IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, and s.268, and ONTARIO REGULATION 283/95 as amended;

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

AND IN THE MATTER OF AN ARBITRATION;

BETWEEN:

ALLIANZ INSURANCE COMPANY OF CANADA

Applicant

- and -

LOMBARD INSURANCE COMPANY OF CANADA, HER MAJESTY THE QUEEN, AS REPRESENTED BY THE MINISTER OF FINANCE

Respondents

DECISION

COUNSEL:

Mark K. Donaldson for the Applicant

Harry P. Brown for the Respondent Allianz Insurance Company Of Canada

S. J. Sokol for the Respondent Her Majesty The Queen, As Represented by The Minister Of Finance

ISSUES:

1. Was Timothy Klue insured under a motor vehicle liability policy by Lombard Insurance Company of Canada, issued to his employer, for the purposes of the Statutory Accident Benefits Schedule, on the date of the accident?

RESULT:

1. Timothy Klue was not insured under the Lombard policy at the time of the accident.

HEARING:

This hearing in this matter was held in the city of Toronto, in the province of Ontario on June 4, 2008 and February 2, 2009.

FACTS & ANALYSIS:

This arbitration arises out of a motor vehicle accident which occurred on Thursday, September 12, 2002 at approximately 11:45 a.m. At that time, Ms. Karla Merino was walking in a pedestrian crosswalk in the city of Windsor when she was struck by a Jeep Cherokee operated by Mr. Timothy Klue, which was owned by him and his spouse, Sonia Khalit. Ms. Merino was catastrophically injured in the accident.

Karla Merino did not have a motor vehicle policy of her own and accordingly, her solicitor made an application for Statutory Accident Benefits to Allianz Insurance Company of Canada ("Allianz") who insured Ms. Merinos mother's motor vehicle, taking the position that she was a dependant of her mother. After some delay, Allianz began paying accident benefits. On April 25, 2003, Allianz served the Motor Vehicle Accident Claims Fund ("the Fund") as well as State Farm Insurance Company and ING with of a Notice of Dispute Between Insurers. Lombard Insurance Company of Canada ("Lombard") was added to the dispute somewhat later, and State Farm and ING are no longer parties to these proceedings.

The issue before at this time in its broadest sense is whether Lombard is responsible for payment of accidents to or on behalf of Ms. Merino. In order to determine this, it is necessary to determine if Timothy Klue, the driver of the vehicle that struck Ms. Merino, was insured by Lombard at the time of the accident.

The facts of this case are relatively straightforward. Mr. Timothy Klue had been a technician/installer of cable systems for Phasecom/Mastec Systems since May 1995. As part of his employment he was required to have a valid drivers license and he was provided with a company vehicle for his regular use in attending to service calls. Phasecom/Mastec offered their drivers the option to keep the company vehicle overnight and weekends in order to drive to and from work for a fee of approximately $25.00 per week, which was deducted from their pay. Timothy Klue opted to participate in this plan and accordingly had regular use of a company automobile essentially 24 hours a day, 7 days a week.

Phasecom/Mastec Systems was insured by Lombard under policy CPB0870904, which included an automobile policy that was in effect at the time of the accident. I will deal with the particulars of that policy later in my decision. In any event, it is agreed by all the parties that until the day of the accident, Mr. Klue was covered by the Lombard policy.

On September 11, 2002, the day before the accident, Phasecom/Mastech conducted a surprise inspection of Mr. Klue's company vehicle and discovered empty beer bottles in it. As a result, Mr. Klue was told to meet with his employer at 8:00 a.m. on September 12, 2002 to discuss the matter. At that time, Mr. Klue was terminated for cause, effective immediately. He surrendered the keys to the company car at that time. His last day of pay was September 11, 2002, the day before the accident. His mother-in law drove Mr. Klue home from the company's premises, using the uninsured Jeep Cherokee owned by Mr. Klue and his wife. After his arrival home, Mr. Klue drank a quantity of beer then drove his Jeep to see his wife. While doing so, at approximately 11:45 a.m. on September 12, 2002, he struck Ms. Merino.

Allianz and the Fund take the position that there is statutory accident benefit coverage available to Karla Merino under the Lombard policy. They maintain that for a number of reasons, the Lombard policy was still in effect at the time of the accident and that would provide coverage to her. Their arguments involve primarily the question of whether the coverage ended when Mr. Klue was terminated and what notice, if any, was required to be given to Mr. Klue advising him

that he was no longer covered by the policy. In order to determine these issues, it is necessary to look at the policy and surrounding documents in further detail.

The policy issued to Phasecom/Mastec was an OAP-1. This covers vehicles which meet the definition of described automobiles, newly acquired automobiles, temporary substitute automobiles or "other automobiles" in accordance with policy provisions. The policy also covers the unlisted drivers who operate the vehicles owned or leased by Phasecom/Mastec when they have the permission of the named insured.

The OAP-1 was modified by a number of special endorsements and regular endorsements. Special endorsement No. 1 included an OPCF-3 with permission to rent or lease vehicles so that all vehicles leased by Phasecom/Mastec would be covered by the policy.

Special endorsement No. 2 provides coverage for loss or damage to all private passenger vehicles, for a $1,000.00 deductable, and all other vehicles a $2,500.00 deductable. Special endorsement No. 3 lists specifically additional named insureds and vehicles. I note that Mr. Klue and his vehicle were not on this endorsement.

The policy was also subject to an OPCF-21B2 endorsement (Blanket Fleet Coverage), which provides coverage for all vehicles licensed in Ontario that are "owned by you and licensed or leased by you from the following lessors as shown on the Schedule of Lessors attached to this policy for more than thirty days under a written agreement that requires you to insure the automobiles". I note that the company's vehicles were not involved in the accident.

The policy also had an OPCF-44 endorsement. This provides under insured family protection coverage and has no applicability to our case.

There is also an OPCF-27B endorsement, which provides coverage for loss or damage to a non-owned automobile including the equipment, resulting from care, custody or control of that pre-owned automobile. It would appear to be designed to permit an employee to operate "other vehicles" in the context of business. This endorsement provided coverage for light commercial

vehicles such as the one driven by Mr. Klue. The parties, at the hearing, spent a considerable period of time dealing with whether OPCF-27 or 27B applied to Mr. Klue's situation. Automobile Schedule 1 provides details of what coverage is provided under the policy. Group 2 therein covers light commercial vehicles of the sort driven by Mr. Klue while employed by Phasecom/Mastec. This clearly provides OPCF-27B coverage to Mr. Klue while employed. OPCF-27 coverage was not provided to light commercial vehicles but rather private passenger vehicles, of which the policy covered 12.

Having established that OPCF-27B rather than OPCF-27 applies, one must then look at the "limitations of this coverage" found in Section 3 of OPCF-27B, which states:

> 3.1 The coverage applies only to automobiles in your care, custody or control in connection with your business.
>
> 3.3 We will not cover loss to any automobile which is owned or licensed in the name of any person insured by this change, or by any person living in the same dwelling as these persons.

These exclusions would apply to Mr. Klue as the Jeep Cherokee owned by him was not in his care, custody or control in connection with his business. He would also be excluded as the Cherokee was "owned or licensed in the name of any person by this change, or by any person living in the same dwelling as these persons."

These special conditions are similar to those set out in OAP-1.2.2.3 covering "other automobiles". Counsel for the Fund and Allianz argued special condition 5 applies. It states:

> **5.** For all coverages except for Accident Benefits, the other automobile cannot be an automobile that you or anyone living in your dwelling owns or regularly uses. Nor can the other automobile be owned, hired or leased by your employer or anyone living in your household. However, if you drive one of these other automobiles while an excluded driver under the policy for that automobile this policy will provide liability and underinsured automobile coverages while you drive that automobile.

Counsel for Lombard points, however, to Special Condition 6, which states:

6. If you are a corporation, unincorporated association, partnership, sole proprietorship, business, or other entity, the employee or partner for whose regular use a described automobile is supplied, and their spouse or same –sex partner who lives with that person will be covered when they drive the other automobile under the following conditions:

- Both the other automobile and the described automobile must not weigh more than 4,500 kg (gross vehicle weight).
- Neither the employee or partner who is provided with a described automobile, nor their spouses if they live with the employee or partner, are driving the other automobile in connection with the business of selling, repairing, maintaining, storing, servicing or parking automobiles.
- The other automobile is not being used to carry paying passengers or to make commercial deliveries at the time of any loss.
- The other automobile must not be owned, hired, leased regularly or frequently used by you or your employee or any partner or, by anyone living in the same dwelling as these persons.

I am satisfied that special condition 6 is the applicable section given our fact situation and accordingly there would be no coverage under the "other automobile" provisions of OAP-1.

A considerable period of time was spent at the hearing dealing with the issue of whether or not Mr. Klue was a "listed driver" under the Lombard policy. Allianz and the Fund take the position that Mr. Klue was a listed driver under the policy. Accordingly, they argue, Mr. Klue was entitled to proper notice of termination of the policy which they submit was not given in this case. If such notice was required, and not given, then Lombard would be responsible for payment of accident benefits to Ms. Merino.

In support of their position that Mr. Klue was a listed driver, Allianz and the Fund point to what is referred to as the "Phasecom Systems Inc. Truck List, September 2000", which lists Mr. Klue as a technician and has a 1999 GMC Safari listed by his name and the identification number 490. This list is covered by the "Group Fleet" or "Group Fleet 21-B endorsement" and was used for the policy period October 2000 to October 2001. Another list entitled " Phasecom Systems Inc. Truck List – October 2001" covers the period October 2001 to October 2002. I note that while vehicles are contained in that list, the drivers are not. A similar list entitled "Phasecom Systems Inc. Truck List – October 2002" was prepared for the policy period October 2002-October 2003.

In that year, both vehicles and drivers are listed. I note that in the October 2002 list, number 490 is no longer Mr. Klue but rather a Mr. Lamontagne, reflecting the fact that Mr. Klue was no longer driving for the company.

It is a position of Lombard that the lists were simply used by Lombard for internal purposes to establish a premium for that part of the policy, and that simply being put that list did not make Mr. Klue a listed driver, requiring notice of cancellation.

Mr. Greg Kellawan, an executive underwriter with Lombard Canada, testified at the hearing. He explained that the policy in question provided a number of different coverages. The named insured under the policy was "Phasecom Systems Inc." and "Mastec Inc." was an additional named insured. There was also coverage provided under special endorsement No. 3 of part IV of the policy for executives or partners of the company, using passenger vehicles. These people were specifically named insureds under the policy.

The lists of vehicles/drivers referred to above, which included Mr. Klue, were covered by the blanket fleet policy. Mr. Kellawan testified that approximately 30 days prior to the beginning of each annual policy period the broker would supply a list of vehicles to Lombard in order for Lombard to estimate the premium for the coming year. It is worthy of note that the fleet policy generally covered well in excess of two hundred vehicles each year. Mr. Kellawan indicated that the premium was set by taking into account the number of vehicles to be covered and that random drivers record searches would be made of some the listed employees to estimate a driver risk factor. I note that the drivers on the list did not have an address listed.

During the term of the policy the parties were not required to update their list under the fleet policy. At the end of the term there would be a determination of the number of vehicles in the fleet and what amounted to a premium correction would be made and paid to the insured. I note that in the September 2001 list, only the vehicles are listed but not the technician. Mr. Kellawan indicated that they would simply assume the same drivers as the year before, for purposes of setting the premium. In the September 2002 list, the list includes both the vehicle and the name of the technician. Noteably, Mr. Klue is no longer on the list but rather but another technician has

been assigned his number. I am satisfied, based on the documentary evidence and the evidence of Mr. Kellawan, whose evidence I accept, that the lists covering the group fleet were essentially documents prepared to determine a premium and not intended to be considered "listed drivers" under the policy. To extend the purpose of that list to make them listed drivers and therefore require notice of termination of coverage under the policy would be contrary to the intent of the parties. It would also create commercial chaos if written notice were required each time an employee left the company. One must remember that we are dealing with a commercial agreement where the list was simply prepared for premium purposes without addresses even being listed.

In light of the above, I find that Mr. Klue was not a listed driver under the policy and therefore notice of termination of the policy was not required.

Counsel for Allianz and the Fund also submitted that Mr. Klue was not fired until 9:00 a.m. on the day of the accident and therefore he continued to have coverage under the policy until the end of that day. In support of that position they rely on the decision of the Ontario Court of Appeal in Larizza vs. Commercial Union of Canada et al. (1990), 74 OR(2^{nd}) 559. In that case there had been a one-year policy of insurance issued. The insured borrowed money to pay the premium and under the terms of the loan agreement the insured would make monthly installments to the lender. If the insured defaulted in the payment the lender could cancel the policy and apply any unearned premium to the balance owed to the lender. The insured defaulted on an installment and the lender sent notice of cancellation to the insurer specifying the "effective date of cancellation" as January 8, 1983. The insurer did not receive the notice of cancellation until the morning of January 10, 1983 at sometime before 11:00 a.m. An accident involving one of the insured's vehicles occurred later on that date. In that case, the Court of Appeal was dealing with, in essence, an insured giving notice to an insurer and the trial judge had found that Statutory Condition 8 (1)(b) applied and the insured could terminate the contract "at anytime on request". The Court of Appeal held that "at anytime" referred the right to terminate at anytime during the life of the policy without having to give any specified number of days of notice. The Court of Appeal noted that the original notice of termination would have taken effect by midnight on January 7, 1983, but, because of delays, it was not received until

January 10th. The policy therefore remained in effect until notice was actually received. The original notice did not state what time on January 7th the policy was to be terminated and therefore it was to be assumed that it would be at the end of the day.

The court states:

> "In absence of an expressed request by the insured as to the time of day at which he wishes the policy to be cancelled, the policy, in my view, should remain in force in the later case for the whole day upon which notice is received by the insurer…..being obligated to pay the premium for the full day, it must surely follow that the insured is entitled to coverage for the full day."

Counsel for Allianz and the Fund argue that at bare minimum, coverage should have remained in effect until midnight of the day of the accident, as it was only at 8:00 a.m. on that date that Mr. Klute was advised that he had been terminated, effective immediately.

While I am in complete agreement with the Court of Appeal's position in Larizza, I do not think that it applies in this case. In our case, we have a situation where Mr. Klue's insurance was totally dependant upon his employment with the company. Without the employment, he had no insurance. There can have been no doubt in Mr. Klue's mind that as of 8:00 a.m. on the date of the accident he had been terminated, effective immediately. He handed in his keys to the company vehicle and he left the premises. He was paid up until the end of the previous day. There is no evidence that Mr. Klue paid a premium for insurance for the day of the accident. There was no evidence before me that he had had a deduction from his pay for the use of the company vehicle for that day. Simply put, Mr. Klue's insurance terminated when his employment came to an end. As such, there was a very specific time at which his insurance coverage ceased, and that was prior to the accident.

Counsel for Allianz has also submitted that Mr. Klue was a "deemed named insured" at the time of the accident, pursuant to Section 66 (1) (a) of the Statutory Accident Benefits Schedule, which states:

> "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 an 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;..."

The fundamental problem that I have with Allianz's position with regard to Section 66 is that it requires Mr. Klue to have had the company vehicle available for his regular use at **the time of the accident**. Mr. Klue had, of course, been terminated before the accident and had handed in his keys. The company vehicle was not available to him when he was involved in the accident and accordingly Section 66 (1) (a) does not apply.

For the reasons set out above I find that Timothy Klue was not covered by the Lombard policy at the time of the accident.

In the event that the parties are unable to agree with respect to the issue of cost I may be spoke to.

Dated at Toronto, this _____ day June 2009 .

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M. Guy Jones

Arbitrator