

**IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990 c. I. 8 , as amended, Section 268, as amended**

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 :

PAFCO INSURANCE COMPANY

Applicant

- and -

CUMIS GENERAL INSURANCE COMPANY

Respondent

DECISION

COUNSEL

Sean A. Brown – Flaherty, Dow, Elliott & McCarthy LLP
Lawyer for the Applicant, Pafco Insurance Company
(hereinafter referred to as “Pafco”)

Nathalie V. Rosenthal – Zarek, Taylor, Grossman, Hanrahan LLP
Lawyer for the Respondent, Cumis General Insurance Company
(hereinafter referred to as “Cumis”)

ISSUE

The Applicant, Pafco Insurance Company (“Pafco”), has commenced a Priority Dispute as against Cumis General Insurance Company (“Cumis”) with respect to a motor vehicle accident that occurred on March 6, 2011, and for which a claim for statutory accident benefits has been made by Gaetano Miceli to Pafco.

The insurers have agreed to refer this dispute to arbitration for the purpose of determining whether Cumis stands in priority to Pafco with respect to the payment of accident benefits to Gaetano Miceli.

The parties have agreed that the arbitrator will be asked to determine answers to the following questions:

Question 1. Was Gaetano Miceli insured under Pafco policies 911108,

558060936 or 5580121721, at the time of the accident of March 6, 2011?

- Question 2. Was Gaetano Miceli an insured of the Cumis policy 01407919 ("the Cumis policy"), covering a 1992 Toyota Camry, as of March 6, 2011, subject to an Excluded Driver Endorsement?
- (a) If the answer to question 2 is NO, was Gaetano Miceli a dependant of Concetta Miceli? - to be determined in a separate Arbitration Hearing;
 - (b) If the answer to question 2 is YES, proceed to question 3;
- Question 3. Was Gaetano Miceli subject to a valid Excluded Driver Endorsement on the Cumis policy, as of March 6, 2011?
- (a) If the answer to question 3 is NO, proceed to question 5;
 - (b) If the answer to question 3 is YES, proceed to question 4;
- Question 4. Is Gaetano Miceli precluded from claiming Statutory Accident Benefits from Cumis if he was an occupant of the 1992 Toyota Camry on March 6, 2011, and not the driver of the said vehicle?
- (a) If the answer to question 4 is NO, proceed to question 5;
 - (b) if the answer to question 4 is YES, the arbitrator should still proceed to Questions 5 and 6, with further submissions required by the parties regarding the entitlement of Gaetano Miceli to *some* accident benefits from Cumis, if it stands in priority, notwithstanding the application of the Excluded Driver Endorsement.
- Question 5. Is Cumis in priority to Pafco with respect to the payment of Statutory Accident Benefits to Gaetano Miceli as a result of his accident of March 6, 2011?
- Question 6. If it is found that Cumis and Pafco are equal in priority, is Cumis in priority to Pafco because Gaetano Miceli was an occupant of the Cumis insured vehicle at the time of the accident?

PROCEEDINGS

This matter proceeded before me on the basis of written submissions, documents and jurisprudence provided to me by counsel.

AGREED FACTS

1. Cumis issued policy 01407919 (the "Cumis policy") covering a 1992 Toyota.
2. The Cumis policy was in effect on March 6, 2011.
3. The Cumis policy provided liability coverage and Statutory Accident Benefits.
4. The Cumis policy holder was Concetta Miceli. Concetta Miceli is Gaetano Miceli's mother.
5. Pafco issued policy 558060936 (the "Pafco policy") covering a 2002 Honda.
6. The Pafco policy was in effect beginning December 9, 2010 and was in effect on March 6, 2011.
7. The Pafco policy was issued to Ronald Miceli, the brother of Gaetano Miceli.
8. Gaetano Miceli was listed as an operator of the 2002 Honda.
9. On March 6, 2011, the Pafco policy provided coverage for Statutory Accident Benefits.
10. The accident of March 6, 2011 occurred while Ronald Miceli was operating the 1992 Toyota insured by the Cumis policy;
11. Gaetano Miceli was a passenger in the 1992 Toyota;
12. Gaetano Miceli submitted an Application for Accident Benefits to Pafco.

APPLICABLE LEGISLATION

A priority dispute arises when there are multiple motor vehicle liability policies which might respond to a statutory accident benefit claim made by an individual involved in a motor vehicle accident. Section 268 (2) of the Insurance Act sets out the priority rules to be applied to determine which insurer is liable to pay statutory accident benefits.

As Gaetano Miceli was an occupant of a vehicle at the time of the accident, the following rules with respect to priority of payment apply:

- (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 (1), the occupant has recourse against the insurer of the automobile in which he or she was an occupant;*
- (iii) *If recovery is unavailable under (1) or (2), 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 (1), (2) or (3), the occupant has recourse against the Motor Vehicle Accident Claims Fund.*

Section 3 (1) of the Statutory Accident Benefits Schedule – Accidents On or After September 1, 2010 defines an “insured person” as follows:

- (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, spouse if the named insured, specified driver, spouse or dependant,
 - (i) is involved in an accident in or outside of Ontario that involves the insured automobile or another automobile.”

ANALYSIS AND FINDINGS

1. Was Gaetano Miceli insured under Pafco policies 911108, 558060936 or 5580121721, at the time of the accident of March 6, 2011?

The answer to this question is really not contentious. Pafco has acknowledged that it issued policy 558060936 (the “Pafco policy”) covering a 2002 Honda. The Pafco policy was in effect beginning December 9, 2010 and was in effect on March 6, 2011. The Pafco policy was issued to Ronald Miceli, the brother of Gaetano Miceli. The claimant Gaetano Miceli was listed as an operator of the 2002 Honda. According to the definition of “insured person” as contained in the Statutory Accident Benefits Schedule he was a person specified in the policy as a driver and therefore an “insured person” under the Pafco policy. On March 6, 2011, the Pafco policy provided coverage for Statutory Accident Benefits.

The answer to this question is “YES”.

2. Was Gaetano Miceli an insured of the Cumis policy 01407919 (“the Cumis policy”), covering a 1992 Toyota Camry, as of March 6, 2011, subject to an Excluded Driver Endorsement?

- (a) **If the answer to question 2 is NO, was Gaetano Miceli a dependant of Concetta Miceli? - to be determined in a separate Arbitration Hearing;**
- (b) **If the answer to question 2 is YES, proceed to question 3;**

Pafco submits that the claimant was a listed driver as confirmed by the Cumis Underwriting File which shows that the claimant was a listed driver

with respect to policy 01407919 covering 3 vehicles, including the 1992 Toyota in which the claimant was a passenger at the time of the subject accident.

The Certificate of Insurance with respect to policy 01407919 shows the claimant Gaetano Miceli as a listed driver being driver 2 with regard to the 3 vehicles described in the policy for the period April 1, 2010 to April 1, 2011.

Section 3(1) of the SABS defines an "insured" as follows:

"insured person" means, in respect of a particular motor vehicle liability policy,

(a) the named insured, **any person specified in the policy as a driver of the insured automobile** and...,

(b) **a person who is involved in an accident involving the insured automobile**, if the accident occurs in Ontario, or

I am satisfied that the Gaetano Miceli was a person "specified in the policy as a driver" according to the Certificate of Insurance referred to above and therefore an "insured" under the Cumis policy subject to the Excluded Driver Endorsement dealt with in the paragraphs to follow.

3. Was Gaetano Miceli subject to a valid Excluded Driver Endorsement on the Cumis policy, as of March 6, 2011?

(a) **If the answer to question 3 is NO, proceed to question 5;**

(b) **If the answer to question 3 is YES, proceed to question 4;**

Cumis has produced an Excluded Driver Endorsement that purports to be executed by Gaetano Miceli and Ronald Miceli on December 13, 2008. This is with reference to the 1992 Toyota Camry. For the purposes of this arbitration, Pafco does not dispute the authenticity of the signatures and has accepted as a fact that the Excluded Driver Endorsement is listed on the Cumis policy.

However, Pafco will not agree that Cumis has met its statutory obligation pursuant to s.232 (3) and (5) of the *Insurance Act* by failing to deliver a copy of the executed Excluded Driver Endorsement to Gaetano Miceli and Ronald Miceli.

Pafco relies on sections 232 (3), (5) and (5.1) of the *Insurance Act* which states:

Insured entitled to copy

(3) Subject to subsection (5), the insurer shall deliver or mail to the insured named in the policy, or to the agent for delivery or mailing to the insured, the policy or a true copy thereof and every endorsement or other amendment to the contract.

Certificate of policy

(5) If an insurer adopts a standard policy approved under subsection 227(5), it may, instead of issuing the policy, issue a certificate in a form approved by the Superintendent.

Effect of certificate

(5.1) A certificate issued under subsection (5) is of the same force and effect as if it were the standard policy, subject to the limits and coverages shown by the insurer on the certificate and any endorsements issued with or subsequently to the certificate.

Pafco relies on the Ontario Court of Appeal decision in GMAC Leasco Corporation v. Lombard Insurance, 2007 ONCA 665 (CanLII) which states:

[7] The application judge ruled that ss. 232(3) and (5) were ambiguous as to whether an insurer must provide a copy of an endorsement to an insured. She found that as the action was being defended by the respondent as a statutory third party and that as the appellant was entitled to a defence under a contingent lessor's motor vehicle liability policy, the application should be dismissed and the issue of the respondent's obligation to indemnify the appellant left to be resolved later on a more complete record.

[8] I respectfully disagree with the application judge's conclusion that ss. 232(3) and (5) are ambiguous. In my view, these provisions are clear: the insurer is normally required to deliver or mail a copy of (1) the policy and (2) every endorsement, but where it adopts a standard policy, it may issue a certificate in the prescribed form instead of a copy of the policy. Nothing in the language of s. 232(5) relating to the issuance of a certificate derogates from or limits the duty imposed by s. 232(3) to provide the insured with a copy of every endorsement. Thus, when read together in their ordinary and natural meaning, ss. 232(3) and (5) [page516] require an insurer to deliver or mail to its insured (1) the policy, or a certificate in an approved form, and (2) every endorsement. By failing to deliver to the appellant a copy of the OPCF 28A Endorsement, the respondent failed to comply with the Insurance Act, s. 232(3).

[9] The OPCF 28A Endorsement has the harsh effect of denying insurance coverage when an excluded driver operates the vehicle. **To gain the benefit or protection of such an endorsement, an insurer must take appropriate steps to ensure that it is brought to the insured's attention:** see *Newcourt Financial Ltd. v. Bruno*, [1999] O.J. No. 2363, [1999] I.L.R. 3709 (S.C.J.); *Maksoud v. Elias*, [2004] O.J. No. 4008, 134 A.C.W.S. (3d) 145 (S.C.J.); *Gore Mutual Insurance Co. v. 1443249 Ontario Ltd. (c.o.b. Enroute Towing)* 2004 CanLII 27736 (ON SC), (2004), 70 O.R. (3d) 404, [2004] O.J. No. 712 (S.C.J.).

In the circumstances, Pafco took the position that Cumis has not provided anything to establish that it met its obligation to deliver or mail to Gaetano Miceli and Ronald Miceli the Excluded Driver Endorsement after it had been signed and returned by them to the Insurer. By failing to deliver the Endorsement, Pafco took the position that Cumis failed to comply with the *Insurance Act*, s. 232(3) and as a result Gaetano Miceli was not subject to a valid Excluded Driver Endorsement.

In my view the *GMAC Leaseco Corp. v. Lombard Insurance* is distinguishable from the case here. In *GMAC* it was only the lessees of the vehicle that signed the OPCF 28A Form. The owner/lessor of the vehicle did not sign the OPCF 28A Form and was not provided with a copy of it. The Court found that the insurer needed to provide the owner/lessor with an executed copy of the OPCF 28A Excluded Driver Endorsement for it to be valid.

It is important to note that, in *GMAC Leaseco Corp. v. Lombard Insurance*, the owner/insured was not the same person as the individuals who signed the OPCF 28A Form. The court found that a copy of the signed OPCF 28A Excluded Driver Endorsement should have been provided to the insured.

In this case, Gaetano Miceli and Ronald Miceli both signed OPCF 28A Excluded Driver Endorsement Form pertaining to the 1992 Toyota owned by Ronald Miceli.

It should also be noted that, in *GMAC Leaseco Corp. v. Lombard Insurance*, the excluded driver was operating the insured vehicle at the time of the accident. In our case, Gaetano Miceli was a passenger in the 1992 Toyota.

The Court found in *GMAC Leaseco Corp. v. Lombard Insurance*, that the endorsement was not valid because it was not provided to the non-signatory, the owner/lessor. The court made it quite clear that a failure to mail this document to the owner/lessor together with evidence the owner/lessor had no knowledge of the OPCF 28A made the endorsement invalid. That is not the case here as both Gaetano Miceli and Ronald Miceli were aware of the OPCF 28A as they both signed it.

I cannot accept the submissions of Pafco that the OPCF 28A was invalid as not delivered to the insured. Nowhere in subsection 232 (3) of the *Insurance Act* does the legislature state that an executed copy of the endorsement must be provided.

The parties in our case were provided with a copy of the Endorsement in order for them to sign it. They always had knowledge of the Endorsement. Moreover, the OPCF 28A also states in large bold font: "please sign and return this form. Keep a copy for your records."

I cannot help but find that the OPCF 28A Excluded Driver Endorsement was provided to, and signed by the insured and the excluded driver. Furthermore, the change was clearly reflected in the Cumis policy. Each vehicle described in Cumis policy 01407919 reflects that there was an OPCF 28A. Therefore, in my view Gaetano Miceli was subject to a valid Excluded Driver Endorsement on the Cumis policy, as of March 6, 2011.

The more important question is the impact of the Excluded Driver Endorsement on the availability of statutory accident benefits which will be dealt with in the paragraphs to follow.

4. Is Gaetano Miceli precluded from claiming Statutory Accident Benefits from Cumis if he was an occupant of the 1992 Toyota Camry on March 6, 2011, and not the driver of the said vehicle?

Cumis takes the position that there valid Excluded Driver Endorsement and therefore Gaetano Miceli cannot be considered an "insured" so as to have statutory accident benefits available to him as he was not the "named insured" and excluded from driving all 3 vehicles listed in the Certificate of Insurance.

On all of the evidence before me I am satisfied that although excluded from driving all 3 vehicles listed on the Certificate of Insurance he was nevertheless "specified in the policy as a driver" on the face of the Certificate so as to entitle him to certain coverages while not operating the listed vehicles. This exposure could have been avoided if Cumis had simply not shown Gaetano Miceli as a listed driver on the face of the Certificate of Insurance in a situation where he was excluded from driving all the vehicles listed on the Certificate. I find that being "specified in the policy as a driver" provides him with certain coverages and in particular statutory accident benefit coverage provided he was not driving a vehicle that he was excluded from driving. In the subject accident he was a passenger.

I am moved by the body of jurisprudence which holds that the accident benefit legislation is remedial in nature and as such should be accorded a broad and liberal interpretation.

It appears to me that the reason why Cumis required the OPCF 28A was to address the risk of Gaetano Miceli driving the insured automobiles.

That risk was addressed by the execution of the Endorsement by Ronald and Gaetano Miceli. No other rights or entitlements were taken away by the OPCF 28A.

Gaetano Miceli was a passenger in the 1992 Toyota operated by his brother Ronald. He was not violating the terms of the Excluded Driver Endorsement. The terms of the Endorsement states in unequivocal language:

WARNING - BY SIGNING THIS FORM YOU AGREE THAT IF THE EXCLUDED DRIVER DRIVES ANY AUTOMOBILE DESCRIBED BELOW:

THIS POLICY WILL NOT PROVIDE THE INSURANCE REQUIRED BY LAW;

1. Purpose of This Change - This change is part of the policy. Except for certain Accident Benefits, it excludes all **coverage when the person (the "Excluded Driver") named in paragraph 3 below drives the automobile(s)** described in paragraph 2 below.

2. Exclusions from Coverage - Except for certain Accident Benefits under Section 4 of the policy, we will not provide coverage **while the Excluded Driver is driving the automobile(s) listed below**, as well as any temporary substitute automobile and any newly acquired automobile as defined in the policy.

3. Acknowledgment of Excluded Driver - **I promise that I will not drive the automobile(s) described in paragraph 2 above. I understand that if I do,**

- **there is no coverage under the policy for:**
- **most Accident Benefits;**

The clear language of the Endorsement states that Gaetano Miceli would only be excluded from claiming accident benefits if he was *driving* the 1992 Toyota. There is no bar to his right to claim SABS if he is a *passenger* in the Toyota. Equally, there would no bar if he were a passenger in someone else's vehicle or simply a pedestrian on the street. He is only barred if he is *driving* the automobile identified in the Endorsement, and then, he is only barred from receiving *most* accident benefits.

The denial of *most accident benefits* in the event where an excluded driver actually *drives* the insured vehicle is also addressed in the SABS at section 31(1) which states:

Circumstances in which certain benefits not payable:

31. (1) The insurer is not required to pay an income replacement benefit, a non-earner benefit or a benefit under section 21, 22 or 23,

(a) in respect of a **person who was the driver of an automobile** at the time of the accident,

(iii) **if the driver is an excluded driver** under the contract of automobile insurance, or

Taken together, there can be no other interpretation of this Endorsement other than that argued by Pafco, specifically that the Excluded Driver Endorsement only bars a claim for *some* SABS if the excluded driver is driving the insured automobile.

5. Is Cumis in priority to Pafco with respect to the payment of Statutory Accident Benefits to Gaetano Miceli as a result of his accident of March 6, 2011?

I find that Gaetano Miceli was not a “named insured” under either the Pafco or Cumis policies but an “insured” under both pursuant to s. 3(1) of the Statutory Accident Benefits Schedule with both insurers therefore standing in equal priority.

6. If it is found that Cumis and Pafco are equal in priority, is Cumis in priority to Pafco because Gaetano Miceli was an occupant of the Cumis insured vehicle at the time of the accident?

Subsection 268 (2) of the *Insurance Act* legislates the priority rules for determining which insurer is liable to pay Statutory Accident Benefits to an occupant of an automobile in an accident.

The rules are stated in subsection 268 (2) and 268 (5) of the *Insurance Act* 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 subparagraph 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 subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.

...

Choice of insurer

(4) 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 statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits. R.S.O. 1990, c. 1.8, s. 268 (4); 1993, c. 10, s. 1.

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 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. 1993, c. 10, s. 26 (2); 1999, c. 6, s. 31 (9); 2005, c. 5, s. 35 (13).

Same

(5.1) 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. 1993, c. 10, s. 26 (2).

Same

(5.2) 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 dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant. 1993, c. 10, s. 26 (2); 1999, c. 6, s. 31 (10); 2005, c. 5, s. 35 (14).

Pafco submitted that if the claimant was an insured of both policies it is s. 268 (5.2) above that breaks any tie in priority and that since Gaetano Miceli was an occupant of the Cumis vehicle he was obligated to claim against the Cumis policy. The difficulty with this argument is that subsection 5 only deals with situations where the claimant is a "named insured or the spouse or dependant of the named insured". This is not the case here. Gaetano Miceli was not a "named insured or spouse or dependant of the named insured". He had a different status. He was merely "an insured person" as opposed to a "named insured".

It is therefore s.268(4) that provides the tie breaking mechanism in the present circumstances. This section provides the claimant with an absolute discretion as to which insurer is chosen to pay accident benefits. Gaetano Miceli has done that by serving Pafco with his claim for statutory accident benefits. By so doing Pafco stands in priority to pay benefits to the claimant.

I find that Pafco is the priority insurer for payment of statutory accident benefits to Gaetano Miceli.

ORDER

I hereby order that the priority claim of Pafco is dismissed with costs payable to Cumis on a partial indemnity basis.

I hereby order that Pafco pay the costs of the arbitrator.

DATED at TORONTO this 31st)
day of March, 2014.)



KENNETH J. BIALKOWSKI
Arbitrator