arbitrator Blackman also noted that the section 41(1) of the 1994 *Schedule*, which parallels section 15(8) of the current *Schedule*, restricted the availability of benefits and could "no more be ignored than the maximum limits on supplementary medical and rehabilitation benefits...". [6]

18 Arbitrator Blackman's approach recognizes that, without specific restriction, "existing home" may be given a broad and liberal interpretation that allows an insured the flexibility to chose where to live. His approach also recognizes that specific restrictions cannot be ignored. I adopt that approach. I find that "existing home" in the context in which it is used is not threshold for entitlement to home modifications. It is more of a yardstick by which to measure the cost of renovations the insurer is required to pay.

19 The Fund conceded that Justin's existing home does not have to be the one he is actually living in. The Fund conceded that it may be one he is planning to move into. However, the Fund attached the caveat that he must first establish that he will be

moving into that home and it is reasonable to do so. The caveat appears to be based on the concern that the Fund's exposure to payment might be increased, depending on the choice the insured is permitted to make. I find that the *Schedule* addresses that concern by imposing specific limitations on the amount of exposure, by a consideration of the reasonableness of the proposed expenditure, rather than by restricting the meaning of "existing home".

20 I note however that, although the *Schedule* allows flexibility in the insured's choice of a home, the choice is not entirely up to the insured. As Arbitrator Blackman noted, the finding will depend on the particular facts of the case. A significant consideration will be whether the insured's present accommodations meet post-accident needs. [7] I find that, on the particular facts of this case, the relevant ones being that Justin has not requested modifications of any other home, has a reasonable connection to the proposed home, and has expressed a settled intention live there, the home at 46 Queen Street, Streetsville is Mr. Vanden Berg-Rosentha's "existing home" within the meaning of section 15 of the *Schedule*.

Remedial Work

21 Section 15 places limits on the amount that the insurer is required to pay for home modifications in two ways: by defining the type of work and by and by providing the option to purchase a new home, with the insurer's contribution limited to the value of the renovations that would have been required on the existing home.

22 The submissions on this preliminary issue were limited to whether the proposed work falls within the defined type of work. More specifically, whether the proposed work is required to reduce or eliminate the effects of any disability resulting from impairment as a result of the accident.

23 Mr. Vanden Berg-Rosentha submits that the proposed remedial work falls within this limitation, if the *Schedule* is given a generous and wide interpretation, consistent with the remedial purpose of the legislation. He relies on the Superior Court decision in *Wynn v. Belair Direct* [8] to support the proposition that the quality of life of the applicant is relevant to the determination of the nature and quality of the housing benefit to be conferred on the insured. In *Wynn* , the plaintiff brought a motion for an interim order for benefits. The Court considered the plaintiff's current quality of life, not in determining the scope of the renovations available, but whether the plaintiff had demonstrated the urgency required to justify an interim order. I do not find that case to be of assistance in determining the scope of work for which the insurer is required to pay.

24 I agree that the limitation is to be given a generous and wide interpretation, consistent with the remedial purpose of the legislation. However, the clearly stated purpose cannot be ignored. For this application to succeed, the purpose of the work must be to reduce or eliminate the effects of any disability resulting from impairment as a result of an accident. That purpose necessitates a connection between the proposed work and accident related impairments.

25 In *Saliba v. Allstate Insurance Co. of Canada* [9] , the applicant's existing home was rented premises which was impossible to modify. He purchased a home at a cost of $339,000 and claimed the capital cost of the new home, plus renovation costs of $146,000. The relevant *Schedule* contained a purpose test similar to current *Schedule*. Arbitrator Palmer denied the claim for the capital cost of the house, ruling that the applicant did not require a house, because of the accident. [10]

26 I adopt Arbitrator Palmer's approach. I find that the proposed structural work and mould abatement at the Queen Street home is not required to reduce or eliminate the effects of any disability resulting from impairment caused by the accident. The Fund is therefore not required to pay for that work. In his report, Mr. Wallace indicates that before occupancy would be allowed, a building inspector would likely require the entire house to be rewired, because of illegal wiring over the years. He also indicates that the hydro breaker panel has been vandalized and would need repair. I find that that work is also not required to reduce or eliminate the effects of any disability resulting from impairment caused by the accident. In his report, Mr. Wallace indicates that there is no running water in the house, because the burst pipes have not been repaired. I find that that work is also not required to reduce or eliminate the effects of any disability resulting from impairment caused by the accident.

27 In summary, I find that Justin does not require a mould free environment, a home that is structurally sound, lawful electrical wiring and running water because of the accident.

28 My ruling does not mean that the Fund's obligations are strictly limited to the four corners of the cost of installation of grab bars etc. As with any construction project, there may be work that is necessary and incidental to the principal objective that is properly included in the cost of the project.

29 The question of whether it is more reasonable to purchase a new home to accommodate Justin's needs remains unanswered. The material did not disclose details of the family's resources. Perhaps it would be reasonable to consider selling the home on Queen Street and investing the proceeds in a property that can more readily be renovated to accommodate Justin's needs.

30 In *MacMaster v. Dominion of Canada General Insurance Co.*[1994 CarswellOnt 4976 (Ont. Insurance Comm.)] [11] , Arbitrator Makepeace wrote the following:

> The underlying purpose of section 6 [section 15 under the current *Schedule*] is to return the applicant to his or her pre-accident level of function, to the extent that is reasonably possible. Mr. MacMaster is not entitled to receive a "windfall" as a result of his accident. He is not entitled to hold out for a house, and accept nothing less. He must be reasonable in working with the Insurer to reach a solution which, while it may not be ideal, is workable and reasonable. Nor is he required to accept a standard of living he would not have accepted before the accident.

31 I urge the parties to take the conciliatory approach that Arbitrator Makepeace recommended.

Expenses:

32 The parties made no submissions on expenses. I reserve the assessment to the hearing Arbitrator. However, should the parties resolve the matter without a hearing but are unable to resolve the issue of expenses, either party may make an appointment for me to determine the matter in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

***J. Rogers Member*:**

33 Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

> 1. The residence on Queen Street South, is Mr. Vanden Berg-Rosentha's "existing home" within the meaning of section 15 of the *Schedule*.
>
> 2. The Fund is not required to pay, in addition to the cost of renovations, the cost of remedial work (e.g. plumbing, electrical, structural and mould removal) without which the proposed renovations cannot proceed.
>
> 3. The assessment of this hearing is reserved to the hearing Arbitrator. Should the parties resolve the matter without a hearing but are unable to resolve the issue of expenses, either party may make an appointment for me to determine the matter in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Footnotes

1 The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

2 Tab 2, Applicant's submissions

3 Tab 2, Respondent's submissions

4 OIC A96-000394, January 15, 1997).

5 Footnote 4, at page 7

6 Footnote 4, at page 8

7 See *Alfred v. Allstate Insurance Co. of Canada* (June 1, 1999), Doc. FSCO A98-000559 (F.S.C.O. Arb.).

8 [2002] O.J. No. 4180 (Ont. S.C.J.)

9 (March 7, 2001), Doc. FSCO A00-000366 (F.S.C.O. Arb.)

10 I note that, although the applicant did not rely on it for this proposition, the Court in *Wynn* ruled that the limitation in section 15(8) could not be implemented and therefore had no application. The Court found that it was more reasonable to purchase a new home than to renovate the existing home. However, The Court reasoned that section 15(8) contemplates that renovations to the existing home are reasonably possible and concluded that, since the renovations in that case were not possible "section 15(8) cannot be implemented and therefore has no application".

The Court therefore required the insurer to pay the entire cost of the purchase of a new home. It appears to me that the Court's logic removes all meaning from section 15(8) which is only triggered if it is more reasonable to purchase a new home to accommodate the needs of the insured person than to renovate the insured person's existing home. Arbitrator Palmer took a different approach in similar circumstances in *Saliba* .

11 OIC A-006025, October 26, 1994).