

**IN THE MATTER OF SECTION 268 OF THE *INSURANCE ACT*,
R.S.O. C.1.8 and ONTARIO REGULATION 283/95;**

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

**AND IN THE MATTER OF AN ARBITRATION
RESPECTING PRIORITY FOR PAYMENT OF
STATUTORY ACCIDENT BENEFITS**

BETWEEN:

THE GUARANTEE COMPANY OF NORTH AMERICA

Applicant

- and -

ACE INA INSURANCE COMPANY

Respondent

DECISION – (COSTS ORDER AMENDED)

COUNSEL:

Shawn MacDonald for the Applicant

D'Arcy McGoey for the Respondent

ISSUE:

Is the Claimant deemed to be a 'named insured' under the policy issued by ACE INA to Enterprise Rent-A-Car pursuant to section 3(7)(f)(ii) of the *SABS*, because she was an occupant of a vehicle involved in an accident that was being rented for a period of more than thirty days at the time of the accident ?

RESULT:

No, the Claimant is not a deemed named insured under the ACE policy, as the vehicle was not being rented at the time of the accident for more than thirty days.

BACKGROUND:

1. Nasra Abdi was involved in an accident on January 1, 2011, while driving a Dodge Caliber owned by Enterprise Rent-A-Car (“Enterprise”) and insured by ACE INA Insurance (“ACE”). Ms. Abdi had rented the vehicle a few weeks earlier on December 3, 2010, while her personal vehicle was being repaired. That vehicle was insured by Guarantee Company of North America (“Guarantee”).

2. The Claimant submitted an application for payment of accident benefits to Guarantee, and they have paid benefits to her and on her behalf. Guarantee claims that Ms. Abdi is deemed to be a named insured under the ACE policy pursuant to section 3(7)(f)(ii) of the *SABS*, as at the time of the accident, the vehicle that she was in was “being rented by the individual for a period of more than 30 days”. It contends that ACE is therefore in higher priority to pay her claim, in accordance with section 268(5.2) of the *Insurance Act*.

3. The accident in question occurred on Saturday evening, January 1, 2011. The Enterprise location from which Ms. Abdi rented the vehicle is closed from noon on Saturdays until Monday morning. While it is not known exactly when the vehicle was returned to Enterprise, it is not disputed that it was found on the lot the following Monday morning when the store opened, and was “checked back in” on the Guarantee system on January 3, the thirty-first day after it was rented.

4. While Guarantee contends that the vehicle was returned on the 31st day after it was provided to Ms. Abdi and was therefore “being rented” for more than 30 days, ACE asserts that the date on which the vehicle was actually returned is not relevant, and that the terms of the parties’ rental agreement and their intentions should dictate whether the rental extended beyond thirty days.

THE EVIDENCE:

5. None of the key facts are disputed, and neither party called any *viva voce* evidence at the hearing. Counsel relied on the transcripts of Examinations Under Oath held of Ms. Abdi and James Whitley, a representative of Enterprise, and filed various other documents obtained from Enterprise.

6. The evidence revealed that the Claimant had previously rented vehicles from the Enterprise location on Weston Road at various times during 2010. The duration of the rentals varied from a few days to several weeks. She did not use a credit card to pay for these rentals, but rather paid by cash or cheque.

7. Ms. Abdi explained that she went to the Enterprise location on December 3, 2010, to rent a car to drive while her own vehicle was being repaired. It appears that she initially rented a red Kia, but returned to the store later in the day and exchanged it for a Dodge Caliber. The Rental Agreement signed on that day provided that Ms. Abdi would return the car by 11:30 a.m. on December 10, 2010. It also indicates that she paid \$340 by “cheque/cash” at that time.

8. It is not disputed that Ms. Abdi and Enterprise had a series of further discussions, in which the return date of the vehicle was changed. A document entitled “Callback Listing” was produced by way of undertaking after Mr. Whitley’s examination, and indicates that various communications took place between the parties during the month of December. It notes the following:

- An Enterprise representative spoke with the Claimant on Dec 13 and asked her for a further deposit
- the parties spoke on Dec 14 and changed the return date of vehicle to Dec 20
- an Enterprise representative called Ms. Abdi on both Dec 20 and 21 and asked her to come in to pay further deposit and confirm the return date
- the return date of the vehicle was changed on Dec 21 to Dec 28

- an Enterprise representative called Ms. Abdi again on Dec 29 asking for a further deposit and to confirm return date

The last notation on the Callback Listing document is on December 30 at 1:44 pm. It states “return date changed to 12/30/10”.

9. The vehicle was not, however, returned to Enterprise on December 30. It is not known whether anyone at Enterprise explicitly consented to Ms. Abdi keeping the vehicle beyond that date. It is undisputed that she was driving the Dodge Caliber on January 1, 2011, when the accident occurred. She had been in possession of the vehicle at that point for 29 days.

10. Ms. Abdi was asked at her examination about how long she had intended to rent the vehicle for. She was not able to recollect any of the relevant dates, but did state that she planned to drive the rental vehicle until her personal vehicle was repaired and returned to her. She provided an undertaking to provide a copy of the invoice from her mechanic, and did so. It is dated January 15, 2011, and indicates that the transmission on her Toyota Highlander was rebuilt and repaired.

11. James Whitley was examined under oath prior to the hearing on behalf of Enterprise. Mr. Whitley is a Risk Manager employed by Enterprise Holdings, the parent company of Enterprise-Rent-A-Car. He explained that most of the Enterprise locations close at noon on Saturdays, and remain closed on Sundays. He stated that if a vehicle is returned after the location closes on Saturday, a customer would be charged until Monday morning when the vehicle is “checked back in”, unless prior permission was received. There was no evidence that Ms. Abdi received such permission.

12. The witness confirmed that Enterprise’s internal records show that the rental agreement for the Dodge Caliber rented by Ms. Abdi was “closed” shortly after the Weston Road location opened on January 3, 2011, when the car was discovered on the lot in a damaged condition. This was 31 days after the rental contract was signed on December 3, 2010. He also confirmed that the Enterprise documents filed revealed that Ms. Abdi was

charged a monthly fee of \$739 and the daily fee of \$39.99 for one day, for a total rental period of 31 days.

13. Mr. Whitley also explained that the company has a practice of re-writing its rental contracts every 30 days, to keep them within the definition of “short-term rentals”. He did not specify which definition he was referring to. Mr. Whitley stated that if a customer has had a vehicle for 28 or 29 days, someone at Enterprise would call them and ask them to come in and sign a new contract. He explained, however, that if the 30-day period is reached and the customer has not come in, a two or three-day “grace period” would be extended before the matter was escalated and further action taken.

RELEVANT PROVISIONS:

Insurance Act - Section 268

(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,

(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.

(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

Statutory Accident Benefits Schedule

3. (7) For the purposes of this Regulation,

(f) an individual who is living and ordinarily present in Ontario is deemed to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,

(i) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity, or

(ii) the insured automobile is being rented by the individual for a period of more than 30 days; and

PARTIES' ARGUMENTS:

Applicant's submissions

14. Counsel for Guarantee submitted that Ms. Abdi's rental began on December 3, 2010 and ended on January 3, 2011, when the vehicle was found on the Enterprise lot and "checked back in" to their system. He noted that this was a period of thirty-one days. He contended that Ms. Abdi had consequently rented the vehicle in question for "a period of more than 30 days" and was therefore deemed by section 3(7)(f)(ii) of the *SABS* to be a named insured under the ACE policy insuring the rental vehicle. He submitted that while she was also a named insured under the Guarantee policy, section 268(5.2) of the *Act* applies to these circumstances and leads to the conclusion that ACE would be in higher priority to pay her claim.

15. Counsel acknowledged that it was not known when the vehicle that Ms. Abdi had rented was actually returned to the lot. He noted, however, that the accident took place on Saturday evening, January 1, and that the car would therefore have had to have been returned to Enterprise after the location closed on Saturday at noon. He submitted that the company's policy dictated that any vehicle returned after that time is considered to have been rented until the following Monday morning, with the customer being charged accordingly.

16. Counsel also noted that whereas the original agreement provided that Ms. Abdi would rent the car for one week and be charged a weekly rate, she was ultimately charged a monthly

rate and one extra day at the daily rate, as opposed to successive weekly rates until the end of the rental.

17. Counsel for Guarantee noted that the phrase “*is being rented*” appearing in section 3(7)(f)(ii) of the current version of the *SABS* represents a change in language from the 1994 version of the *SABS*, which deems an individual to be a named insured under a policy if an insured automobile “*is rented* for a period of more than 30 days”. He submitted that the older version uses the simple past tense, whereas the phrase “is being rented” in the newer version uses the progressive tense. He contended that this change is significant, and suggests that a renter could become a deemed named insured if an accident occurred less than 30 days after the rental commenced, if the vehicle was in the course of “being rented” for more than 30 days.

18. Counsel noted that the Claimant stated at her examination that she had intended to drive the rental vehicle until her own vehicle was repaired, and that these repairs were not completed until January 15, 2011. He contended that Ms. Abdi would likely have kept the rental vehicle until then, and that she was therefore clearly in the process of renting it for more than 30 days on January 1, the date of the accident.

19. Counsel for Guarantee acknowledged that the last notation on the Callback Listing filed indicates that the last “return date” for the vehicle was December 30. He emphasized, however, that no steps were taken by Enterprise when Ms. Abdi did not return the vehicle by that date, and contended that given the various extensions that Enterprise had agreed to over the course of the previous weeks, it was reasonable to assume that the parties would not have expected the terms of the original contract to be enforced.

Respondent’s submissions

20. Counsel for ACE argued that the evidence indicates that the parties had not intended Ms. Abdi’s rental to extend beyond 30 days, and that she therefore should not be deemed to be a named insured under the ACE policy. He emphasized the difference between an extension to the return date of the vehicle, and the agreed-upon terms and conditions of the

original rental contract. He acknowledged that the parties had had a series of discussions that extended the return date of the vehicle after the initial agreement was signed, but argued that these did not alter the general terms of the contract entered into by the parties on December 3, 2010.

21. Counsel noted that the Callback Listing recording all of the conversations between the parties from December 6 onwards notes that the final return date of the vehicle was to be December 30. He contended that this signifies Enterprise's intention that the rental would not be extended beyond December 30th, twenty-seven days after it began.

22. Counsel for ACE disputed Guarantee's contention that the phrase "is being rented" should be interpreted in a different manner than the words "is rented" that appear in the earlier version of the *SABS*. He submitted that the focus should be on the plain meaning of the phrase "if at the time of the accident, the insured automobile is being rented by the individual for a period of more than 30 days", and that there are two possible interpretations— one being to ask how long the car had actually been rented for on the day of the accident, and the second being to consider what the parties intentions were, regardless of the number of days that had accrued by the date of the accident. He suggested that the parties' intentions regarding the duration of the rental should be paramount, relying on Arbitrator Samis' comments in the case of *Allstate Insurance v. Liberty International Insurance* (August 29, 1995) in this regard.

23. Counsel contended that in any event, if the first interpretation is preferred, the accident took place on January 1, 2011, 29 days into Ms. Abdi's rental. He argued that that fact should be more determinative of the outcome than the fact that the Enterprise lot happens to be closed on Saturday afternoons and Sundays, or that the company chose to charge Ms. Abdi the rental fees that it did.

Reply submissions

24. Counsel for Guarantee replied that the conduct of the parties after the original agreement was signed clearly indicates that neither of them intended to be strictly bound by the provisions of the original agreement, and that ACE should therefore be estopped from

arguing that the Rental Agreement signed on December 3 constitutes the entire agreement between the parties. He also claimed that ACE's assertion that there was no agreement to extend the rental period beyond December 30 should not be accepted, as the past conduct of both parties suggests that Enterprise would not take any steps to enforce the terms of the original agreement if Ms. Abdi did not return the vehicle on that date.

ANALYSIS & FINDINGS:

25. After considering the parties' submissions and reviewing the language in section 3(7)(f) of the applicable *SABS* closely, I have concluded that Ms. Abdi is not a deemed named insured under the ACE policy. While I appreciate that aspects of the evidence presented may suggest that the "deemed named insured" provision is triggered, I find that when the plain meaning of the words of the section are given effect, and the provision is construed with the regulatory purpose in mind, the vehicle that Ms. Abdi rented from Enterprise was not being rented for a period of more than 30 days at the time of the accident.

26. I start by reviewing both prongs of section 3(7) (f). The introductory sentence provides that an individual living in Ontario is deemed to be the named insured under the policy insuring a vehicle at the time of an accident if, at the time of the accident, either the automobile in question is being made available for the individual's regular use by a variety of entities, or, if the automobile is being rented by the individual for a period of more than 30 days. The "regular use" provision appears in part (i) of the subsection, and the "more than 30 days" provision appears in part (ii) of the same subsection. In my view, the approach used to interpret part (ii) should be the consistent with the approach used to interpret part (i), as they form part of the same section.

27. Counsel for Guarantee contended that the change in wording from "is rented" appearing in the 1994 *SABS* to "is being rented" in the 1996 version of the *SABS* is significant, but acknowledged that no arbitrators or judges had been asked to consider the effect of the change. While I see a fine distinction between these phrases, I am not convinced that the different tense used carries the meaning that counsel for Guarantee suggests.

28. The bigger change, in my view, between the language in the two versions of the *SABS* above is the addition of the qualifying phrase “if at the time of the accident”, applicable to both parts of section 3(7)(f). This was picked up on by Justice Belobaba in his ruling in the *ACE INA v. Co-operators’ Insurance* (2009) 77 C.C.L.I (4th) 272 appeal, and formed the basis for his overturning of the arbitrator’s decision. He determined in that case that a claimant who worked as a customer service representative for a rental car company who was involved in an accident on a Saturday evening, as he was driving downtown for an evening out with friends, did not meet the “regular use” test as at the time of the accident he was not at work and did not therefore have regular use of the rental company’s vehicles.

29. Since then, it has been settled law that when analysing whether a claimant enjoys the “regular use” of a vehicle made available to him or her, one must restrict the inquiry to whether the claimant had such use at the time of the accident. Justice Belobaba’s decision shifted the approach from considering whether a claimant’s regular use of a company vehicle was like a “floating charge” that remained with him or her at all times, to the very narrow question of whether *at the moment when the accident occurred* he or she enjoyed regular use of the vehicle. In my view, the second branch of section 3(7)(f) that is in issue here should be approached in a similar manner.

30. Justice Belobaba explicitly determined that the addition of the phrase “at the time of the accident” indicated the legislators’ intention to focus the inquiry on that particular moment in time. I agree. The focus of an inquiry under either branch of section 3(7)f should not be on what the parties may have intended, which is often difficult to discern from the evidence, but rather on whether the vehicle was rented for more than 30 days at the time of the accident.

31. Ms. Abdi’s accident occurred on January 1, 2011 around 9:00 p.m. She had rented the vehicle on December 3, 2010. The accident therefore occurred on the 29th day of the rental, and on a plain reading of the words in the section, it cannot be said that at the time of the accident that the insured automobile was being rented by her for a “period of more than 30 days”.

32. I appreciate that this approach of focusing solely on the plain meaning of the words in the provision effectively ignores the parties' intentions. In many cases, however, an inquiry into these intentions yields confusing or inconclusive results. That is true in this case. A reading of Ms. Abdi's Examination Under Oath transcript reveals that while she did not recall many details relating to her dealings with Enterprise, she did, however, state clearly that she had intended to rent the vehicle while her personal vehicle was being repaired. When she signed the Rental Agreement, she agreed to return the car on December 10, 2010. Yet, the mechanic's invoice she filed after her examination indicated that the car was not repaired and returned to her until January 15, 2011, more than five weeks after that date. The reason for this discrepancy is not clear. Did she significantly underestimate the length of time that the repair would take? Or, was she not certain that she would require the rental car (or be able to pay for it) for that whole period? The answer to that question is simply not known.

33. The Callback Listing filed and referred to by counsel on several occasions is an interesting document that also raises questions about the parties' intentions. As outlined above, it documents various conversations between the parties in which the return date of the vehicle is bumped back, and further deposits are asked for. The last entry on the document is on December 30, 2010 at 1:44 pm, and states "return date changed to 12/30/10". While it is clear that the vehicle was not returned on that date, the following day or the one after that (the accident occurred that evening after the location closed), there are no further entries. In the end, the document raises as many questions as it answers.

34. These irreconcilable aspects of the evidence may be unique to this case, but in my view also reveal why a straightforward reading of the words of the section is preferable to attempting to construe the parties' intentions.

35. As a final point, counsel for Guarantee submitted that the fact that the Enterprise location was closed from the time of the accident until the following Monday morning leads to the conclusion that Ms. Abdi's rental would have extended to the 31st day. While the practical outcome of this may well have been that Ms. Abdi was charged until the Monday morning (January 3), I do not accept that this transforms the rental for the purpose of the

SABS to one beyond 30 days. The accident occurred on January 1st, and in keeping with my comments above, that date is the one that counts, regardless of the details of a particular store location's chosen business hours.

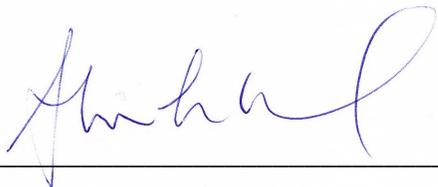
ORDER:

36. For the reasons expressed above, I find that Ms. Abdi is not a deemed named insured under the ACE policy, and that Guarantee's application for arbitration is hereby dismissed.

COSTS:

37. Given the result, ACE is entitled to be reimbursed for its legal costs on a partial indemnity scale. If counsel cannot agree on the quantum of costs payable, I invite them to contact me in writing and a pre-hearing call will be convened to discuss the issue.

DATED at TORONTO, ONTARIO this ___10th ___ DAY OF OCTOBER, 2014.



Shari L. Novick

Arbitrator