

**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990,
c. I. 8, section 275 and *REGULATION 283/95***

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

CERTAS DIRECT INSURANCE COMPANY

Applicant

- and -

LOMBARD GENERAL INSURANCE COMPANY OF CANADA

Respondent

DECISION

COUNSEL:

Harry P. Brown and Mark Sone for the Applicant

Mark Donaldson and Kimberley Tye for the Respondent

ISSUE:

1. Was Mr. Rajathurai an “insured person” under the policy issued by Lombard to Classic Towing on the date of the accident ?

RESULT:

1. No, Mr. Rajathurai was not an “insured person” under the Lombard policy on the date of the accident, and accordingly, Certas is in higher priority to pay his accident benefits claim.

BACKGROUND:

Nisanthan Rajathurai was injured when the vehicle in which he was an occupant was involved in an accident on April 21, 2009. That vehicle was insured by Certas Direct Insurance Company (“Certas”). He submitted an application for accident benefits to Economical Mutual Insurance Company (“Economical”). It appears that Mr. Rajathurai had previously made a claim to Economical with respect to an earlier accident, and was advised to submit this application to them as well.

Economical accepted the application, but put both Certas and Lombard General Insurance Company of Canada (“Lombard”) on notice of its intention to dispute its obligation to pay benefits to the Claimant. The parties agreed at the commencement of the arbitration proceeding that Economical was not the priority insurer. Certas agreed to take over the adjusting of Mr. Rajathurai’s claim on a “without prejudice” basis, and Economical withdrew from the arbitration. Certas asserts that Lombard is in higher priority to pay the claim, in accordance with subsection 268(2) of the *Insurance Act*.

Lombard insured the vehicles owned and operated by a company called Classic Towing at the relevant time. Mr. Rajathurai had worked as a driver for Classic Towing until October 2008, approximately six months prior to the accident in question. Despite this fact, Mr. Rajathurai’s name appears on a document entitled “Description of Drivers”, completed by Lombard or its broker and sent to Classic Towing when the policy was renewed in November 2008. Certas contends that the Claimant was consequently a “listed driver” on the Lombard policy on the date of loss, and that would put Lombard in higher priority.

AGREED FACTS & EVIDENCE:

The parties do not dispute the relevant facts, but disagree about the legal implications that flow from them. Each party filed a Brief of Documents, containing various documents that were referred to at the hearing. The briefs also contained transcripts of examinations under oath conducted of the Claimant, Paul Falco (the owner of Classic Towing), and Julie Galbraith, an underwriter with Lombard. Ms. Galbraith also testified at the arbitration, as did Mark Rolfe, another underwriter at Lombard.

The documents filed indicate that the broker who had placed the policy with Classic Towing wrote to Lombard in October 2007 to provide information required for the renewal of the policy the following month. He attached Motor Vehicle Record (“MVR”) searches, Commercial Vehicle Operators’ Reports (“CVOR”), and an updated fleet list and list of drivers. His note states – “for renewal we are going to make this account 21B because of the size of it”. The parties agree that the reference to “21B” refers to Ontario Endorsement 21B – Blanket Fleet Coverage for Ontario Licensed Automobiles, and that policies that include that endorsement are commonly referred to as ‘fleet policies’.

The 21B endorsement provides coverage for all vehicles owned, leased or operated by the insured during the policy term. It requires that a Schedule of vehicles covered by the policy be submitted to the insurer. Documents filed indicate that twenty-five tow trucks and four passenger vehicles were covered under the policy issued by Lombard to Classic Towing that was in effect from November 2007 to November 2008.

A document entitled Description of Drivers is also contained within the policy documents. This document is the focus of Certas’ argument in this case. The “effective date” of November 16, 2007 appears on the top of the page, with the words – “the following list describes the drivers covered by this policy at its inception”. A list of twenty-six drivers’ names follow, including that of the Claimant, along with their drivers’ license numbers.

It is common ground that Mr. Rajathurai's employment with Classic Towing ended in October 2008. Mr. Falco testified at his examination under oath that Lombard was not advised of this fact.

The parties agreed to renew the policy on the same terms in the fall of 2008. The broker sent a revised list of vehicles to be covered (twenty-three tow trucks, five passenger vehicles this time), as well as 22 MVRs and various CVOR's. He also forwarded a Description of Drivers list. Aside from the "effective date" having been changed from November 16, 2007 to November 16, 2008, that list was identical to the one sent in 2007. Despite the fact that the Claimant had left the employ of Classic Towing in mid-October, his name remained on the list.

Ms. Galbraith explained that a list of drivers is typically submitted to the insurer thirty days before the renewal of a fleet policy, for the purposes of measuring risk in order to determine the premium. She stated that underwriters will assess the risk in part by reviewing the MVR's provided. When it was pointed out to her that only 7 of the MVR's provided by the broker for the 2008 policy renewal pertained to the 26 drivers named on the list, she stated that that information would have been sufficient to assess the "quality" of the drivers. She testified that Lombard did not consider the drivers listed on the Description of Drivers document to be "listed drivers" under the policy.

Ms. Galbraith also stated that Lombard would not expect to receive notice from its insured if drivers whose names appeared on the list left the company, or if new drivers joined the company during the course of the policy term. She explained that a "fleet policy" did not require an insured to report these type of changes.

The parties also referred to an Autoplus Report requested by Certas in May 2009, approximately one month after the accident. The Report indicates that Mr. Rajathurai was an operator under the Lombard policy issued to Classic Towing, covering the date of loss. Neither witness called by Lombard could explain why the Claimant's name appeared this way in the report. Mr. Rolfe testified that insurers will generally provide driver

information to the Insurance Bureau of Canada (“IBC”), who will then pass it on to CGI for the purpose of including it in the Autoplus system. He stated, however, that insurers do not provide driver information for fleet policies, and that given that there is no requirement under such policies for an insured to report a change in drivers to Lombard, Lombard would be unable to report the change to IBC.

Mr. Rolfe also testified that drivers who operate vehicles covered by a fleet policy are covered by that policy as long as they have the consent of the named insured to operate the vehicles. In his view, once Mr. Rajathurai was no longer employed by Classic Towing, he would not have had the consent of the company to operate their vehicles and would therefore not have coverage under the Lombard policy.

PARTIES’ ARGUMENTS:

Applicant’s argument

Certas argues that the fact that Mr. Rajathurai’s name appears on the Description of Drivers form leads to the conclusion that he is an ‘insured person’ under the Lombard policy and is determinative of the issue. Counsel noted the evidence provided by the Lombard underwriters to the effect that Lombard created the form, sent it to its broker, and that the information contained on it was filled in by the broker. Lombard then sent that document to its insured as part of their package of policy documents. He submitted that the wording on the document specifies that the Claimant is covered by the policy, and that as no steps were taken to remove his name from the list, he would have been covered on April 21, 2009, the date of the accident.

Counsel cited the oft-quoted statement of the court in the *Kingsway v. West Wawanosh* (2002) CanLii 14202 (Ont. CA) case to the effect that certainty and predictability are important features in priority disputes between insurers, and contended that given that the Claimant’s name appears on the list, the clear conclusion to be drawn is that he was covered for the duration of the policy.

Mr. Donaldson noted that the 21B endorsement merely requires that a list of vehicles to be covered must be submitted to the insurer on the renewal date of the policy, and is silent with regard to a list of drivers. He submitted that it is therefore a ‘red herring’ and not relevant to the analysis.

Mr. Donaldson acknowledged that the decision in the case of *Allianz Insurance Company vs. Lombard Insurance and Her Majesty the Queen* (decision of Arbitrator Jones, dated June 23, 2009, upheld on appeal, unreported decision of Pattillo, J., April 15, 2010) addressed the issue in this case, and determined that an employee whose employment with a named insured ends prior to an accident is no longer covered by his employer’s fleet policy. He submitted, however, that this decision is distinguishable from the instant case in that the claimant in the *Allianz* case was not shown as a ‘listed driver’ on an Autoplus search as was the case with Mr. Rajathurai. He also noted that a Description of Drivers form had not been provided to Lombard in that case, as was done here.

Mr. Donaldson also referred to and relied on the decisions in *Progressive Casualty Insurance v. State Farm Mutual* (unreported decision of Arbitrator Robinson, dated September 26, 1997), and *Wawanesa Mutual Insurance v. Co-Operators* [2004] O.J. No. 4588 (appeal of Arbitrator Bialkowski’s decision). It was determined in those cases that drivers who were listed on the policies in issue as a result of inadvertence or oversight remained covered under the policies despite the parties’ clear intentions that their names be removed and coverage terminated.

Respondent’s argument

Counsel for Lombard submitted that when a 21B endorsement is provided by an insurer, the coverage attaches to the vehicles listed on the policy and consequently there are no ‘listed drivers’ on the policy. He contended that once the broker requested the endorsement in this case, the parties followed the usual practice with fleet policies, and that their expectations should be given effect. He noted that although a list of drivers was provided by Classic Towing to Lombard approximately sixty days prior to the renewal

date, there was no requirement that such a list be provided, and that it was only forwarded to Lombard to assist with the underwriting function.

Counsel also noted that Classic Towing was not obliged to advise Lombard that any of the employees who were initially listed on the Description of Drivers form were no longer employed by the company. He pointed out that in fact, Mr. Falco, the owner of Classic Towing, did not advise Lombard when the Claimant left the company's employ. He also noted that the drivers' addresses were not included on the form, so that Lombard would not have the information required to contact anyone who left during the course of the policy term, to notify them that they were no longer covered by the policy.

Mr. Brown submitted that the fact that the Claimant's name appears on the Autoplus search as being an operator on the Lombard policy should not be given any weight in the analysis. He noted that there are several discrepancies in the report, including the spelling of the Claimant's name, and suggested that his name likely appears because Lombard had paid out on a previous claim made by or against him.

Counsel referred to the fact that Mr. Rajathurai was involved in an accident in December 2008, after he left Classic Towing but prior to the accident in question, and noted that he had applied to State Farm for benefits. He contended that this indicates that the Claimant did not expect to be covered under the Lombard policy issued to Classic Towing after he had left their employ.

Finally, Mr. Brown submitted that the cases cited by Certas in support of their position involved "listed drivers" on individual policies. He argued that as neither of the policies in those cases carried the 21 B fleet endorsement, they are distinguishable from the instant case. He urged me to follow the decision reached by Arbitrator Jones (upheld by the court) in the *Allianz* case, noting the finding in that case that a list of names submitted to the insurer was not intended to be considered a list of 'listed drivers' under the policy, but rather a document prepared for the purpose of determining a premium.

RELEVANT PROVISIONS:

Subsection 268(2) of the *Insurance Act* states:

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.

Section 2 of *Regulation 403/96* provides:

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

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

ANALYSIS & FINDINGS:

The issue in dispute can be stated as follows – can a driver remain covered under a former employer’s “fleet policy” when he is involved in an accident after his employment ends, but during the term of the policy? Given the argument asserted by Certas, the

question must be considered in light of the fact that the driver's name was included on a list of drivers provided to the insurer upon renewal of the policy, notwithstanding the fact that his employment had ended prior to the renewal date.

I turn first to the decision in *Allianz v. Lombard and MVACF*, *supra*, referred to by both parties and discussed above. In that case, the claimant's employment was terminated in the morning, and he was involved in an accident later in the day while driving an uninsured vehicle. Arbitrator Jones determined that the claimant was no longer covered under his employer's policy once his employment had been terminated, regardless of the fact that his name and vehicle number appeared on a list that had been provided to the insurer. In reference to the exact point raised in this matter, he states –

...the lists covering the group fleet were essentially documents prepared to determine a premium and (were) 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....we are dealing with a commercial agreement where the list was simply prepared for premium purposes without addresses even being listed.

(at p. 8).

Arbitrator Jones went on to state that the claimant's coverage under the policy was totally dependent upon his employment with the company, and that once he was no longer employed, he no longer enjoyed coverage under the policy (at p. 9).

Allianz appealed the arbitrator's finding. The court upheld his decision, and explicitly agreed with the finding that coverage under the policy would only extend as long as the claimant is an employee of the named insured. Justice Pattillo rejected the authorities relied on by Allianz (the same two decisions Certas relies on in this case), making the point that while the individuals who were listed on those policies would have been entitled to notice of their coverage terminating under the individual policies they were named on, a fleet policy does not carry the same obligation.

Mr. Donaldson argues that the *Allianz* case is distinguishable from this case, and that I am not bound by the result above. He contends that the fact that the Description of Driver form includes Mr. Rajathurai's name, and states that the drivers on the list are "covered by the policy" cloaks the Claimant with the status of a 'listed driver'.

I do not agree. It is clear from the evidence that the list of drivers was supplied for the purpose of enabling the underwriters to assess the risk and set the premium for the policy, in the same way as was done in the *Allianz* case. While the document does state that the drivers listed are covered under the policy, I find that as there was no requirement to provide this type of list once the 21B endorsement was agreed to, it would be improper to interpret the document as creating a class of "listed drivers" as Certas suggests. To do so would be to ignore the overarching fact that Lombard had issued a "fleet policy" to Classic Towing, which by definition does not include a class of listed drivers.

Mr. Donaldson made the point that the 21B endorsement does not replace the OAP 1, and must be read along with its provisions. While I agree with that statement, it is clear that the 21B endorsement changes the parties' practices and obligations to each other in a fundamental way. In an individual policy, a premium is established based on the actual drivers covered by the policy, and the addition or deletion of a driver will often trigger a change in the premium charged. That is not the case with respect to "fleet policies".

That approach would also be untenable in a commercial setting such as here, where the named insured operates many vehicles and has a changing roster of drivers over the course of a policy term. The 21B Endorsement requires that a list of vehicles to be covered must be filed prior to the renewal, but does not require that a list of drivers be filed. This makes the policy simpler to administer, in that the company does not have to notify the insurer every time there is a change in drivers or staff. It also spreads the risk over more drivers, making it less important to track the comings and goings of each.

In my view, it makes practical sense that an employee who leaves the employ of a company he used to drive for no longer be covered under that fleet policy. In this case, Mr. Rajathurai's only connection to Lombard was through his employment with Classic

Towing, and once that relationship ended, it is only logical that the coverage he was extended under the fleet policy should similarly end. In any event, the court has determined this issue in the *Allianz* case, and I am bound by its decision.

Certas also argues that the fact that Mr. Rajathurai is listed as an operator under the Lombard policy on an Autoplus search conducted a month after the accident distinguishes this case from the *Allianz* decision. While there was no reference to an Autoplus search in that decision, I find that that fact alone is insufficient to establish that the Claimant was a “listed driver” under the Lombard policy. Neither of the Lombard underwriters who testified at the hearing could explain why Mr. Rajathurai’s name appeared on the search, and counsel for Lombard suggested that it resulted from Lombard having made payments on a claim made arising from another accident.

I note that most insurers operate under the assumption that information appearing on an Autoplus search should be confirmed or corroborated as it may not always be reliable. Having said that, I find that the fact that the Claimant’s name appears on the report is not enough to distinguish it from the decision in the *Allianz* case.

CONCLUSION:

Accordingly, I find that Mr. Rajathurai was not a “listed driver” on the Lombard policy issued to Classic Towing on the date of the accident. Certas is therefore in higher priority to pay Mr. Rajathurai’s claim in accordance with section 268(2) of the *Insurance Act*.

COSTS:

In accordance with the parties’ Arbitration Agreement, I find that Certas is responsible to pay the costs of arbitration incurred by Lombard, as well as the arbitration fees and related disbursements. If counsel cannot agree on the quantum payable, please contact me and I will consider written submissions on the point.

DATED at TORONTO, ONTARIO this _____ DAY OF MAY, 2012.

Shari L. Novick

Arbitrator