

**Saleh v. State Farm Mutual Automobile Insurance Co., [2014] O.F.S.C.D. No. 258**

Ontario Financial Services Commission Insurance Decisions

Ontario Financial Services Commission

Toronto, Ontario

Panel: Robert Bujold, Arbitrator

Heard: July 8 and 10, 2014.

Decision: December 18, 2014.

FSCO No. A12-007868

**[2014] O.F.S.C.D. No. 258**

Between Khaled Saleh, Applicant, and State Farm Mutual Automobile Insurance Company, Insurer

(26 paras.)

## **Appearances**

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Diana Colangelo for Mr. Saleh.

John P. Desjardins and Bitia M. Rajaei for State Farm Mutual Automobile Insurance Company.

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## **REASONS FOR DECISION**

### **Issues:**

1 The Applicant, Khaled Saleh, was injured in a motor vehicle accident on July 24, 2009. He applied for and received certain statutory accident benefits from State Farm Mutual Automobile Insurance Company ("State Farm"), payable under the *Schedule*.<sup>1</sup> Mr. Saleh also applied for weekly caregiver benefits which State Farm denied. The parties were unable to resolve their disputes through mediation, and Mr. Saleh applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act, R.S.O. 1990, c.1.8*, as amended.

2 The issues in this hearing are:

1. Is Mr. Saleh entitled to receive weekly caregiver benefits in the amount of \$300.00 per week from July 24, 2009 through July 23, 2011?
2. Is State Farm liable to pay Mr. Saleh's expenses in respect of the arbitration?
3. Is Mr. Saleh liable to pay State Farm's expenses in respect of the arbitration?
4. Is Mr. Saleh entitled to interest for the overdue payment of benefits?

### **Result:**

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1. Mr. Saleh's application for arbitration is dismissed.
2. A decision regarding expenses of the arbitration is deferred.

### Overview

4 Mr. Saleh claims a weekly caregiver benefit in the amount of \$300 per week in respect of his two children, Youssef and Mariam, who were 5 and 3 years old respectively at the time of the accident. To qualify, Mr. Saleh must establish that, at the time of the accident, he was "the primary caregiver" for Youssef and Mariam, and that, as a result of the accident, he suffered "a substantial inability to engage in the caregiving activities in which he or she engaged at the time of the accident."<sup>2</sup>

5 In this case, State Farm also raised concerns related to the identity of the person or persons who provided caregiver services post-accident and challenged the quantum of the expenses submitted by Mr. Saleh.

6 While the evidence pointed to Mr. Saleh as a devoted father and the family's breadwinner, it failed to establish that he was "the primary caregiver" for Youssef and Mariam. Since caregiver benefits are only available to the primary caregiver, Mr. Saleh's claim could not succeed, and it was unnecessary to consider any of the other issues related to his claim for caregiver benefits.

### EVIDENCE AND ANALYSIS:

#### Was Mr. Saleh the primary caregiver for his children, Youssef and Mariam?

7 At the time of the accident, Mr. Saleh was employed as a limousine driver by a company owned by his wife, Jahida Saleh. The company owned one limousine operated by Mr. Saleh.

8 The evidence varies regarding the number of hours that Mr. Saleh worked pre-accident, but all of the evidence confirms that he worked full-time. Mr. Saleh testified that he worked 40 - 50 hours per week, although some days he would work less and some days not at all. In a report by Vivek Malhotra, an occupational therapist who conducted in-home assessments on Mr. Saleh's behalf, Mr. Saleh is noted to have reported that he "used to work full-time (50 - 60) driving limousine."<sup>3</sup> In another in-home assessment conducted on Mr. Saleh's behalf by Varun Madan, occupational therapist, Mr. Saleh is noted to have reported that he worked 60 hours over 6 days per week.<sup>4</sup> Mr. Saleh admitted that he would sometimes work 6 days in a week. Dr. Bereznick, a chiropractor who conducted an assessment on behalf of State Farm (in response to a treatment plan) reported that "[p]rior to the subject motor vehicle collision, Mr. Saleh was driving about 70 hours per week."<sup>5</sup> Mr. Saleh challenged telling Dr. Bereznick that he worked 70 hours per week in the period immediately prior to the accident. Mr. Saleh suggested that Dr. Bereznick may have been referring to a limousine job he had back in 1998. Mr. Saleh did admit, however, that it was possible for him to work 70 hours in a week, although it would not be typical. When asked by State Farm's counsel if her husband would work as much as 12 hours per day, 6 days per week, Mrs. Saleh responded "no, he wasn't reaching that," but she could not state how many hours he worked.

9 Mr. Saleh testified that, while he worked full-time, he still managed to spend a lot of time at home. His licence did not permit him to pick up fares from the airport, and he did not stay on the road or parked at a location waiting for fares. If he was not attending to a pre-arranged fare, he was at home. Mr. Saleh also testified that he was very involved with his children, especially his youngest children from his second marriage, Youssef and Mariam. Mr. Saleh testified that he and his wife, Jahida, shared responsibility for the children. When asked who was primarily responsible, he responded "both of us."

10 In terms of specific pre-accident caregiver tasks, Mr. Saleh testified that he would help feed and dress the

children. He would also help at bath time. Mr. Saleh testified that he would read to his children and help with homework.<sup>6</sup> He would also take them for walks, and take them to activities such as swimming, skating and hockey. He would sometimes take the children to these activities on his own and sometimes they would go as a family. They generally liked to do things as a family. He would also sometimes take Youssef to school or pick him up afterward, although he admitted that his wife did so more often than he did. He also testified that he was generally able to do more with the children on weekends than weekdays. He admitted that, as a result of his work, he would sometimes not be home to help get the children ready in the morning or to put them to bed at night, but, when he was home, he and his wife would share the responsibilities.

**11** Mr. Saleh did not call any treating or expert medical witnesses in support of his claim to a caregiver benefit, but the reports of Mr. Malhotra and Mr. Madan, the occupational therapists retained on his behalf, formed part of the documentary record.

**12** Mr. Malhotra conducted an in-home assessment in October 2009, and follow-up assessments in March and August 2010. All three assessments indicate that Mr. Saleh reported that, with respect to the childcare tasks of bathing, feeding and changing, his "Spouse did it prior to MVA." However, the first assessment does recommend 10 hours per week of assistance for "Playing with children, supervision, homework, and taking them to events (for children 6 and 3 1/2 years old)."<sup>7</sup>

**13** Mr. Madan's report in July 2011 also indicates that it was Mr. Saleh's subjective report that, prior to the accident, he was not responsible for "bathing, dressing, undressing, meals and feeding" the two youngest children. As for "play/assist with school tasks/activities," Mr. Madan's report indicates that these tasks were "Shared with his wife."

**14** Mr. Saleh denied that he did not help with bathing, feeding or dressing the children, although he admitted that he obviously could not breastfeed the youngest child. He also admitted that his wife may have changed more diapers than he did.

**15** Mrs. Saleh also testified at the hearing. When asked if it would be fair to say that she was a full-time homemaker, Mrs. Saleh responded that she spent all of her time "working for her children, her husband and her home." Although the owner of the limousine business, Mrs. Saleh clarified that "working" for her husband included taking calls from customers and doing some related administrative work. She estimated that the business received 40 to 50 calls per month lasting about two minutes each, but she admitted that she probably took no more than half the calls, as Mr. Saleh would answer the phone when he was home. Administrative duties involved putting customer orders into the computer. Mrs. Saleh estimated that this took an average of 20 minutes per day. Mr. Saleh also shared in the administrative work.

**16** It is clear from the evidence that, while the limousine business represented full-time work for Mr. Saleh, Mrs. Saleh's contributions required well under an hour in an average day.

**17** The only other activity that Mrs. Saleh identified as taking her away from caring for her children, her husband and her home were twice weekly visits to the Mosque. She estimated that she was gone for perhaps two hours on each occasion, and Mr. Saleh would look after the children when he was around.<sup>8</sup>

**18** With respect to the statements contained in the reports of Mr. Malhotra and Mr. Madan that her husband was not responsible pre-accident for bathing, dressing or feeding the children, Mrs. Saleh supported her husband's evidence that he did play a role in these tasks. However, she was primarily responsible for meals and, while Mr. Saleh would sometimes help with bathing and dressing the children, she admitted that, as between them, she engaged in these tasks more than he did.

**19** With respect to their relative contributions to the care of the children generally, Mrs. Saleh testified that when her husband was at work, she would take care of the children. When they were both at home, they would share responsibility.

**20** I have no difficulty in finding on the evidence before me that Mr. Saleh not only worked hard to provide for his family, but that he was also an involved father who contributed significantly to the physical and emotional needs of his children. I accept that, when he was available, he shared in many of the caregiver responsibilities required to look after Youssef and Mariam. As a result, I am sure that, post-accident, his substantial contributions were missed. Still, and even if I accept that Mr. Saleh had some role in feeding, dressing and bathing the children pre-accident, I am unable to conclude that Mr. Saleh was "the primary caregiver" for the purposes of the *Schedule*.

**21** I find that, while they were both devoted parents, Mr. and Mrs. Saleh had different roles and responsibilities when it came to providing for the family. Looking after the children clearly constituted a larger proportion of Mrs. Saleh's time in an average day, while attending to the business to support the family constituted a larger proportion of Mr. Saleh's time in an average day.

**22** But it is not just a matter of the number of hours that each parent spent with the children that leads me to the conclusion that Mr. Saleh was not the primary caregiver. I also find that, while both parents may have shared responsibility for reading and playing with the children and going on outings, Mrs. Saleh was primarily responsible for most of the day-to-day caregiver tasks, such as feeding, dressing, bathing and supervising the children, as well as taking Youssef to school and picking him up afterwards.

**23** Counsel for Mr. Saleh suggested that, where two parents share equally in caregiver tasks for their children, either or both may be fairly regarded as "the primary caregiver." That may be correct, but those were not the facts in this case. While Mrs. Saleh's caregiver contributions may not have greatly exceeded those of Mr. Saleh, she clearly contributed more, and it would be a mischaracterization of the evidence to place their respective caregiver contributions on par. As for any time that Mr. Saleh may have spent with the children to allow Mrs. Saleh some time for herself, including time to attend Mosque, it was not sufficient to avoid the inescapable conclusion that, for the purposes of the *Schedule*, Mrs. Saleh was the primary caregiver for Youssef and Mariam.

**24** As Mr. Saleh was not the primary caregiver for Youssef and Mariam at the time of the accident, his claim for caregiver benefits must fail. His application for arbitration is therefore dismissed.

#### **EXPENSES:**

**25** The parties are encouraged to try to resolve the issue of expenses of the arbitration between themselves. In the event that resolution is not possible, either party may seek a determination of expenses in accordance with Rules 75 to 79 of the *Schedule*.

December 18, 2014

Date

Robert Bujold

Arbitrator

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#### **ARBITRATION ORDER**

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

1. Mr. Saleh's application for arbitration is dismissed.
2. A decision regarding expenses of the arbitration is deferred.

December 18, 2014

Date

Robert Bujold  
Arbitrator

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- 1** *The Statutory Accident Benefits Schedule -- Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.
- 2** See section 13 of the *Schedule*.
- 3** Ex. 1, Tab 8C
- 4** Ex. 1, Tab 8H
- 5** Ex. 1, Tab 9D
- 6** "Homework" only applied to the older child, Youssef, who was 5 at the time of the accident, and consisted mainly of "explaining things, making stories and checking words."
- 7** The follow-up assessments do not recommend any caregiver assistance for these items, but this seems to be based on "Spouse assisting with this task since the MVA," not on an explicit finding that Mr. Saleh no longer required assistance with these tasks. In any event, 10 hours per week (a little less than 1.5 hours per day) was the most Mr. Malhotra ever recommended for caregiver assistance.
- 8** The evidence established that there were at least two other persons who provided occasional caregiver assistance when Mr. Saleh was not around. Mr. Saleh had at least one daughter from his previous marriage who was residing with them at the time of the accident. Although she was not always home, and there was the suggestion that, being a step-daughter, it was difficult for Mrs. Saleh to ask for too much help, Mrs. Saleh testified that her step-daughter would help with the other children, if asked. As well, a family friend who visited from Dubai for extended periods stayed in a basement suite in the house and "provided some babysitting, here and there."

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