

FSCO A01-001117

**BETWEEN:**

**TEKEBASH BERHE**

**Applicant**

**and**

**STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY**

**Insurer**

**REASONS FOR DECISION**

**Before:** Judith Killoran

**Heard:** July 4, 2002, at the offices of the Financial Services  
Commission of Ontario in Toronto.

**Appearances:** David R. Neill for Mrs. Berhe  
Heather Kawaguchi for State Farm Mutual Automobile Insurance Company

**Issues:**

Mr. Hailemariam Gebremeskel was killed in a motor vehicle accident on January 20, 2000. His mother, Mrs. Tekebash Berhe, claimed entitlement to death benefits under the *Schedule*. The parties were unable to resolve their disputes through mediation, and Mrs. Berhe applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The issues in this hearing are:

1. Is Mrs. Berhe entitled to death benefits pursuant to section 25 of the *Schedule*?
2. Is Mrs. Berhe entitled to interest for the overdue payment of benefits pursuant to subsection 46(2) of the *Schedule*?
2. Is either party liable to pay the other's expenses in respect of the arbitration under subsection 282(11) of the *Insurance Act*, R.S.O. 1990, c.I.8?

**Result:**

1. Mrs. Berhe is entitled to death benefits in the amount of \$35,000.
2. Mrs. Berhe is entitled to interest for the overdue payment of benefits pursuant to subsection 46(2) of the *Schedule*.
3. The issue of expenses may now be spoken to.

**Procedural Issues:**

Mrs. Berhe applied under section 25 for death benefits. However, at mediation and pre-hearing, she restricted her claim to \$10,000 under subsection 25 (2) 2.i. which provides for a payment to each of the insured person's dependants, and to each person to whom the insured person had an obligation at the time of the accident to provide support under a domestic contract or court order. However, at the hearing Mrs. Berhe asked to add to her claim her entitlement under subsection 25(3) which states:

If no payment is required by paragraph 1, an additional payment of \$25,000 to the insured person's dependants and the persons, other than a former spouse or same-sex partner of the insured person, to whom the insured person had an obligation at the time

of the accident to provide support under a domestic contract or court order, to be divided equally among the persons entitled.

As a result, Mrs. Berhe claimed a total amount in death benefits of \$35,000.

State Farm conceded that it would not have brought any further evidence nor prepared the case differently if the claim were for the larger amount. I find that the mediator's report and the pre-hearing letter both referred to a claim for death benefits under section 25. Therefore, I will consider the claims under both subsections of section 25.

Mrs. Berhe's counsel informed me that Mr. Teshome Gislasié, who had a power of attorney and acted as an agent for Mrs. Berhe, was unable to attend the arbitration hearing due to illness. Regrettably, Mr. Gislasié could not be a witness. I asked counsel if he was seeking an adjournment but he declined and stated he was prepared to proceed with the arbitration hearing.

## **EVIDENCE AND ANALYSIS:**

Mr. Gebremeskel died as a result of a fatal car accident on January 20, 2000. He was a pedestrian at the time and was struck by a car insured by State Farm. There is no issue between the parties that State Farm is the proper insurer for Mrs. Berhe to proceed against with her claims for death benefits. State Farm paid the maximum of \$6,000 for funeral costs under subsection 26 of the *Schedule*. The remaining issue is whether Mrs. Berhe meets the criteria for entitlement to death benefits under the *Schedule*.

Mr. Gebremeskel's friend, Mr. Gislasié, contacted an attorney in Ethiopia, to obtain a letter confirming that Mr. Gebremeskel's mother, Mrs. Berhe, was principally dependant on her son for support. Instead, Mr. Gislasié received a translated copy of a hearing from a communal court in Kebele, Ethiopia. Rather than hearing from Mrs. Berhe about whether she was a dependant, the court asked various witnesses to give testimony. The witnesses included: a priest, a government worker, and a textile factory worker. These witnesses lived close to Mrs. Berhe and gave evidence that she was

receiving money from her son and was financially dependant on him. As a result, the communal court ruled that Mrs. Berhe was a dependant of her son.

State Farm was not satisfied with the court ruling. On September 24, 2001,<sup>1</sup> State Farm forwarded a number of questions to Mrs. Berhe which were to be answered in the form of a statutory declaration.

The information requested was:

1. That she was the mother of Hailemariam Gebrehiwot Gebremeskel.
2. Her current address.
3. Her rent.
4. The amount of money she received from her son.
5. How she received monies from her son.
6. How these monies were used.
7. If those monies were used for other persons.
8. Who she resides with.
9. Her marital status.
10. Any income from other sources.
11. Copies of her bank statements or other documentary proof which would indicate that the monies were received and how they were expended.
12. The names and address of her other children and whether they sent her any money.
13. The length of time she was receiving money from her son.
14. Income tax returns for 3 years pre-accident (to indicate all monies earned).
15. Any documentation which would help support that she was principally financially dependant on her son would be helpful.

On November 28, 2001, State Farm repeated its request for further information.

The sworn statutory declaration and answers was received by Mrs. Berhe's counsel on July 2, 2002.<sup>2</sup>

The statutory declaration states the following:

1. I am the natural mother of the late Hailemariam Gebremeskel.

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<sup>1</sup>Exhibit 10

<sup>2</sup>Exhibit 3

2. I am alive and well and living in Deberki Kebele, Ethiopia, in an apartment for which I pay \$150.00 (Ethiopian dollars) per month.
3. My son, the late Hailemariam Gebremeskel, paid to me approximately \$250 (Canadian dollars) per month to assist me with my daily living expenses.
4. I am married and reside with my husband at the above address. My husband does not work.
5. Occasionally, I did receive monies from my other children, but I was principally dependant on my son, the late Hailemariam Gebremeskel for financial support.

In a supplementary explanation attached to the statutory declaration, Mrs. Berhe confirms, among other things, that the money from her son was received through banks and mail but mostly through individuals, and was used for family maintenance from 1988 to his death. Mrs. Berhe confirmed that she does not have any income nor copies of bank statements or income tax returns as there was no personal income. The rate of foreign exchange in Ethiopia is variable. For example, on June 7, 2002, the rate of foreign exchange in Ethiopia is one American dollar to 8 Birr and cents. sb Ethiopian currency.

Mrs. Berhe filed her son's bank records from the Royal Bank which do not show a sum of \$250 being withdrawn every month.<sup>3</sup> However, sums of money appear to have been withdrawn fairly regularly and attributed to foreign exchange on March 9, March 30, May 11, and June 22, 1998. The amounts withdrawn on the respective dates were: \$1,431.60, \$720.10, \$1,451.60, and \$1,491.00. On October 13, 1998, there is a funds transfer of \$538.00 to Mrs. Tekebash Berhe. On December 21, 1998, the account was debited for an international money order in the amount of \$149.49. The bank records for 1999 and 2000 have smaller amounts debited for foreign exchange. None of these amounts resemble \$250.00. However, Mrs. Berhe's sworn affidavit declares that she received money from her son through various sources. It is certainly possible that other withdrawals made by her son from his bank account could have been used to purchase international money orders or send cash through friends and relatives to his mother.

State Farm asked that I draw an adverse inference because of the lack of information provided about Mrs. Berhe's assets and financial obligations. I find that Mrs. Berhe made her best efforts to provide the information requested. In fact, she obtained a decision from an Ethiopian court and later, provided

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<sup>3</sup>Exhibit 5

both an affidavit and a supplementary explanation in response to State Farm's request for information. In addition, all documents were translated from the Tigrinia language to English and notarized.<sup>4</sup>

## LAW AND FINDINGS

In order to qualify for death benefits, Mrs. Berhe must establish that she was dependant on her son. The definition of "dependant" is set out in subsection 2(6) of the *Schedule*:

For the purpose of this Regulation, a person is a dependant of another person if the person is principally dependant for financial support or care on the other person or the other person's spouse.

State Farm relied on the case of *Morton and Halifax Insurance Company*<sup>5</sup> which considered the phrase "principally dependant for financial support" as discussed in *Miller v. Safeco Insurance Co. Of America*<sup>6</sup>. Mr. Justice O'Brien at the trial level concluded that each case had to be determined on its own facts but suggested the following criteria:

matters such as the amount and duration of the financial or other dependency, the financial or other needs of the claimant, the ability of the claimant to be self-supporting, and the general standard of living within the family unit should be considered.

The Court of Appeal agreed with these criteria except for the "general standard of living in the family"-the "lifestyle" issue.

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<sup>4</sup>Exhibits 2 and 3

<sup>5</sup>(FSCO A98-000679, January 11, 2000)

<sup>6</sup>(1984) 48 O.R. (2d) 451 (H.C.J.), aff'd (1985) 50 O.R. (2d) 797 (Ont. C.A.)

In *Mark and Dominion of Canada*,<sup>7</sup> Arbitrator Manji outlined eight criteria to consider when interpreting the phrase “principally dependant for financial support.” The criteria are:

1. The applicant must “chiefly” or “primarily” or “for the most part” derive his or her financial support from that person rather than from other sources.
2. The dependence must be financial and does not include other forms of dependence such as social dependence except when social factors relate to financial dependence.
3. Financial support includes the concept of “money’s worth” or the reasonable value of goods and services provided and exchanged.
4. The determination of the nature and degree of dependency is essentially one of fact and requires an assessment of all of an applicant’s particular circumstances at the time of the accident to determine whether the applicant was chiefly deriving their support from the other person.
5. The applicant’s particular circumstances in their entirety must be assessed at the time of the accident. However, the applicant’s position cannot be determined solely by a single snapshot of circumstances at that date.
6. Matters such as the amount and duration of the financial dependency, the financial or other means of the applicant, the ability of the applicant to be self-supporting (at the time of the accident) are appropriate considerations for determining the question of financial dependency.
7. While the ability to be self supporting is a relevant criterion of dependency, nothing in the *Schedule* suggests that this must be measured with reference to a subsistence-level of living.
8. The overriding principle governing interpretation of the dependency provisions is that the benefits legislation is remedial and as such should be accord a broad and liberal interpretation that best meets its objectives.

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<sup>7</sup>*Mark and Dominion of Canada General Insurance Company* (FSCO A96-000341, January 27, 1999)

I have considered the above criteria when determining whether Mrs. Berhe was a dependant of her deceased son. As well, I must decide the weight which is to be given to the Ethiopian court decision which has declared Mrs. Berhe a dependant. The Ethiopian communal court of Deberki Kebele was very clear about the question which it must consider and stated: "...the applicant, Mrs. Tekebash Berhe presented her application, which was dated September 05, 2000, requesting that the fact she was a dependant of her deceased son Hailemariam G/Hiwet, and that she lives in a rental house to be confirmed and the case to be conveyed to the appropriate authority."

The Ethiopian court ordered Mrs. Berhe to present witnesses who knew about this case. After reviewing the evidence presented by the three witnesses, the court released its decision: "Since the witnesses have testified that Mrs. Tekebash Berhe is a dependant of her son Hailemariam, living on 250 Canadian dollars which he sends her monthly, that in the past as well as at the present she lives in a rental house for which she pays 150 Birr - Ethiopian currency a month, in general that she is a dependant of her son Hailemariam G/Hiwet; we have unanimously decided that this decision to be conveyed to the concerned authority to be used as her evidence."<sup>8</sup>

I consider that the communal court in Ethiopia treated the question of dependancy as a very serious question and sought the testimony of various witnesses who gave evidence about their knowledge of Mrs. Berhe's dependancy on her son. While this was another forum that determined the question of dependancy, I believe that at the same time as I am required to weigh the evidence before me and ultimately decide the question, I am also obliged to treat a decision of the Ethiopian court with respect. While it is not determinative, the decision, taken together with Mrs. Berhe's affidavit and supplementary document in response to State Farm's request for further information comprise a body of evidence which satisfy me that Mrs. Berhe was financially dependant on her son.

I have assessed all of the Applicant's particular circumstances at the time of the accident and I find that Mrs. Berhe "chiefly" or "primarily" or "for the most part" derived her financial support from her son.

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<sup>8</sup>Exhibit 2



Money's worth is not an issue in this case. It appears that Mrs. Berhe was financially dependant on her son from 1988, had no other visible means of regular support other than some money sent by her other children, and had no ability to be self-supporting. I also adopt as an overriding principle governing interpretation of the dependency provisions that the benefits legislation is remedial and as such should be accorded as broad and liberal interpretation that best meets its objective. Mrs. Berhe is entitled to receive from State Farm a total of \$35,000 in death benefits together with interest.

**EXPENSES:**

The parties made no submission with respect to expenses. I encourage them to resolve this issue themselves. However, if they are unable to do so, they may apply for an expense hearing in accordance with the procedure set out in the *Dispute Resolution Practice Code* (Fourth Edition).

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Judith Killoran  
Arbitrator

September 9, 2002

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Date

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**BETWEEN:**

**TEKEBASH BERHE**

**Applicant**

**and**

**STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY**

**Insurer**

**ARBITRATION ORDER**

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

1. Mrs. Berhe is entitled to death benefits in the amount of \$35,000.
2. Mrs. Berhe is entitled to interest for the overdue payment of benefits pursuant to subsection 46(2) of the *Schedule*.

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Judith Killoran  
Arbitrator

September 9, 2002

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Date