



FSCO A09-000442

BETWEEN:

J. S.

Applicant

and

GUARANTEE COMPANY OF NORTH AMERICA

Insurer

REASONS FOR DECISION

Before: Jeffrey Rogers

Heard: June 23, 2010, in Kitchener, Ontario.

Appearances: Daniel Fife, solicitor for J.S.
Rose Bilash and Jonathan de Vries, solicitors for Guarantee Company of
North America

Issue:

1. Is J.S. entitled to receive a rehabilitation benefit in the amount of \$204,130 for renovations to his home on Stirling Avenue, pursuant to section 15 of the *Schedule*?

Result:

1. J.S. is not entitled to receive a rehabilitation benefit in the amount of \$204,130 for renovations to his home on Stirling Avenue, pursuant to section 15 of the *Schedule*.

INTRODUCTION:

Section 15 of the *Schedule*¹ requires an insurer to pay certain rehabilitation benefits to an insured person who sustains an impairment as a result of an accident. These benefits include the cost of home modifications to accommodate the needs of the insured person. 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, the insurer is required to purchase a new home.

Section 15(8) of the *Schedule* provides that "[T]he 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."

The question in this case is whether, in J.S.'s circumstances, the insurer is required to pay an amount for home modifications, in addition to what it has paid for the purchase of a new home.

FACTS:

The facts are not in dispute. They are as follows: The Applicant, J.S., was rendered a quadriplegic as a result of catastrophic injuries he suffered in a motor vehicle accident on July 17, 2007. He applied for and received statutory accident benefits from Guarantee Company of North America ("Guarantee"), payable under the *Schedule*. J.S. was 16 years old at the time of the accident. He lived with his parents and brother in a rented house on Karn Street in Kitchener ("the Karn Residence"). J.S. and his family occupied the main and upper floors and another tenant occupied the lower levels.

Guarantee approved a request for David Borthwick of Accessible Solutions Inc. to complete a housing assessment of the Karn residence. On November 22, 2007, Mr. Borthwick reported that the cost of modifications required to accommodate J.S.'s needs would be \$279,980, exclusive of

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

GST, building permits and incidentals.² He later gave the opinion that the total cost would be \$343,480 to \$348,480.

Renovation of the Karn Residence was not an option because the landlord refused to allow any of the proposed modifications. Mr. Borthwick therefore recommended considering “alternative long-term housing options which may be available for [J.S.] and his family.”³

Guarantee wrote to J.S. on December 13, 2007 and told him that it was prepared to pay \$279,980, inclusive of “GST, taxes/fees and moving expenses etc.” for the purchase of another residence.⁴ The letter stated that the new home must meet the “needs required by [J.S.’s] disability” and be pre-approved by Guarantee. After receiving this letter, J.S.’s family began looking for alternative housing. They located a house for sale on Stirling Avenue in Kitchener (“the Stirling Residence”). They felt that it was in a desirable location and provided a good basis for renovations. The sale price was \$224,900.

On December 28, 2007, Guarantee approved funding for an assessment of the cost of modifications of the Stirling Residence, to be completed by ACEON. On January 22, 2008, ACEON reported that the cost to modify the Stirling Residence would be \$177,300. Therefore, the total cost of purchasing the Stirling residence and modifying it was \$402,200.

After receiving the ACEON report, a team meeting of a number of the service providers involved in J.S.’s care was held to consider the available options. As a result of this meeting Peggy Stuart of Accessible Homes was consulted. She advised that there were no accessible homes then for sale in the area. Therefore, homes that required modifications were the only available option.

Guarantee then asked a local real estate agent to show additional homes in the area, fitting a number of baseline criteria. The price of available homes meeting the criteria ranged from \$249,000 to \$324,888. All of them required modifications. Therefore, the Stirling residence was

² Home Modifications Report, Joint Arbitration Brief, Tab 6

³ Home Modifications Report, at page 35

⁴ Letter dated December 13, 2007, Joint Arbitration Brief, Tab 7

not only J.S.'s desired home, it was also the one that could be most reasonably purchased and modified.

J.S. submitted a Treatment Plan, dated January 24, 2008, in the amount of \$436,425.⁵ This sum included the cost of purchasing the Stirling Residence, modifying it, and all related fees, disbursements and taxes. On February 4, 2008, Guarantee responded that it would pay \$279,980, being the estimated cost of renovating the Karn Residence. Guarantee paid J.S. \$279,980 on April 2, 2008. Nevertheless, J.S.'s family decided to buy the Stirling Residence. They signed an Agreement of Purchase and Sale on April 8, 2008, with a closing date of April 15, 2008. The purchase proceeded as scheduled and J.S. moved into the Stirling Residence.

After the purchase, Guarantee continued to be involved in assessing J.S.'s needs for modifications to the Stirling Residence. On September 4, 2008, Esther Atkin, an occupational therapist Guarantee had retained to assess the reasonableness and necessity of the treatment plan for modifications to the Stirling Residence, provided her opinion. By that time Guarantee and Ms. Atkin had also received architectural drawings for the modifications that Mr. Borthwick had completed, with Guarantee's approval. Ms. Atkin concluded that the proposed modifications to the Stirling residence were reasonable and necessary. However, she did not comment on whether \$436,425 was a reasonable cost of purchase and renovation. When asked for clarification, she informed Guarantee that she could not comment because the estimates in the Treatment Plan were prepared without architectural drawings. She recommended that Mr. Borthwick be asked to provide an estimate of the cost of the renovations.

On December 8, 2009, Mr. Borthwick gave the opinion that the cost of renovating the Stirling Residence would be \$229,840, plus incidentals. The parties have now agreed that the total cost is \$255,130. Guarantee paid J.S. a further \$51,000, about two weeks before the hearing. That amount represents what Guarantee believes to be the reasonable cost of incidentals for the renovation of the Karn Residence. J.S. claims entitlement to payment of a further \$204,130. That is the difference between the total cost of renovations to the Stirling Residence and the \$51,000 Guarantee recently paid. J.S. also claims interest on the \$204,130.

⁵ Joint Arbitration Brief, Tab 9

In the alternative, J.S. claims that he is entitled to payment of a further sum for incidentals, based on the assessment of the Karn Residence. He also claims interest on that amount, interest on the \$51,000 Guarantee recently paid, and a special award. Because these issues require oral evidence that they were not prepared to present before me, and because a hearing on them was not required unless J.S. proved unsuccessful on his first position, the parties agreed to defer their dispute on the remaining issues to a later date.

ANALYSIS:

I find that J.S.'s circumstances place him squarely within the limits of entitlement to rehabilitation benefits for home modifications, established by sections 15(5)(i) and 15(8) of the *Schedule*.

Section 15(5)(i) provides as follows:

The rehabilitation benefit shall pay for all reasonable and necessary expenses incurred by or on behalf of the insured person as a result of the accident... for...home modifications and home devices, including communications aids, to accommodate the needs of the insured person, or the purchase of 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;

That section gives the insurer two alternatives:

- (a) Modify the insured person's existing home; or
- (b) Purchase a new home to accommodate the needs of the insured person if that is more reasonable.

Section 15(8) provides as follows:

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.

That section sets a maximum value on the rehabilitation benefit, where an insurer is required to purchase a new home.

Renovations not possible

J.S. argued that section 15(8) does not apply in his circumstances because it was not possible to do the renovations to the Karn Residence as a result of the landlord's refusal to allow them.

In *Wynn v. Belair Direct*,⁶ the Court initially took the approach that J.S. suggests. In that case, the plaintiff lived in rented premises that could not be renovated. She sought an order requiring the insurer to purchase a new home to accommodate her needs. In granting the order, the motions court Judge stated as follows:

Clearly, based on the evidence before me, 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." In fact, the evidence is that it is not possible to renovate the insured person's existing home and that option has been rejected by the consultant retained by the Defendant. The question left for this court that must be resolved, is how to apply section 15(8) under the circumstances. The subsection obviously contemplates that renovations to the insured person's existing home are reasonably possible. Here, on the evidence, they are not. Under those circumstances, section 15(8) cannot be implemented and therefore has no application.⁷

In my view, the refusal of the Court to apply section 15(8) is inconsistent with its own finding that it was "more reasonable to purchase a new home to accommodate the needs of the insured person than to renovate the insured person's existing home."

The appeal of that decision was resolved without a hearing. However, in granting leave to appeal, the Divisional Court found that the Judge erred in the interpretation of section 15(8).

The Court stated as follows:

There is an incorrect interpretation made by the motions court judge on s. 15(8) of SABS that sets limits for the housing renovations. I agree with counsel for the defendant who maintained that the plaintiff's existing home will not be renovated, pursuant to the entitlement under the SABS legislation. The defendant needs to know what the needs are and the insurer is entitled to as many reports as it feels it needs in the circumstances. What is missing from the equation is what it will cost

⁶ [2002] O.J. No. 4180

⁷ At Paragraph 22.

to renovate the existing home. There is a statutory requirement that obliges the defendant to determine what it will cost to renovate the plaintiff's home. **There is a difference in considering Ms. Pringle's report between what the needs are and what is paid under the legislation.** (Emphasis added) There is a live issue concerning the amount of housing benefit and that issue is still there. There is a statutory requirement that the insurer has to meet to determine what it will cost to renovate and that determination needs to be made, even though the rented premises of the plaintiff will not be renovated. Ms. Pringle's report on which the motions court judge relied is only one half of the equation and it was an error to rely on it.⁸

The relevant facts in *Wynn* are the same as in this case. I find the above statement by the Divisional Court to be binding authority for the approach to be taken in these circumstances. The cost of renovations to the existing home sets the amount of the housing benefit. "There is a difference...between what the needs are and what is paid under the legislation" as the Court states. The insurer is only required to pay "what it will cost to renovate the existing home."

Existing Home

As J.S. pointed out, the *Schedule* does not define "existing home." He submitted that the Stirling Residence is now his "existing home" and he is therefore entitled to the claimed cost of modifications.

Arbitrator Blackman considered the term in *Cole and Allstate Insurance Company of Canada*⁹ and stated 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.¹⁰

⁸ *Wynn v. Belair*, [2003] O.J. No. 3531, at paragraph 66

⁹ (OIC A96-000394, January 15, 1997)

¹⁰ At page 7

I accept the *Cole* approach. The relevant language of the current *Schedule* is unchanged from the 1994 *Schedule* that Arbitrator Blackman considered. The absence of a definition of “existing home” leaves open the possibility that J.S. is entitled to further payment for modifications to the Stirling Residence, should his needs increase or change. He might also be entitled to funds for the purchase of another home, if it is then more reasonable to do so.

However, as Arbitrator Blackman pointed out, which home is the “existing home” depends on the particular facts of the case. There is no precedent for finding that the Stirling Residence is the “existing home” on the facts of this case. That approach would negate the intent of sections 15(5)(i) and 15(8) and instead require the insurer to purchase a new home and pay for modifications to the new home, with no maximum value. On the facts of this case, I find that the Karn Residence is J.S.’s “existing home.”

Equitable remedy

J.S. argued that the facts show that Guarantee anticipated that it would pay for the modifications to the Stirling Residence. He pointed out that Guarantee was involved in the decision to purchase a new home, required that the \$279,980 it paid be used to purchase a new home to accommodate his needs, approved funding of assessments to determine the cost of renovations to the Stirling Residence and received an opinion that the proposed renovations are reasonable and necessary. J.S. did not point out a legal principle that creates entitlement to the claimed payment, because of Guarantee’s conduct.

In my view, Guarantee acted as it was entitled to do, in the circumstances. It was entitled to rely on the limit established by sections 15(5)(i) and 15(8), and it did so. It did not waiver from its position that it would pay no more than those sections required. Therefore, J.S. could not argue that Guarantee was required to pay more by application of any principle of equity. Despite its position, Guarantee had an obligation at all times to acquire information in order to assess the reasonableness of proposed alternatives, it had an obligation to ensure that the benefits it paid were used for the intended purposes, and it had an obligation to keep an open mind about J.S.’s entitlement to other benefits.

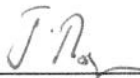
Guarantee's involvement in the decision to buy the Stirling Residence was consistent with its obligation to assess whether it was reasonable to do so. The terms it imposed when it paid J.S. \$279,980 ensured that the benefit was used for its intended purpose.

Guarantee was entitled to assess the reasonableness of the proposed modifications to the Stirling residence, even though it was not prepared to pay for them. As the Divisional Court pointed out in *Wynn*, the insurer has an obligation to assess the needs, despite the monetary limits on payment. I find it laudable that Guarantee kept an open mind and funded assessments and services to which J.S. may be entitled under sections 15(5)(l) or 24 of the *Schedule*, despite the limit imposed by sections 15(5)(i) and 15(8).

For the above reasons, I find that J.S. is not entitled to receive a rehabilitation benefit in the amount of \$204,130 for renovations to his home on Stirling Avenue, pursuant to section 15 of the *Schedule*. I find that J.S. is entitled to payment of an amount that represents the value of modifications to the Karn Residence. The hearing will now be reconvened to address J.S.'s alternative position. Either party may contact the Case Administrator to establish the date.

EXPENSES:

The parties made no submissions on expenses. The decision on expenses is reserved until the hearing has been completed on the remaining issues. Should the parties resolve the remaining issues on their own, but remain 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*.



Jeffrey Rogers
Arbitrator

August 25, 2010

Date



FSCO A09-000442

BETWEEN:

J. S.

Applicant

and

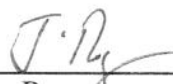
GUARANTEE COMPANY OF NORTH AMERICA

Insurer

ARBITRATION ORDER

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

1. J.S. is not entitled to receive a rehabilitation benefit in the amount of \$204,130 for renovations to his home on Stirling Avenue, pursuant to section 15 of the *Schedule*.



Jeffrey Rogers
Arbitrator

August 25, 2010

Date