IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, s. 275 and s. 9 of Ontario REGULATION 664;

AND IN THE MATTER OF THE ARBITRATION ACT,
S.O. 1991, c. 17; as amended;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

CO-OPERATORS INSURANCE COMPANY

Applicant

- and -

ZURICH INSURANCE COMPANY OF CANADA

Respondent

DECISION

COUNSEL:

Mark K. Donaldson for the applicant, Co-operators Insurance

Heather Kawaguchi for the respondent, Zurich Insurance Company of Canada

ISSUES:

1. Does Rule 6 (2), 17(2), or the ordinary rules of law apply in this matter?

DECISION:

1. Rule 17 (2) of the fault determination rules apply and Co-operators is therefore entitled to loss transfer from Zurich.

HEARING:

1. This arbitration was held on August 26, 2005 in the city of Toronto, in the province of Ontario. The hearing proceeded on the basis of documentary evidence alone. No witnesses were called.

FACTS & ANALYSIS:

This arbitration arises out of a motor vehicle accident which occurred on November 14, 2002. On that date, a heavy commercial vehicle driven by Mr. Ivan Stankovic was on the north shoulder of Highway 401 westbound, near the city of Cambridge when it was struck by a 2002 Lexus automobile driven by Mr. Calvin Ng. The heavy commercial vehicle was insured by Zurich and the Lexus by Co-operators. Mr. Ng and a companion were injured in the accident and Co-operators paid accident benefits pursuant to the statutory accident benefits schedule. Co-operators is now claiming compensation from Zurich for payments made pursuant to the "loss transfer" provisions of the Insurance Act.

Section 275 of the Insurance Act allows for indemnification in relations to accident benefits in certain circumstances. In cases where heavy commercial motor vehicles are involved in collision, the insurer paying out accident benefits may be compensated for the payments in

accordance with the fault determination rules set out in Ontario Regulation 668. If none of the rules are found to apply, then the ordinary rules of law apply.

From the documentary evidence filed at the hearing it would appear that the heavy commercial vehicle, a Mack Tractor trailer, was parked entirely on the north shoulder of westbound Highway 401 in Puslinch Township, approximately 2 kilometres outside the city of Cambridge. At approximately 3:30 a.m., the westbound Lexus driven by Mr. Ng swerved to the right and the right front of the Lexus hit the rear of the transport truck. Highway 401 at this location is a six lane divided highway with 3 lanes eastbound and 3 lanes westbound. In addition, there was an additional westbound merge lane which ends to the west of the accident location. There is a 3.4 meter wide paved shoulder north of the travelled lanes. The transport truck was parked entirely on the shoulder, with the rear left corner of the trailer located 1.8 metres north of the most northerly lane at the time of the accident. The location of the accident was in a "no parking" area with several "no parking" signs located to the north of the shoulder both east and west of the accident location. There are overhead lights in the area.

It is unclear how long the transport truck had been on the shoulder of the highway although the driver, Mr. Stankovic, gave a statement to the police to the effect that he had been sleeping in the cab of the truck at that location since approximately 11:00 p.m. or approximately four and a half hours prior to the accident.

Zurich argues that section 6(2) should apply to this situation. This section must be read in conjunction with section 6 (1). Section 6 deals, as the heading suggests, with "Automobiles travelling in the same direction and lane". The section states:

> (1). This section applies when automobile "A" is struck from the rear by automobile "B", and both automobiles are travelling in the same direction and in the same lane.
>
> (2) If automobile "A" is stopped or is in forward motion, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 % at fault for the incident.

I have a number of difficulties with the respondent's position in this matter. To begin with, the vehicle were not in the same lane. The Lexus veered into the back of the transport truck which was located on the shoulder of the roadway. As well, while section 6 (2) does not refer to the "same lane", section 6 (1) does refer to the "same lane" and in my view section 6 (2) cannot be read in isolation. Section (1) clearly states that "this section applies… and both automobiles are travelling in the same direction and in the same lane". The provisions of section (1) therefore apply to section 6 (2) except where they are inconsistent.

I also note that the heading for section 6 states:

> "Rules for automobiles travelling in the same direction and lane"

Headings or titles are not, strictly speaking, part of the governing legislation, however, I do note that in this case it is consistent with the wording of section 6 (1) and I find that section 6 (2) requires that the vehicles be in the same lane.

I have further difficulty with the applicability of section 6(2) to this situation, as the accident occurred on the shoulder rather than on the travelled lanes of the roadway. The term "lane" is not defined in the fault determination rules. The highway traffic act defines a "roadway" as:

> "the part of the highway that is improved, designed or ordinarily used for vehicular traffic, but does not include the shoulder . . ."

I also note that section 151 of Highway Traffic Act states:

> (1) drivers to obey signs posted at designated paved shoulders – where any part of the King's Highway has been designated as having a paved shoulder for use by vehicular traffic and official signs have been erected accordingly to indicate the designation, every driver of a vehicle shall obey the instructions on the official sign.
>
> (2) Regulations . . .
>
> (3) Paved shoulder deemed not part of the road way – A paved shoulder designated under this section shall be deemed not to be part of the road way within the meaning of the definition of "road way" in subsection (1) or part of the pavement for the purposes of clause 150(1) (b).

Arbitrator Malach, in State Farm Insurance Companies vs. Pilot Insurance Company (unreported decision dated April 22, 2003) dealt with a somewhat similar issue. In that case Arbitrator Malach dealt with an accident which occurred on the shoulder of a road but under Rule 11 of the fault determination rules, which applies to vehicles "travelling in the same direction in adjacent lanes". Arbitrator Malach stated:

> "I find that this section is not applicable. The MTO vehicle was off the travelled portion of the highway prior to the impact. The "shoulder" is not an adjacent lane."

Counsel for the respondent provided me with three cases, R. vs. Lehr [2005] A.J. No. 942; Vanzanten vs. Brush [1991] B.C.J. No. 1045; and Richard vs. Roy [1993] N.B.J. No. 258. In those cases, the courts used the term "shoulder or emergency lane", "shoulder or emergency curb lane" and "emergency or breakdown lane". None of those cases set out whether or not there was a definition of those terms in any applicable provincial legislation. In addition, the courts simply used those terms in passing, rather than discussing the issue of whether in fact they were lanes.

In light of my other findings in this case, in the final analysis, it perhaps does not matter if the shoulder was a "lane", however I am of the view that Arbitrator Malach was correct and the shoulder was not a lane, and accordingly section 6 (2) does not apply.

The final difficulty that I have with the applicability of section 6(2) to this fact situation is that, in my view, the transport truck was "parked" rather than "stopped" at the time of the accident. The fault determination rules do not define the terms "stopped", or "parked", but they use these different terms in the rules (see section 17 of the rules). In Rule 6 they use the term "stopped". I reviewed the meaning of the terms "parked" and "stopped" in the case of Liberty Mutual Insurance Company vs. Zurich Insurance Company (unreported decision released August 25, 2005). When determining if a vehicle is stopped or parked, one must look at the duration of the stop, the method of stopping and the intent of the person. In this case Mr. Stankovic was

stationary for a period of approximately four and a half hours and sleeping in the cab of the truck. Mr. Stankovic clearly intended to park his truck and not use it for a considerable period of time. I conclude therefore that the transport truck was "parked" rather than "stopped" at the time of the accident and accordingly 6 (2) does not apply.

Co-operators takes the position that rule 17 applies. It states:

> (1) if automobile "A" is parked when it is struck by automobile "B", the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 percent at fault for the incident.
> (2) If automobile "A" is illegally parked, stopped or standing when it is struck by automobile "B" and if the incident occurs outside a city, town or village, the driver of automobile "A" is 100 percent at fault and the driver of automobile "B" is not at fault for the incident.

On the evidence filed, I find that the transport was illegally parked and that the incident occurred outside a city, town or village. I also note that unlike section 6, section 17 does not require that the accident occur in a lane rather than on the shoulder. I also note that to come within the parameters of section 17 the transport truck could be parked, stopped or standing. I already found that it was parked at the time of the accident. For these reasons I find that section 17 (2) of the fault determination rules applies.

Counsel for the respondent rightly pointed out that the driver of the Lexus violated a number of the provisions of the Highway Traffic Act including sections 150 (2) and 154 (1). This might be relevant if I were to have found that section 17 did not apply and the ordinary rules of law apply. They are, however, irrelevant when applying the fault determination rules. While this may seem like an unjust result, the fault determination rules were established to provide a relatively quick

and inexpensive way to determine which insurer was to be responsible for the payment of accident benefits. As the Ontario Court of Appeal in Jevco Insurance Company vs. Canadian General Insurance Company 14 O.R. (3rd) 545 stated:

> The scheme of the Legislation under section 275 of the Insurance Act, and the companion Regulations is to provide for an expedient and summary method of reimbursing the first party insurer for payment of no fault benefits from the second party insurer who's insured was fully or partially at fault for the accident. The fault of the insured is to be determined strictly in accordance with the fault determination rules prescribed by Regulation, and any determination of fault in litigation between the insured plaintiff and the alleged tortfeasor feature is irrelevant".

In light of the above, I find that section 17(2) of the fault determination rules apply in this situation and Co-operators is therefore entitled to loss transfer from Zurich.

In the event that the parties are unable to agree on the issue of costs, I may be spoken to.

Dated this _____ day of September, 2005.

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M. Guy Jones
Arbitrator