Ontario Insurance Commission

Ontario

Commission des assurances de l'Ontario

Appeal P96-00015

OFFICE OF THE DIRECTOR OF ARBITRATIONS

ALLSTATE INSURANCE COMPANY

Appellant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent

and

JOYCE ALFRED

Respondent

Before: David R. Draper, Director's Delegate

Counsel: Todd J. McCarthy (for Allstate)
Eric K. Grossman (for State Farm)
James R. Howie (for Joyce Alfred)

APPEAL ORDER #2

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, **it is ordered that**:

1. The appeal is dismissed and the arbitration order dated November 30, 1995, is confirmed.

2. Ms. Alfred is entitled to her reasonable appeal expenses, payable by Allstate Insurance Company of Canada.

3. State Farm Mutual Automobile Insurance Company is not entitled to its appeal expenses.

October 27, 1997

David R. Draper
Director's Delegate

REASONS FOR DECISION (#2)

I. NATURE OF THE APPEAL

This appeal involves a dispute between two insurers about which company is responsible for paying accident benefits to Joyce Alfred.

Ms. Alfred was injured while a passenger in a car owned by Anandavadivel Sinnathamby and insured by State Farm Mutual Automobile Insurance Company ("State Farm"). She did not own a vehicle and did not have her own automobile insurance. Jebanendran Vyramuthu, who was also a passenger in the car, owned an automobile insured by Allstate Insurance Company ("Allstate").

Ms. Alfred applied to both State Farm and Allstate for accident benefits. She applied to State Farm as the insurer of the vehicle in which she was an occupant. She applied to Allstate as Mr. Vyramuthu's spouse.

In my appeal decision issued on April 23, 1997, I upheld the arbitrator's conclusion that Joyce Alfred was the spouse of Jebanendran Vyramuthu at the time of her accident. However, I reserved on Allstate's new argument that despite Ms. Alfred's spousal status, she does not qualify under its policy because she was not "the occupant of any other vehicle" within the meaning of the legislation and the policy.

II. RELATED APPEALS

Three other similar appeals were heard on the same day as this one.[1] As a result, I had the

[1] *Adabi-Ghomi and Allstate Insurance Company of Canada and Wellington Insurance Company*, (October 27, 1997, OIC P96-00065); *Addai-Agekum and Citadel Insurance and Citadel General Insurance Company*, (October 27, 1997, OIC P96-00013); and *Aujla and Progressive Casualty Insurance Company of Canada and Old Republic Insurance Company*, (October 27, 1997, OIC P96-00037).

advantage of hearing submissions from a number of experienced counsel.

All four appeals involve someone injured while an occupant of a vehicle they did not own or insure. The common question is whether they should claim accident benefits from the insurer of that vehicle or their own insurer (or their spouse's). However, the cases are not identical. Three involve someone driving a commercial vehicle, either a taxi or a heavy truck. In the fourth, the injured person was a passenger in a car owned by someone else. Also, due to the dates of the accidents, three cases are decided under the legislation in effect until December 31, 1993 (Bill 68), while one involves the later scheme (Bill 164).

In each case, the arbitrator concluded that the person's own insurer (or the spouse's) was responsible for paying accident benefits. Those insurers appealed. Because of the differences among the cases, the appeals were not formally consolidated and separate appeal decisions are being issued.

III. ANALYSIS

Ms. Alfred was injured on December 23, 1993. Therefore, her entitlement to accident benefits is based on the provisions of the *Insurance Act* then in effect (Bill 68 - "the *Act*"), Ontario Regulation 672/90, *Statutory Accident Benefits Schedule - Accidents Before January 1, 1994* ("the *Schedule*"), and the standard owner's policy (O.P.F.1 - "the policy").

Unlike the *Adabi-Ghomi*, *Addai-Agyekum* and *Aujla* appeals, this case does not involve the taxi or commercial vehicle exclusions. Allstate contends that Ms. Alfred is not an "insured person" under its policy because she was not an occupant of "any other vehicle," as defined in section 5.2.2(iv) of the policy, which states:

> (iv) any **OTHER AUTOMOBILE:** other than the described automobile, which is of a gross vehicle weight of 4,500 kilograms or less, while personally driven by the insured or by his or her spouse if residing in

> the same dwelling premises as the insured, provided that. . . .

Allstate submits that because Ms. Alfred was not driving, the car does not fit within the definition of "any other automobile" and, therefore, she does not qualify as an "insured person."

Although the facts are different, my analysis in *Adabi-Ghomi* applies. The definition of "any other automobile" in section 5.2.2(iv) is not a general definition. It is one part of the definition of "the automobile." Therefore, it does not apply to the definition of "insured person" in section 2 of the *Schedule* (s.2.2.3(c) of the policy), the relevant portion of which states as follows:

> "insured person", in respect of a particular motor vehicle liability policy, means,
>
> (c) the named insured, his or her spouse and any dependant of either of them while the occupant of ***any other automobile,***

"Any other automobile" in this section is an undefined term that should be given its ordinary meaning. Because Ms. Alfred was an occupant of another vehicle at the time of the accident, she qualifies as an insured person under the Allstate policy. She also qualifies as an insured person under the State Farm as an occupant of the insured automobile.[2] Because of section 268(2) of the *Act*, however, Ms. Alfred must claim benefits from Allstate:

> **268.**— (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 dependant, as defined in the *No-Fault Benefits Schedule*, of a named insured, the person shall claim no-fault benefits against the insurer under that policy. . . .

As a result, I agree with the arbitrator that Allstate is responsible for paying Ms. Alfred's accident benefits.

[2] Paragraph (a) of the definition of "insured person" in the *Schedule* and section 2.2.3(a) of the policy.

IV. APPEAL EXPENSES

Ms. Alfred asks that her appeal expenses be paid. As I stated in the *Adabi-Ghomi* decision, it was helpful to hear the perspective of the insured person. Therefore, I am persuaded that Ms. Alfred should receive her reasonable appeal expenses, which should be minimal. She was represented by the same lawyer who represented Mr. Adabi-Ghomi. Mr. Howie did not prepare written submissions in either case and made oral submissions only once, applicable to both cases.

State Farm also seeks its appeal expenses for both parts of the appeal. I am sympathetic to its position. In another forum, it would likely recover at least some of its expenses. However, I conclude that I do not have the authority to make the order requested.

In *Chapman and Allstate Insurance Company of Canada and Wellington Insurance Company*, (October 6, 1994, OIC P-001897 and P-001898), the Director of Arbitrations held that she had no authority to order one insurer to pay the appeal expenses of the other. At that time, the relevant section of the *Act*, which applies to appeals through section 283(7), provided as follows:

> **282.**—(11) The arbitrator may award **to the insured person** such expenses incurred in respect of an arbitration proceeding as may be prescribed in the regulations to the maximum set out in the regulations.
>
> [emphasis added]

However, this section has been amended since the *Chapman* decision. As of November 1, 1996, it reads:

> **282.**—(11) The arbitrator may award, according to criteria prescribed by the regulations, **to the insured person or the insurer**, all or part of such expenses incurred in respect of an arbitration proceeding as may be prescribed in the regulations, to the maximum set out in the regulations.
>
> [emphasis added]

State Farm submits that this section now provides jurisdiction to award an insurer its expenses, whether from the insured person or another insurer. Allstate contends that section 282(11) does

not authorize the payment of expenses as between insurers. In the alternative, it submits that the amendments do not apply to this case because it was underway long before they came into force.

This case has a lengthy history. In May 1994, the mediator issued her report and the arbitration process was started that same month. By that time, the *Act* had been amended to allow the Lieutenant Governor in Council to make regulations dealing with insurer priority disputes[3]:

> 10.4 governing the procedure for determing who is liable to pay statutory accident benefits under section 268, including requiring insurers to resolve disputes about liability through an arbitration process established by the regulations and requiring the interim payment of benefits pending the determination of liability.

However, no priorities regulation was yet in place. Therefore, Ms. Alfred applied for arbitration, asking the arbitrator to determine which insurer was responsible for paying her accident benefits. This was treated as a "dispute in respect of any insured person's entitlement to statutory accident benefits," within the meaning of section 279(1) of the *Act*.

The arbitration hearing took place in December 1994. While the decision was still pending, the priorities regulation, Ontario Regulation 283/95, came into effect on May 27, 1995. This regulation creates rules for dealing with disputes about which insurer is responsible for paying accident benefits. The first insurer to receive a completed application is responsible for paying accident benefits until any dispute about priorities is resolved. If the insurers are unable to resolve the issue, it goes to an arbitration under the *Arbitrations Act, 1991*, not to an arbitrator at the Ontario Insurance Commission.

Regulation 283/95 was clearly intended to take priorities disputes out of the dispute resolution process under the *Insurance Act*. This legislative initiative was taken well before the expenses section of the *Act* was amended. As a result, I conclude that section 282(11) is not meant to deal

[3] This section was added as part of the Bill 164 amendments to the *Insurance Act*, effective January 1, 1994.

with expenses between insurers. It only extends the old rule by allowing expenses to be ordered in either direction. Not only can the insurer be ordered to pay the insured person's expenses, but the insured person can now be ordered to pay the insurer's expenses.

In addition, there is nothing in the expenses regulation, Ontario Regulation 464/96, to suggest that it was intended to deal with expenses between insurers. The criteria for awarding expenses set out in section 12(2) reflect a consideration of two sides - the insurer and the insured person. For example, the arbitrator is to consider "conduct of the insurer or the insured person" that tended to shorten or prolong the proceeding, and whether the proceeding or any position "taken by the insurer or the insured person" was without merit.

As a result, there will be no order of expenses between the two insurers.

October 27, 1997

David R. Draper
Director's Delegate