

**IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990 c. I. 8, Section 268 AND
REGULATION 283/95 MADE UNDER THE *INSURANCE ACT***

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

THE PERSONAL INSURANCE COMPANY

Applicant

- and -

KINGSWAY GENERAL INSURANCE COMPANY

Respondent

AWARD

LAWYERS

Michael Hart
Counsel for the Applicant, The Personal Insurance Company

Mark Wilson
Counsel for the Respondent, Kingsway General Insurance Company

ISSUES IN DISPUTE

This is a priority dispute arising out of a motor vehicle accident which took place on March 28, 2007. Mr. Wayne Palmer was driving on Highway 43 near Perth, Ontario, when involved in a collision.

The Applicant, The Personal Insurance Company (hereinafter referred to as "The Personal"), has paid statutory accident benefits to Mr. Palmer. However, it is The Personal's position that the Respondent, Kingsway General Insurance Company (hereinafter referred to as "Kingsway") is the insurer responsible for the payment of statutory accident benefits to Mr. Palmer.

The issues involved in this case are:

- (a) Is Kingsway in priority of payment in relation to The Personal by virtue of the fact that Mr. Palmer is a "listed driver" under the Kingsway policy?
- (b) In the alternative, is Section 66 of Ontario Regulation 403/96 - Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996 (hereinafter referred to as the "SABS") applicable in the circumstances of the present case?

FACTS

The portion of the Arbitration to address which insurer is the priority insurer proceeded by way of an Agreed Statement of Facts, Examination Under Oath transcripts of Wayne Palmer and Ralph

Edmund Robertson and written submissions. The issues related to quantum were to be addressed at a later stage, if necessary. The Agreed Statement of Facts are as follows:

1. On or about March 28, 2007, Wayne Palmer was involved in a motor vehicle accident in Ontario (hereinafter "the accident");
2. At the time of the accident, Wayne Palmer was operating a motor vehicle with consent owned by Harold Firlotte (hereinafter the "Firlotte vehicle"). As such, Mr. Palmer is an occupant of the Firlotte vehicle within the meaning of s.268 (2) of the *Insurance Act*;
3. At all material times, the Firlotte vehicle was insured by The Personal under a standard automobile policy. Harold Firlotte is the named insured on this policy and Donna Firlotte would be deemed named insured by virtue of being the spouse of the named insured;
4. At all material times, Wayne Palmer was not a named insured or a dependant or spouse of either of the named insureds on the insurance policy of Harold Firlotte. Wayne Palmer was not a listed driver on the policy. He would however, be an insured under the policy issued by The Personal by virtue of his occupancy in the vehicle insured under that policy;
5. At the time of the accident, Wayne Palmer was an individual living and ordinarily present in Ontario within the meaning of section 66 (1) of the SABS;
6. Branch Finance Corporation, operating as Access Taxi, was the named insured on a standard fleet policy with Kingsway General Insurance Company. At the time of the accident, Access Taxi owned 10 to 20 vehicles, which were insured under the standard fleet policy with Kingsway General Insurance and used to provide taxi transportation services;
7. The standard fleet policy included a schedule of drivers as part of the policy, which listed some 47 drivers. On the date of loss, Wayne Palmer was a listed driver on the schedule of drivers within the policy;
8. Branch Finance Corporation was the sole owner of Access Taxi, which in turn was a sole proprietorship within the meaning of s.66 (1) (a) of the SABS performing a transportation taxi service;
9. Access Taxi provided vehicles to drivers and provided dispatch services to the drivers for the purpose of providing taxi and transportation services;
10. Drivers of the Access Taxi vehicles were required to submit their gross receipts and deductions taken for stand fees, dispatch services, Insurance, GST and UIC;
11. Insurance was deducted from the gross receipts for the purpose of paying a portion of the Kingsway standard fleet policy premium. It was deducted in a certain amount based on the gross receipts, to a maximum of \$7.50 per cash out;
12. On or about December 5, 2006, Wayne Palmer entered into an agreement to obtain use of vehicles owned by Access Taxi and dispatch services supplied by Access Taxi for the purpose of providing taxi and transportation services within the municipality of Smiths Falls and Perth;

13. Between December 6, 2006 and the date of the accident, Wayne Palmer obtained a vehicle from Access Taxi and drove same while providing taxi services 48 times. He typically drove a vehicle 2 to 3 times a week for 10 to 12 hours at a time. His last three shifts prior to the accident were on March 23, March 24 and March 26, 2007;
14. Wayne Palmer did not have exclusive jurisdiction of any one vehicle, owned by Access Taxi and insured by Kingsway. He drove any of the approximately 10 to 20 vehicles that were available and insured under the Kingsway policy;
15. Wayne Palmer did not have personal use of any of the Access Taxi vehicles at any time, and at the time of the accident he was not driving an Access Taxi vehicle nor was he scheduled to do so that day;
16. At the time of the accident Mr. Palmer was not a named insured on the Kingsway fleet policy;
17. Mr. Palmer did not own a vehicle at the time of the accident, nor was he the spouse or a dependant of anyone who owned a vehicle and accordingly is not a named insured, spouse of a named insured or dependent of a named insured under any policy of automobile insurance;
18. Mr. Palmer applied to and has received statutory accident benefits from the Applicant, The Personal Insurance Company.

ANALYSIS & FINDINGS

Section 268 of the *Insurance Act* sets out a priority scheme to determine which insurer should pay benefits to a claimant in a situation where the claimant has available insurance coverage to pay accident benefits under more than one policy.

The provisions of Section 268 of the *Insurance Act* relevant to the present facts situation are as follows:

Liability to pay

(2) The following rules apply for determining who is liable to pay statutory accident benefits:

1. *In respect of an occupant of an automobile,*
 - (i) the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,*
 - (ii) if recovery is unavailable under subparagraph (i), the occupant has recourse against the insurer of the automobile in which he or she was an occupant,*
 - (iii) if recovery is unavailable under subparagraphs (i) or (ii), the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,*
 - (iv) if recovery is unavailable under subparagraphs (i), (ii) or (iii), the occupant has recourse against the Motor Vehicle Accident Claims Fund.*

Liability

(3) An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits.

Choice of insurer

(4) If, under subparagraphs (i) or (iii) of paragraph 1 or subparagraphs (i) or (iii) of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits.

Same

(5) Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy, or the person is the spouse or a dependent as defined in the Statutory Accident Benefits Schedule of a named insured, the person shall claim statutory accident benefits against the insurer under that policy. 1993, c.10, s.26 (2).

The Personal advances two arguments as to why the Kingsway policy should stand in priority to the policy issued by The Personal. The Agreed Statement of Facts confirms in paragraph 4 that Mr. Palmer was an “insured person” under the policy issued by The Personal by virtue of his occupancy in the vehicle insured under The Personal policy. The Agreed Statement of Facts confirms in paragraph 7 that Mr. Palmer was a “listed driver” under the policy issued by Kingsway. The first argument advanced by The Personal is that Mr. Palmer was a “listed driver” under the Kingsway policy and that policy would stand in priority to The Personal’s policy in which coverage is triggered only as a result of Mr. Palmer having been an occupant. The first argument advanced by The Personal involves the interpretation of Section 268 (2) of the Insurance Act. The second argument advanced by The Personal is that Mr. Palmer was a deemed “named insured” under the Kingsway policy by reason of the fact that he had “regular use” of the Access Taxi vehicles insured by Kingsway. The second argument advanced by The Personal involves the interpretation of Section 66 of the Statutory Accident Benefits Schedule.

The first issue which must be dealt with is whether the Kingsway coverage, by reason of the fact that Mr. Palmer was a “listed driver”, stands in priority to the coverage in The Personal policy arising by reason of Mr. Palmer’s “occupancy” in the vehicle insured by The Personal.

The Personal takes the position that the priority scheme set out in Section 268 (2) (1) distinguishes priority between a policy where the claimant is a listed driver to policy coverage which only arises as a result of occupancy in a vehicle. The Personal maintains that Section 268 clearly makes the policy where the claimant is a listed driver primary to the policy where the claimant was merely an occupant.

The Personal relies on the decision of Axa Insurance Company v. State Farm Mutual Automobile Insurance Company and CGU Insurance Company of Canada (July 14, 2005, a decision of Arbitrator Jones). In that decision, the claimant Adam Botting, was a passenger in a motor vehicle owned by Mr. Linde, insured by AXA. The claimant was also a listed driver on a policy issued by State Farm. Arbitrator Jones analyzed the priority wording of Section 268 (2) (1) and reached the conclusion that the priority scheme requires one to first look to the insurer of the automobile in which the claimant was an insured, and only if recovery is unavailable under subparagraph (i) does one have recourse against the insurer of the automobile in which he or she was an occupant. Arbitrator Jones found that if one were to adopt State Farm’s position, that merely being an occupant, one would become an insured for the purposes of Section 268 (2) (1) (i) that this would make Section 268 (2) (1) (ii) largely, if not entirely, meaningless. Arbitrator Jones stated:

“Section 268 (2) (1) lays out a fairly straightforward and logical system for determining priority disputes. You look first to the insurer of an automobile in respect to which the occupant is an insured and only if the insurance is not available there do you look to the insurer of the automobile in which he was an occupant. To simply, in essence, make an occupant an insured and thereby make Section 268 (2) (1) (ii) essentially or almost meaningless to me makes little sense. Reading the subparagraphs in the way suggested by AXA makes perfect sense and provides a full and effective priority system.”

Arbitrator Jones concluded that Section 2 of the Statutory Accident Benefits Schedule definition of “insured person” includes a “listed driver”. Section 2 of the Statutory Accident Benefits Schedule definition of “insured person” includes:

a) The named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured and any dependant of the named insured or spouse, if the named insured, specified driver, spouse or dependant,

i) is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or

ii) is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse’s dependant.

I agree with the analysis made by Arbitrator Jones in the AXA v. State Farm (supra) decision. The only reasonable interpretation to be given to the wording set out in Section 268 (2) (1) is that there was an intention to give priority to the policy where the claimant was an insured over the policy providing coverage merely by reason of occupancy.

In reaching my decision with respect to the first argument advanced by The Personal, I did consider the caselaw advanced by counsel for Kingsway. In particular, I have considered the cases of The Co-operators v. Lombard Insurance Company of Canada (Arbitrator Malach, dated August 10, 2006) and Co-operators General Insurance Company v. Zurich Insurance Company (Arbitrator Jones, dated March 16, 2007). These cases stand for the proposition that being a “listed driver” does not render an individual a “named insured”. That may well be the case. The first argument advanced by The Personal does not involve the interpretation of Section 268 (5) of the Insurance Act. The first argument advanced by The Personal involves the interpretation of Section 268 (2) of the Insurance Act. Section 268 (2) (1) merely requires an individual to be an “insured”, rather than a “named insured”, to have priority over a policy where the individual was merely an occupant of the insured vehicle. As I have indicated, Section 2 of the Statutory Accident Benefits Schedule includes a “listed driver” as a “insured person” so as to satisfy the requirements of Section 268 (2) (1) (i) of the Insurance Act.

The second part of the argument advanced by The Personal is based on the fact that the Kingsway policy would be in priority by reason of the fact that Mr. Palmer was a deemed “named insured” by reason of Section 66 of the Statutory Accident Benefits Schedule.

Section 66 (1) of the SABS provides:

COMPANY AUTOMOBILES AND RENTAL AUTOMOBILES

66. (1) *An individual who is living and ordinarily present in Ontario shall 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, or*

(b) *the insured automobile is being rented by the individual for a period of more than 30 days.*

On the facts outlined in the Agreed Statement of Facts, I am satisfied that Mr. Palmer had "regular use" of the Access Taxi vehicle. In my previous arbitral decision in Zurich Insurance Company v. The Personal Insurance Company (December 9, 2008), I analyzed the body of caselaw dealing with "regular use". I provided the following analysis of the caselaw:

"Over the years, a body of caselaw has developed as to the type of fact situations which amount to "regular use". A broad spectrum of decisions has emerged. At the high end of the spectrum are cases where, in my view, the finding of "regular use" ought to have been clearly apparent. These decisions include:

1) General Accident Assurance Company of Canada v. London Guarantee Insurance Company (Decision of Arbitrator Robinson, dated September 22, 1998);

2) The Dominion of Canada General Insurance Company v. The Co-operators General Insurance Company (Arbitrator Malach, dated February 10, 1999);

3) Sitler v. Canadian General Insurance Company (1993) O.I.C.D., No.72, affirmed (1995) O.I.C.D. No.127.

In the General Accident case, an individual employed as a full-time bus driver for Laidlaw Transit Ltd., involved in an accident when the bus she was operating was rear-ended by another vehicle, was found to be a "regular user" of the bus. In the Dominion case, an individual provided with a van owned by his employer, which he kept in his possession 24 hours per day, 7 days per week, but restricted to use of the van to work hours and work-related activities, was found to be a "regular user" of that vehicle. In the Sitler case, an individual operating a cab owned by another individual 12 hours per day, 6 days per week, constituted "regular use". In my view, fact situations like these are clearly indicative of "regular use" for the purposes of Section 66 of the SABS.

At the lower end of the spectrum involving "regular use" cases, are cases such as Riesner v. Liao, [1993] O.J. No.805, where the individual had been assigned to the sewer flushing equipment owned by the Region of Durham just two weeks prior to the date of loss. The individual was not even the driver of the vehicle, but merely an occupant who would operate the sewer flushing equipment attached to the vehicle in the course and scope of his employment with the Region of Durham. Riesner was found to be a "regular user" of the Region of Durham vehicle.

The cases where the individuals have been found not to be “regular users” of the subject vehicles were only those where the characterization of the use was “irregular at best and out of the ordinary”, such as the findings in Economical Mutual Insurance Company v. Wawanesa Mutual Insurance Company (Arbitrator Robinson, dated October 8, 2004).

Although the present fact situation may be at the lower end of the spectrum described aforesaid, I nevertheless feel strongly that the use of the McKevitt trucking vehicles by Mr. Ahmed was “regular use” in the context of Section 66 of the SABS.

The facts of the case before me are akin to the facts in the following two decisions:

Unifund Assurance Company v. St. Paul & Marine Insurance Company (Arbitrator Samworth, dated August 9, 2000);

TD General Insurance Company v. Pilot Insurance Company (Arbitrator Torrie, dated May 31, 2007).

The Unifund decision involved an individual who worked as a part-time limousine driver for a limousine company. The work was seasonal. The driving schedule was erratic at best. There was nothing predictable. The days he worked and the assignments that he was given were not predictable. Over a six month time frame leading up to the accident, the individual was working about five days per month. The part-time limousine driver was found to be a “regular user” of the limousines. In the TD case, the individual was a family nanny who used the family vehicle when the mother of the children that she cared for was not using the vehicle. The vehicle would be used from time to time to drive the children to school or to take them to different activities. Arbitrator Torrie found that there was a predictable pattern of use, despite the fact that there was no predetermined schedule. He found that it was not essential that the exact days that the vehicle was to be used be predetermined in order to constitute “regular use”. He found the nanny to be a “regular user” of the family vehicle.

In the fact situation before me, Mr. Ahmed operated McKevitt Trucking vehicles on 28 occasions over a period of three and a half months between May 2, 2006 and August 15, 2006. The arrangement to supply temporary drivers to McKevitt Trucking by G Personnel only came to an end in October 2006, some two months after the date of this accident. It is clear that Mr. Ahmed was operating McKevitt vehicles several times per month. I am satisfied that there was a sufficient frequency of use and a sufficient regularity of use for him to be found a “regular user” of the McKevitt Trucking vehicles, even though:

- he was not an employee*
- he was not a listed driver under the McKevitt policy of insurance*
- he did not have the vehicle available for personal use*
- he was not allowed to keep the keys during non-business hours*
- he did not have exclusive use of the vehicle*

I am of the view that the frequency of use and the regularity of use of the McKevitt vehicles was sufficient to constitute "regular use". Mr. Ahmed's use of the vehicle cannot be characterized as "irregular at best and out of the ordinary".

On the analysis aforesaid, I am satisfied that the pattern of use by Mr. Palmer of the Access Taxi vehicles is sufficient to constitute "regular use". On the basis of the agreed upon facts, one can certainly not characterize Mr. Palmer's use as being "irregular at best and out of the ordinary". Despite my finding that Mr. Palmer had "regular use" of the Access Taxi vehicles insured by Kingsway, I must also consider the words "being made available at the time of the accident" as contained in Section 66 of the Statutory Accident Benefits Schedule.

Since the release of my decision in Zurich Insurance Company v. The Personal Insurance Company on December 9, 2008, there has been judicial interpretation of the phrase "being made available at the time of the accident" as contained in Section 66 of the SABS. The decision of Justice Belababa in ACE INA Insurance v. Co-operators General Insurance Company, dated March 30, 2009, was an appeal from the decision of Arbitrator Robinson, dated July 30, 2008. The claimant in that case was a passenger in a motor vehicle insured by Co-operators but had the regular use of a "company car" provided by his employer, insured by ACE INA. Justice Belababa noted that his decision was not a case about the meaning of "regular use", but about the meaning of the phrase "being made available at the time of the accident". Justice Belababa concluded that the deeming provisions of Section 66 of the SABS would only apply if the claimant was a regular user of such company vehicle and that the vehicle was being made available at the time of the accident. In other words, the company vehicle was accessible to the claimant at the time of the actual collision. He accepted the arguments advanced by the Appellant that meaning had to be given to the changes in wording in Section 66 with the advent of Bill 59 legislation. He found that although the claimant was a regular user of company vehicles, they were not being made available to the claimant at the time of the accident. I feel bound by the decision of Justice Belababa.

In the present facts situation, Mr. Palmer was not driving an Access Taxi vehicle. He did not have personal use of an Access Taxi vehicle. He was not scheduled to operate an Access Taxi vehicle on the day of the accident. Adapting the reasoning of Justice Belababa in ACE INA v. Co-operators (supra), I must find that that Mr. Palmer was not a deemed "named insured" by reason of Section 66 of the SABS.

I understand that leave to appeal is being sought from the decision of Mr. Justice Belababa. Should the Ontario Court of Appeal come to a different decision, then I would be bound by the said decision. On the present state of the law, I cannot find Mr. Palmer was a deemed "named insured" so as to place the Kingsway policy in priority by reason of the deeming provisions of Section 66 of the SABS as the Access Taxi vehicles were not accessible to him at the time of the subject collision.

Regardless of my findings herein with respect to the deeming provisions of Section 66 of the SABS, I have nevertheless found that the Kingsway policy is in priority to The Personal policy by reason of the first argument advanced by The Personal regarding the interpretation of Section 268 (2) (1) and on the basis of the analysis as set out by Arbitrator Jones in AXA v. State Farm (supra).

ORDER

It is hereby ordered that Kingsway General Insurance Company is the insurer required to pay statutory accident benefits to Wayne Palmer, arising from the motor vehicle accident of March 28, 2007.

It is ordered that Kingsway General Insurance Company pay the costs to the Applicant of the proceeding to date on a partial indemnity basis.

It is ordered that Kingsway General Insurance Company pay to the Arbitrator his costs of this proceeding to date.

DATED at TORONTO this 16th)
day of June, 2009.)

KENNETH J. BIALKOWSKI
Arbitrator