

**IN THE MATTER OF the Insurance Act, R.S.O. 1990 c. I.8  
and Regulation 283/95;**

**AND IN THE MATTER OF the Arbitration Act, S.O. 1991,  
s.17;**

**AND IN THE MATTER OF an Arbitration**

**BETWEEN:**

**SECURITY NATIONAL INSURANCE COMPANY**

**Appellant**

**(Respondent on Arbitration)**

**PERSONAL INSURANCE COMPANY OF CANADA LTD.**

**Respondent**

**(Applicant on Arbitration)**

Richard F.L. Rose Q.C., for the Appellant (Respondent on the Arbitration)

Eric K. Grossman, for the Respondent (Applicant on the Arbitration)

**ENDORSEMENT**

**R. A. BLAIR J:**

This is an appeal to a judge of the Ontario Court of Justice (General Division) from the award of an arbitrator, Lee Samis, made pursuant to a submission under the *Arbitration Act*. The issue which arbitrator Samis was asked to determine was which of the two insurers who are parties to this proceeding has priority to respond to the accident benefit claims of Michelle Baker, pursuant to section 268 of the *Insurance Act*. Ms. Baker was seriously injured in a head-on automobile accident which occurred on December 23, 1994.

The facts relevant to this appeal are exceedingly straightforward. There was agreement respecting them before the Arbitrator. Tom Baker was a named insured under a policy of insurance with the Appellant, Security National Insurance Company, with respect to the automobile which was involved in the accident and in which Michelle Baker was at the time a passenger. Ms. Baker was a named insured under a policy with Personal Insurance Company of Canada Ltd. with respect to a separate automobile which she owned. Michelle and Tom Baker are married.

To date, Personal-the named insurer with respect to her own vehicle-has paid the accident benefit claims of Ms. Baker, pending the outcome of the arbitration and of these proceedings. In a decision released July 7, 1998, Arbitrator Samis held that Security National-the named insurer with respect to Mr. Baker's vehicle-was the priority insurer.

**Law and Analysis**

The determination of the arbitration, and of this appeal, turns on an interpretation of the statutory accident benefits priority payment provisions of section 268 of the *Insurance Act*, R.S.O. 1990, c.I.8. Although on the view I take of the matter it is not necessary in the circumstances to analyze those provisions closely-because that has already been done, correctly in my view by others, including the Arbitrator-their pertinent provisions are recited here for purposes of convenience. They are as follows:

**s. 268(1) Statutory accident benefits** - Every contract evidenced

by a motor vehicle liability policy, including every such contract in force when the *Statutory Accident Benefits Schedule* is made or amended, shall be deemed to provide for the statutory accident benefits set out in the Schedule and any amendments to the Schedule subject to the terms, conditions, provisions, exclusions and limits set out in that Schedule.

(2) Liability to pay. - The following rules apply to 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 subparagraph i, or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to no-fault benefits arose,

iv. if recovery is unavailable under subparagraph i, or ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.

2. In respect of non-occupants,

N/A

(3) **Liability.** - An insurer against whom a person has recourse for the payment of no-fault benefits is liable to pay the benefits.

(4) **Choice of insurer.** - If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of no-fault benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits.

(5) **Same.** -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 dependant, 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.

(5.1) **Same.** - Subject to subsection (5.2), if there is more than one insurer against which a person may claim benefits under subsection (5), the person, in his or her discretion, may decide the insurer from which he or she will claim the benefits.

(5.2) **Same.** - If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependent of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant.

**(8) Payments pending dispute resolution.**- Where the *Statutory Accident Benefits Schedule* provides that the insurer will pay a particular statutory accident benefit pending resolution of any dispute between the insurer and an insured, the insurer shall pay the benefit until the dispute is resolved.

Both parties agree that Ms. Baker, an occupant of the vehicle at the time of the Accident, is an insured under both policies. She is both a named insured (under the Personal policy) and the spouse of named insured (under the Security National policy), and consequently she meets the definition of an "insured person" as set out in section 2 of the *No-Fault Benefits Schedule*. She is therefore "a person who has recourse against more than one insurer for the payment of no-fault benefits", as contemplated in subsection 268(4), and were it not for the provisions of subsections (5), (5.1) and (5.2) she would have her choice of insurer from which to claim benefits.

It is at this point the priority/choice regime, as set out in section 268, that the differences between the insurers respecting the issue in these proceedings arise. Counsel for Security National relies upon a series of arbitration decisions under the statutory accident benefits regime, and some Court authorities, which suggest that the tendency under that regime is to require insured persons to claim accident benefits against the policy in which they are the "named insured" when there is recourse on the facts to two or more policies. Faced with the "either/or" provisions of subsection 268(5), he submits that the second branch of the subsection only applies when the injured person is not a named insured under some policy of insurance, because a named insured and the spouse or dependent of a named insured are not on the same "level", and the named insured is the priority ranking. Therefore, he argues, it is not necessary to read further in subsection 268(5) if the injured person is a "named insured". He relied as well on certain charts prepared by the Insurance Bureau of Canada for informational purposes to differentiate between different priorities when an individual is involved in an accident.

Arbitrator Samis did not accept this submission, and in my view he was correct in that regard. Whatever may have been the case in other decisions involving different "priority" situations, arbitration or otherwise-none involved priority disputes respecting claims by an individual who was both a named insured on one policy and the spouse or dependent of a named insured on another-and whatever may be the informational contents of Bulletins and charts, it is the language of s.268 itself which must govern. In my opinion Arbitrator Samis correctly interpreted that language, and the scheme of the Act as therein expressed, particularly having regard to the recent decision of Lax J. in *Axa Insurance v. Old Republic Insurance Co.*, [1998] O.J. No. 918 (Gen Div)., (released March 6, 1998).

Having reviewed the statutory provisions and the matters referred to above, the Arbitrator concluded (Reasons, pp. 7-8):

Section 268 (5.2) of the Insurance Act addresses the case before me. Under subsection 268(5) there is more than one insurer against which Ms. Baker might claim benefits. At the time of the accident she was the occupant of an automobile insured by Security National.

At the time of the accident she was the spouse of the named insured under the Security National policy. Pursuant to subsection 268(5.2) of the *Insurance Act* she is required to claim statutory accident benefits

against Security National.

This conclusion is the correct conclusion. It is buttressed by the analysis in *Axa, supra*, a case which is practically on all fours with this one. In *Axa*, Mrs. Hayward was injured in an accident while an occupant of a vehicle owned by her husband's company but available to Mr. Hayward for his regular use, and insured by Old Republic. Mrs. Hayward was herself the owner of another vehicle, insured by AXA, and was a named insurer under the AXA policy. There were two issues in the case, namely, whether Mrs. Hayward was the spouse of a "named insured" with respect to the Old Republic policy, and, secondly, whether or not s. 91(4) of the Statutory Accident Benefits Schedule, Ontario Regulation 776/93 was *ultra vires* the Lieutenant Governor in Council. Madam Justice Lax held that s. 91(4) was *intra vires* the Lieutenant Governor in Council, and found that Mrs. Hayward was the spouse of a named insurer. She held that Mrs. Hayward was required to claim against the policy of Old Republic, insurer of the vehicle of which she was an occupant at the time of the accident.

Lax. J. analyzed the statutory scheme at some length in paragraphs 4 through 13 of her decision, and I agree with her analysis. It is only necessary to recite a portion of that analysis here. At paragraph 4 and 5 she stated:

[para 4] ... An occupant's first recourse is to the insurer of the automobile in respect of which the occupant is an insured and then to the insurer of the automobile in respect of which the person was an occupant (ss.268(2) 1.i. and ii respectively). The scheme recognizes that there may be instances where an insured will have recourse against more than one insurer for statutory accident benefits. In these circumstances, the claimant is given absolute discretion to decide the insurer from which he or she will claim benefits (2.268(4)). However, if the insured is a named insured under a contract evidenced by a motor vehicle liability policy, s.268(5) requires that the claim be brought by the named insured or by his or her spouse or dependant, against the insurer of that policy. Pauline Hayward, being a named insured under AXA policy, would claim benefits from AXA.

[para 5] Sections 268(5.1) and (5.2) deal with the situation where a person is a named insured under more than one policy. Section 268 (5.1) is similar to s. 268(4) in that it permits a named insured, in his or her discretion, to decide the insurer from which he or she will claim benefits. *However, by virtue of s. 268(5.2), if the claimant is a claimant is an occupant of an automobile in respect of which the person is a named insured or the spouse or dependant of a named insured, the claim must be made against the insurer of the vehicle in which the person is occupant.* Tony Hayward is deemed to be a named insured under the Old Republic policy for the purpose of statutory accident benefits set out in the regulation. If s. 91(4) of the Schedule is effective, s. 268(5.2) requires Pauline Hayward's claim for statutory accident benefits to be paid by Old Republic and not by AXA.

(emphasis added)

I read the statutory scheme set out in s. 268 of the *Insurance Act* in the same fashion as did Lax J. in *Axa*, and Arbitrator Samis in the matter under appeal. Ms. Baker is a "named insured"

under the Personal Insurance policy covering her own vehicle. However, she is the "spouse of the named insured" under the Security National policy- the policy covering the vehicle of which she was an occupant at the time of the accident- and by virtue of the combination of the provisions of subsections 268(5), 268(5.1) and 268(5.2) of the *Insurance Act*, it is Security National which has priority to respond to the claim.

The Arbitrator was correct in so concluding. The appeal is therefore dismissed, with costs.

September 18, 1998 \_\_\_\_\_  
R.A. BLAIR J