

IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, C.I.8,
AND REGULATION 283/95 THERETO

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

AND IN THE MATTER OF AN ARBITRATION
BETWEEN THE PERSONAL INSURANCE COMPANY
AND ING INSURANCE COMPANY OF CANADA

B E T W E E N:

THE PERSONAL INSURANCE COMPANY

Applicant

- and -

ING INSURANCE COMPANY OF CANADA

Respondent

Counsel for the Applicant: Ryan M. Naimark
Counsel for the Respondent: Douglas A. Wallace

AWARD

This matter was heard at Toronto on Tuesday, December 12, 2006.

The matter was submitted to me to arbitrate pursuant to the *Arbitrations Act*, 1991, in accordance with an Arbitration Agreement dated November 22, 2006 and executed by the parties. They have asked me to arbitrate a dispute between the two insurers as to which insurer is fixed with priority to pay accident benefits with respect to injuries sustained by one Jonathan Shaw when he was struck by a motor vehicle on November 27, 2003 in the Province of Ontario.

The parties proceed by way of an Agreed Statement of Facts which is attached as Appendix A to this Award.

ISSUE TO BE DECIDED:

It has been agreed between the parties that, at all material times, Jonathan Shaw was a dependent of his father, Andrew Shaw. It has further been agreed between the parties that:

- (a) The motor vehicle which struck and injured Jonathan Shaw was insured with the Applicant, Personal Insurance Company.
- (b) Andrew Shaw was employed by a company in Ottawa, Ontario known as Pylon Electronics Inc. Pylon operated three delivery vehicles which were insured under a Standard Ontario Automobile Policy of Insurance issued by the Respondent, ING Insurance Company of Canada.
- (c) Neither Andrew Shaw nor his wife owned a motor vehicle which was insured under a policy of automobile insurance at the time of the accident.
- (d) There are no coverage issues as between Personal Insurance Company, ING Insurance Company of Canada and their respective insureds.

The parties have advised me that the sole issue which they wish me to decide at the present time, in accordance with this Arbitration, is as to whether or not Andrew Shaw should be deemed for the purpose of Ontario Regulation 403/96 (SABS) to be the named insured under the ING policy on the basis that a Pylon company vehicle was being made available for Mr. Shaw's regular use.

The dispute between the parties arises from the interpretation of the provisions of Section 66(1) of the *Statutory Accident Benefits Schedule*. Section 66(1) provides as follows:

66(1) An individual who is living and ordinarily present in Ontario should be deemed for the purpose of this Regulation to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident

(a) The insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity...

The parties have agreed that if Andrew Shaw is found to meet the definition above-noted, the priority rules under the *Insurance Act* require that ING Insurance Company of Canada pay the statutory accident benefits, past and future. If, on the other hand, it is concluded that Mr. Shaw is not a person in respect of whom the Pylon automobile was being made available for his regular use by Pylon, then the priority rules provide that the Personal Insurance Company, which has been paying the benefits to this point in time, must continue to pay such benefits.

I have had the opportunity to review in detail the facts and the briefs of authorities of the respective parties. In addition, I was provided with copies of the transcripts of the examinations for discovery of Andrew Shaw and James Mullins. Counsel for each of the insurers made oral submissions. I express my appreciation to both counsel for their helpful facts and for the effective and well presented submissions which they each made.

The facts which are germane to the issue which I must decide, in accordance with the numbering system used in the Agreed Statement of Facts, are these:

1. Andrew Shaw started working for Pylon on May 8, 2000. His job at the time involved local pick-ups and delivery shipping. He did pick-ups and deliveries to customers in Ottawa on average of 3-4 days per week (Facts 19 and 20).
2. While there is some conflict in the evidence, it appears that on those occasions when Mr. Shaw was picking up and delivering equipment, he usually spent anywhere from 4 to 8 hours per day doing so (Fact 21).
3. In early May 2001, Andrew Shaw was promoted to a clerical position which was known as a TEMMIS clerk. He worked at the Ottawa office of Pylon. He put in 8 hours per day (Fact no. 26).
4. After Mr. Shaw was promoted, no delivery driver or other driver was hired to replace him. Indeed, some 10 months later, one of his co-drivers left the employ of Pylon. She was not replaced. From and after March 14, 2003, Pylon employed two less delivery personnel than had been the case in the year 2000 (Fact no. 30).
5. Notwithstanding the change in his job requirements to that of a TEMMIS clerk, Mr. Shaw continued to use a company vehicle from time to time to make deliveries (Fact no. 30).
6. In about May 2003, Pylon made application to a new insurer (ING Insurance Company) for an automobile policy of insurance. At that time, through Pylon's broker, a list was submitted to ING of the individuals who would be considered as drivers for insurance purposes. Andrew Shaw's name was included on the said list as a "driver" (Fact no. 15).
7. The evidence as to the frequency with which Mr. Shaw drove a Pylon vehicle on his employer's business was somewhat contradictory. In a signed statement given 6 – 7 months after the accident, Shaw asserted that used the company vehicle once every two weeks (Fact no. 32).
8. On his examination for discovery held in March 2006, Shaw testified that he performed a delivery on average 1 – 2 times per month between May 2001 and November 2003 (Fact no. 33).
9. Shaw's superior, James Mullins, testified on his examination for discovery that Shaw did a delivery using a company vehicle approximately once per week (Fact no. 37).
10. The shipping supervisor of Pylon, namely, Gus Leclerc, stated that between May 2001 and November 2003, Mr. Shaw was used "rarely" for deliveries,

“perhaps once per week” (Facts no. 38 and 39).

11. In addition to these facts, I have taken note, from his discovery evidence, that from the perspective of the general manager/vice president of Pylon, one Jim Mullins, the description of Mr. Shaw as a driver on the Schedule of Drivers was not relevant to Mr. Shaw’s job description but rather was a guide as to the individuals who would be considered as insured while driving a company vehicle for business purposes (discovery transcript).

FINDINGS OF FACT:

It is necessary that I make findings of fact before I can consider the applicability of those facts to the law. I therefore make the following findings:

- (a) Prior to his promotion in May 2001, Mr. Shaw was employed by Pylon essentially as a full-time delivery driver.
- (b) Following his promotion, Mr. Shaw continued to be a delivery driver but on a considerably less frequent basis.
- (c) Based on my analysis of the agreed facts and the discovery evidence, I conclude that Mr. Shaw was called upon by his employer to carry out delivery duties and activities on an average of 3 – 4 times per month, at least during the period from May 2003 through November 2003, and that he performed those duties accordingly.
- (d) In view of this continuing although lessened activities as a delivery driver, it was appropriate that his name be retained on the list of drivers contained in the ING insurance policy.
- (e) It would be appropriate to characterize Mr. Shaw’s employment activities during the period of May 2003 – November 2003 as being a TEMMIS clerk and part-time delivery driver.

I agree with the comment made by Arbitrator Lee Samis in the matter of State Farm Mutual Automobile Insurance Company and Kingsway General Insurance Company (Award dated October 20, 1999) that the language employed by the Regulation does not require that the use of the employer’s motor vehicle be frequent, exclusive or personal. The mere fact that there is some use which can be said to be regular is sufficient to give the individual status under the policy.

While I do not believe that the parties are in conflict with the fact that Pylon made its vehicle available to Mr. Shaw, I further agree with the comment made by Mr. Samis at page 3 of his award that “actual use is evidence of the availability of the vehicle”.

Counsel for the Respondent, ING Insurance Company of Canada, argued that the vehicle was “available” only when Mr. Shaw was instructed to use it. The inference which I was invited to draw was that this sort of limited availability fell short of that which was intended by the Regulation and that, in any event, the vehicle was not made available to him on a “regular” basis.

Counsel for the Respondent also pointed out that there was no schedule as to when Mr. Shaw might drive the vehicle, that there was no structure with respect to his driving arrangements, that the estimates as to the frequency with which he drove were uncertain and, to some extent, contradictory, that the duration of time that Mr. Shaw was behind the wheel on those occasions when he drove was uncertain and that Shaw was only directed to drive when the company was short-staffed. He argued that all of these matters are factors to be considered when attempting to come to a conclusion concerning the regularity of the use by Mr. Shaw. Counsel argued further that this was not a situation where the company vehicle was generally available to Mr. Shaw but rather constituted specific availability.

As against the foregoing, counsel for the applicant submitted that the word “regular” was an adjective which was intended to describe the periodic or the routine use of the vehicle. He argued that the absence of personal use of the company vehicle is not a relevant factor.

CONCLUSIONS:

For the reasons outlined below, I reject the submissions made by the Respondent. Having carefully considered all of the agreed upon facts as well as the other material and the caselaw supplied to me, and considering the facts in the context of the SABS legislation, the conclusion to which I have come is that at the time of the accident, Pylon Electronics had made available to Andrew Shaw an automobile for his regular use as that term is intended in Schedule 66(1) of the SABS. That use was dictated by the requirements of Pylon, by the flow of its business, by the state and size of its staff and by those persons who were designated, to the insurer, as approved persons to operate the company vehicles.

The SABS is considered as remedial legislation. As such, I am to apply a liberal interpretation. The fact that the dispute happens to be between two insurers and not between an insured and an insurer does not, in my view, change this principle of statutory interpretation.

I do not rely upon or delve into the various dictionary definitions of the word “regular”. Suffice it to say that the evidence supports the conclusion that after his promotion and certainly during the approximately six months or more before the date of the accident, Andrew Shaw was provided with a vehicle owned by his employer, on frequent occasions, for the sole purpose of making deliveries on behalf of the employer. The fact that the number of these occasions may have been less than when Mr. Shaw was a full

time driver, prior to his promotion, and the fact that the regular occasions were not on the basis of a fixed schedule do not, in my opinion, change the regular nature of the use, within the meaning of Section 66(1) of the SABS. He has continued to work as a delivery driver at least several times per month and essentially every month.

In view of the foregoing, I conclude that Andrew Shaw is deemed to be a named insured under the ING Canada policy. It follows that as respects Jonathan Shaw, who was a “dependent” of Andrew Shaw, ING Insurance Company of Canada stands in priority to the Personal Insurance Company with respect to the obligation to pay accident benefits. The application of Personal thus succeeds.

It follows as well that the Applicant, Personal Insurance Company, is entitled to recover back from ING Canada the full amount of the accident benefits which have been paid by Personal to date, together with appropriate interest.

I have been advised by counsel for the parties that they wish me to defer any comment or decision in this Award with regard to calculations pertaining to interest and with regard to the issue of the costs, pending discussions between the parties. I have been advised that if these issues cannot be resolved between the parties, I will be requested to issue a Supplementary Award.

DATED AT Toronto, this 4th day of January, 2007.

Jesse T. Glass, Q.C.