IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, 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:

OPTIMUM FRONTIER INSURANCE COMPANY

Applicant

- and -

ING HALIFAX INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

J. Claude Blouin for the applicant

Alex Voudouris for the respondent

ISSUES:

1. What is the effect, if any, of the exclusionary clause of the ING/Halifax policy endorsement OPCF-30?

2. Is ING/Halifax or Optimum Frontier Insurance Company responsible for payment of statutory accident benefits to or on behalf of Mr. Dennis Bressette?

ORDER:

1. The exclusionary clause set out in OPCF-30 is valid and accordingly Optimum Frontier Insurance Company is responsible for payment of statutory accident benefits to or on behalf of Mr. Bressette.

HEARING:

1. The hearing in this matter took place in the city of Toronto, in the province of Ontario on June 30, 2004. The matter proceeded by way of an agreed statement of facts. No witnesses were called.

FACTS AND ANALYSIS:

The facts of this case are relatively straightforward. On January 9, 2001, while in the course of his employment, Mr. Dennis Bressette was operating a "boom truck" provided by his employer for his regular use. The "boom truck" was a flatbed truck to which was attached a boom, crane-like device used to unload and load materials onto the flatbed. Mr. Bressette was injured while unloading a skid of concrete, sand and cement. The cable supporting the load apparently broke, dropping the load onto an elevator platform attached to the exterior elevator of the building and then tipping off the platform onto Mr. Bressette, who was operating the crane.

The truck was a 1989 Mac truck owned by Royal Building Supplies and insured by an automobile liability policy issued by ING/Halifax. As the vehicle was provided for his regular use, Mr. Bressette was a deemed named insured pursuant to section 66 of the statutory accident benefits schedule.

At the time of the accident Mr. Bressette owned a 1985 Volkswagen Jetta which was insured by Optimum Frontier Insurance Company. Mr. Bressette was a named insured under that policy. Mr. Bressette sent an application for accident benefits to Optimum, who commenced paying the benefits. Optimum subsequently served ING/Halifax with a Notice of Intention to Dispute, taking the position that ING/Halifax was in priority pursuant to section 268 (2) of the Insurance Act and therefore responsible for payment of accident benefits.

The parties agreed that Mr. Bressette was an "occupant" and he was injured in an "accident" within the meaning of the statutory accident benefit schedule.

Counsel for the respondent took issue as to whether or not the vehicle, when parked, and using the crane, was an automobile within the meaning of the Insurance Act and the schedule. His argument was, in effect, that when the boom was in use, it was acting as a crane, and not an automobile. With respect, I do not agree with this position.

In Regele vs. Slusrczyk (1997) 33 O.R. (3rd) 556 the Ontario Court of Appeal established a test for determining what constitutes an "automobile" for the purposes of accident benefits. In that case the court was dealing with the status of a tractor-trailer. The court held that section 224 of the Insurance Act and other sections must be examined to determine whether or not a vehicle was an "automobile". Section 224 (1) of the Insurance Act provides that an "automobile" includes (a) a motor vehicle required under any Act to be insured under a motor vehicle liability policy and (b) a vehicle prescribed by Regulation to be an automobile.

The Court of Appeal went on to establish a two-part test to be followed. The first step is to determine whether the vehicle would be considered to be an "automobile" in ordinary parlance. If the answer is yes, the court does not have to go any further. If the answer is no, then the court has to consider whether or not the vehicle in question is a "motor vehicle required, under any Act to be insured under a motor vehicle liability policy".

The Court of Appeal found that the definition of "automobile" found in section 224 (1) is not exhaustive.

I am of the view that the flatbed truck with the boom attached, is an "automobile" within the normal meaning of the term. Even if it were not, it would still fall within the definition of section 224 (1) of the Insurance Act as a "motor vehicle required under any Act to be insured by a motor vehicle liability policy".

Section 1 (1) of the Compulsory Automobile Insurance Act states that "motor vehicle" has the same meaning as the Highway Traffic Act and includes "trailers and accessories and equipment of a motor vehicle". Section 2 (1) of the Compulsory Automobile Insurance Act provides that no owner or lessee of a motor vehicle shall operate the motor vehicle or cause or permit it to be operated on a highway unless the motor vehicle is insured.

The Ontario Court of Appeal in Copley vs. Ker Farms Limited [2002] O.J. No. 1644, made a distinction between trailers that are under the power and control of a motor vehicle and those which are not. In that case, it found that a tomato wagon that was not fully attached to a transport truck when the accident occurred was not under the power and control of the truck was not a trailer of a motor vehicle within the meaning of the Compulsory Automobile Insurance Act. Accordingly, I find that it was an "automobile" pursuant to section 224 (1) of the Insurance Act.

Our case is different from the Copley case in that the boom was an intrinsic part of the "boom truck" and permanently attached to it. As such, it was required to be insured under section 2 of the Compulsory Automobile Insurance Act.

THE AFFECT OF OPCF-30 ENDORSEMENT ON STATUTORY ACCIDENT BENEFITS MANDATED BY SECTION 268 OF THE INSURANCE ACT:

Counsel for ING/Halifax submits that the affect of the OPCF-30 issued to the Royal Building Supply Company has the affect of removing any accident benefits from the policy of motor vehicle liability issued to the Royal Building Supply Company. The endorsement in question reads as follows:

REMOVING COVERAGE FOR ATTACHED MACHINERY OPCF-30

1. purpose of this change
2. this change is part of your policy. It removes coverage for loss or damage resulting of the ownership, use or operation of attached machinery or apparatus.

LIMITATIONS ON YOUR COVERAGE

1. in return for the premium charge, we will not provide coverage for loss or damage under section 3, "Liability Coverage", or section 4, "Accident Benefit Coverage", of your policy for loss or damage resulting from the ownership use or operation of the following machinery or apparatus, including its equipment, mounted on or attached to the automobile, while at the site of the use or operation of the machinery or apparatus.

Mr. Bressette was injured while operating the boom at the site of its use or operation, and accordingly, if the endorsement is valid, it would have the effect of removing statutory accident benefit entitlement under the policy. In order to determine if it is in fact valid, it is necessary to look at the provisions of the Insurance Act which provide statutory accident benefits as well as the authority for authorizing the endorsement in question.

Section 268 (1) of the Insurance Act provides that:

> Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the statutory accident benefits schedule is made or amended, shall be deemed to provide for the statutory accident benefits set out in the Schedule and any amendments to the Schedule, subject to the terms, conditions, provision, exclusions and benefits set out in that Schedule.

The OCPF-30 endorsement referred to above, was approved by the Superintendent of Insurance pursuant to section 227 (2) of the Insurance Act which states:

> Where, in the opinion of the Superintendent, any provision of this Part, including any statutory condition is wholly or in part inappropriate to the requirements of a contract or is inapplicable by reason of the requirements of the Act, he or she may approve a form of policy, or in part thereof, or endorsement evidencing a contract sufficient or appropriate to ensure the risks required or proposed to be insured, and the contract evidenced by the policy or endorsement in the form so approved is effective and binding according to its terms even if those terms are inconsistent with, vary, omit, or add to any provision or condition of this Part.

The parties filed at the hearing a letter from the Superintendent of Insurance, dated November 28, 2003, confirming that he had indeed approved the OPCF-30. Because of the importance of that document, I will quote from it extensively.

> Dear Mr. Voudouris:
>
> Thank you for your letter dated October 24, 2003 requesting information about Ontario Policy Change Form No. 30 (OPCF-30) – Removing Coverage for Attached Machinery. This form and its predecessors have been in use since at least the 1970's. . . .
>
> The OPCF-30 is intended to be used in connection with commercial vehicles. It removes liability in Accident Benefits coverages from the policy covering the vehicle, but only in respect of loss or damage resulting from the ownership, use or operation of specified machinery or apparatus attached to the vehicle, "while at the site of the use or operation of the machinery or apparatus".
> The rationale behind this endorsement is outlined below.

Automobile insurers must be able to assess the risk represented by the use and operation of the vehicles that they insure. While machinery attached to a vehicle is in transit (g, while being transported between job sites on a public highway), the machinery is not in use and therefore risks specific to operation of the machinery do not arise.

However, because of the wide variety of machinery that may potentially be attached to a vehicle, and the wide variety of uses to which such machinery might be put, it would be difficult for automobile insurers to assess the risk arising out of the operation of such machinery. Moreover coverage for loss or damage arising out of operation of such machinery is typically found in a commercial general liability coverage. It is therefore inappropriate for such coverage to be provided in the standard Ontario motor vehicle liability policy.

In summary, the purpose of the OPCF-30 is to make it clear that claims for loss or damage arising out of the use of machinery while not in transit but for the purpose for which it is intended, for example at a job site, the auto insurance coverage would not apply, and any losses resulting from the use of machinery are more appropriately covered under a general liability policy.

Examples of Appropriate Uses of the OPCF-30 would include excavating equipment, welding equipment, pesticide/other spray equipment, and cooking equipment.

There are, however, instances in which use of a OPCF-30 may not be appropriate. For example, the use of the hoist machinery attached to a tow-truck is intrinsic to the use of the tow-truck as a vehicle and an OPCF-30 is therefore not appropriate in respect of such machinery. Other examples, for which the OPCF-30 would be inappropriate, would include fuel trucks and dump trucks.

Counsel for Optimum relies on the decision of the Ontario Court of Appeal in Persaud vs. Gan Canada [1997] O.J. No. 97 with regard to the effect of an endorsement issued pursuant to section 227 (2) of the Insurance Act on statutory accident benefit coverage mandated by section 268 of the Insurance Act. In that case, a person was injured when thrown from a motor scooter while in Mexico. The insurer denied coverage based on then section 243 of the Insurance Act, which limited insurance benefits to accidents occurring in Canada or the United States of America. In addition, the insurer argued that the policy limited recovery to accidents that occurred in Canada and the United States. The insurer in that case relied on section 227 (2) and argued that that section allowed the policy to include the territorial exclusion.

The Court of Appeal rejected this position stating:

> The plaintiff does not dispute that the Commissioner approved the form of policy used in this case, but there is no evidence that the Commissioner made a decision under section 227 (2) to approve a formal policy inconsistent with the Act. The circumstances in which the Commissioner may approve such a form of policy are limited by section 227 (2). The affect of the subsection is not to validate any form of policy approved by the Commissioner, regardless of the extent to which it departs from the provisions of the Act or the reasons for such departure.

That decision was followed by the Court of Appeal in Luu vs. Zurich [1997] O.J. No. 1049. In that case, the injured party was involved in a motor vehicle accident in Vietnam. The insurer refused to pay accident benefits because the accident occurred in a jurisdiction beyond that set out in the policy. In following Persaud, the Court of Appeal upheld the decision of Arbitrator Palmer, who held that section 268 (1) of the Insurance Act deemed every auto insurance policy to provide accident benefits as set out in the Schedule, and subject to the terms, conditions, provisions, exclusions and limits set out in the Schedule.

Counsel for Optimum relies in part, on the comments of Director Sacks in her decision in that case where she stated:

> The contract must use the form approved by the Commissioner, who has the authority to extend that insurance by section 227 (3) of the Act, but not to limit it. The use of section 227 (2) to purport to limit the benefits incorporated into the policy by section 268 (1) would be beyond the powers of the Commissioner and contrary to the provisions contained in that section.

Counsel for Optimum also relies on the comments of Justice Jilese in Ortez vs. Dominion of Canada General Insurance Company 47 O.R. (3rd) 775, wherein he stated:

> I accept that the Superintendent approved the form of the policy used in this case, but the Superintendent does not have the authority or power to approve a form of policy inconsistent with the terms of the governing legislation.

With the greatest respect, I do not agree with counsel for Optimum's position. Section 227 (2) does allow for the Superintendent to approve a form or endorsement which is inappropriate to the requirements of a contract or inapplicable by reason of the requirements of any Act… and the policy or endorsement in the form so approved is effective and binding even if those terms are inconsistent with, vague, omit or add to any provision or condition of this part.

Section 227 (2) is to be contrasted with section 227 (5) which states that:

> The Superintendent, may approve the form of standard policies containing insuring agreements and provisions in conformity with this Part by insurers in general.

There is, in my view, an important distinction between these two subsections. Section 227 (5) only allows approval of forms for standard **policies** in **conformity** with this Part (of the Insurance Act).

Section 227 (2) on the other hand, does allow for **endorsements** which are **inconsistent** with or vary or omit or add to the provisions of this Part of the Insurance Act.

What we have in this instance, in my view, is an endorsement form that was approved by the Superintendent that is inconsistent or varies section 268 of the Insurance Act. The Court of Appeal in Persaud has made it clear that there are limits on the Superintendent's powers in this regard. The approval must be for a valid reason.

In this case, counsel for ING/Halifax has filed a letter setting out the policy reasons given for the exclusionary endorsement:

> Because of the wide variety of machinery that may potentially be attached to a vehicle and the wide variety of uses to which machinery be put it would be difficult for automobile insurers to assess the risk arising out of the operation of such machinery. Moreover, coverage for a loss or damage arising out of the operation of such machinery is typically found in a commercial general liability coverage. It is therefore inappropriate for such coverage to be provided in the standard Ontario motor vehicle liability policy.

The explanatory letter from the Superintendent then goes on to explain that in some situations the use of an OPCF-30 may not be appropriate. He stated:

> For example, the use of the hoist machinery attached to a tow-truck is intrinsic to the use of the tow-truck as a vehicle and an OPCF-30 is therefore not appropriate in respect of such machinery.

In our case, the crane or boom was being used after the vehicle had arrived at the work site. The flat bed had legs that were planted into the ground in order to allow the boom to operate properly. As such, the boom was really operating as a piece of machinery on a work site and not as a motor vehicle. Accordingly it was properly the subject matter of an OPCF-30.

In light of the above, I am of the view that the exclusionary clause as set out in the OPCF-30 was applicable and therefore Optimum Frontier Insurance rather than ING/Halifax should be responsible for paying the statutory accident benefits.

In the event that the parties cannot agree on the issue of costs, I may be spoken to.

Dated this _____ day of October, 2004 in the city of Toronto.

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M. Guy Jones
Arbitrator