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

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

PEMBRIDGE INSURANCE COMPANY

Applicant

- and -

AXA INSURANCE COMPANY

Respondent

DECISION ON A PRELIMINARY ISSUE

COUNSEL:

Jamie R. Pollack for the Applicant
Rita L. Urbonavicius for the Respondent

PRELIMINARY ISSUE:

Does the application of the priority provisions in section 268 of the *Insurance Act* result in a finding that Pembridge Insurance Company is the insurer responsible to pay Chad Carpenter's accident benefits claim, or does it require a further determination into whether or not Mr. Carpenter is a "dependant" of his parents, and therefore an insured person under their policy with AXA Insurance Company?

RESULT:

1. The application of subsection 268(5.2) of the *Act* mandates that the issue of Chad Carpenter's dependency on his parents be explored.

BACKGROUND FACTS:

Chad Carpenter was involved in a single vehicle accident on October 28, 2006 while driving a Ford pickup truck owned by his parents. That vehicle was insured by AXA. Mr. Carpenter was neither a listed driver nor a named insured on the AXA policy.

Mr. Carpenter owned a Pontiac at the time, and was a named insured on a policy insuring that vehicle. The Pontiac was insured by Pembridge. He was seriously injured as a result of the accident, and applied to Pembridge for accident benefits. Pembridge has paid, and continues to pay him accident benefits. It seeks reimbursement of the benefits paid out from AXA, on the basis that Mr. Carpenter was dependent on his parents and that the priority scheme set out in section 268(2) of the *Insurance Act* dictates that AXA should pay the claim.

An initial pre-hearing teleconference call was convened with counsel to identify the issues in dispute and clarify the usual details relating to an arbitration hearing under Regulation 283/95. Counsel agreed at that time to frame the question of whether section 268 dictates that Pembridge is responsible to pay Mr. Carpenter's accident benefits claim by virtue of his being a named insured under their policy as a preliminary issue, and to proceed by way of written submissions. They agreed that if AXA was successful on this issue that would end the matter, and if it was not, the process would continue with examinations under oath of the relevant parties and a full inquiry on the dependency issue.

RELEVANT PROVISIONS:

Subsection 268(2) is the only relevant provision required for the determination of the preliminary issue. It states:

> (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,
>
> 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.
>
> 2. In respect of non-occupants,
>
> i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,
>
> ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,
>
> iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any 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 non-occupant has recourse against the Motor Vehicle Accident Claims Fund.
>
> (3) An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits.
>
> (4) If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits.

(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.

(5.1) Subject to subsection (5.2), if there is more than one insurer against which a person may claim benefits under subsection (5), the person, in his or her discretion, may decide the insurer from which he or she will claim the benefits.

(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 of the automobile in which the person was an occupant.

PARTIES' ARGUMENTS:

Counsel for AXA contends that a simple approach is required. He argues that as Mr. Carpenter is a named insured on the Pembridge policy in force on his Pontiac at the time of the accident, subsection 268(2)(1)(i) applies, and it is unnecessary to look at any of the provisions that follow. He asserts that the priority scheme in section 268 requires that you look first to the insurer of an automobile in respect of which the occupant is an insured, and that in the event that insurance is not available there, you proceed further down the priority ladder. He states, however, that if the occupant of the vehicle IS an insured, as is the case here, the inquiry stops there.

Mr. Pollack contends that the above approach is consistent with the general view that in a post- no-fault benefits world, an insured party must look first to its own insurer for the payment of accident benefits. (*Portch v. Markel Insurance Co. of Canada [1995] O.I.C.D. No. 29, upheld on appeal [1996] O.I.C.D. No. 204)*

Counsel for AXA also referred to Arbitrator Jones' decision in *AXA Insurance Co*. vs. *State Farm Automobile Insurance Co.* (July 2005). State Farm argued in that case that given that an occupant of a motor vehicle is entitled to collect accident benefits, he or she

should then also meet the definition of an "insured person" for the purpose of section 268(2)(1)(i) of the Act. Mr. Pollack noted that that argument was specifically rejected, and that the arbitrator stated that the general approach followed since no-fault legislation was enacted in 1990 is that insured parties should first look to their own insurers for the payment of accident benefits. He also emphasized Arbitrator Jones' comment that the section dictates that you "look first to the insurer in respect of which the occupant is an insured, and only if recovery is unavailable under subparagraph (i), do you have recourse against the insurer of the automobile in which he or she was an occupant."

Counsel for Pembridge contended that the issue was bit more complicated, and required a more detailed review of the provisions. She submitted that in keeping with the rules of statutory interpretation, section 268 must be read as a whole and each provision must be considered. She contended that counsel for AXA's assertion that the inquiry stops as soon as an applicant fits within section 268(2)(1)(i) would offend this rule.

Counsel noted that section 268(5) mandates that if a person is either a named insured under their own policy, or a spouse or dependent of a named insured, benefits must be sought from that insurer. Section 268(5.1) then provides the person with the discretion to choose which insurer to apply to, in the event that two different insurers meet the criteria. She noted, however, that section 268(5.2) takes away that discretion in the event that a person is an occupant of a vehicle in which they are either a named insured, or a spouse or dependent of a named insured. She referred to the mandatory language of the section, and contended that in the event that Pembridge is successful in proving that Chad Carpenter was dependent on his parents, it would mandate that AXA be liable for the payment of his accident benefits, despite the provision in section 268 (2) (1) (i).

Counsel for Pembridge relied heavily on the findings of Justice Lax in the case of *AXA v. Old Republic Insurance Company* (1998) 38 O.R. (3d) 630, an appeal of an arbitrator's decision. She noted that in that case, the wife of an employee who was deemed to be a named insured on a policy covering his employer's vehicle by virtue of the "regular use" provisions of the SABS, was required to claim benefits from that insurer as a result of her

being injured in an accident while she was a passenger in that vehicle. This finding was made despite the fact that the spouse was a named insured under her own policy with another insurer. Counsel contended that this decision was dictated by the mandatory language in section 268(5.2), and should guide the result in this case.

In his reply submissions, counsel for AXA emphasized that Chad Carpenter was never a named insured under the AXA policy, as asserted by counsel for Pembridge. He also submitted that her reliance on the *AXA v. Old Republic* decision was misplaced, and suggested that the judge's comments and findings are restricted to those who are deemed to be named insureds under section 66 of the *SABS,* a group that did not include Mr. Carpenter.

FINDINGS AND ANALYSIS:

One of the principal rules of statutory interpretation is that all provisions in a statute must be considered, and that a statutory provision is to be construed as a whole. A clear expression of that principle is found in the Supreme Court of Canada's decision in *Greenshields v. The Queen* [1958] S.C.R. 216, where Locke, J. states – "The broad general rule for the construction of statutes is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest." (at p. 225)

Adopting that approach to a consideration of the priority scheme set out in subsection 268(2) of the Act, I must consider any provision that relates to an occupant of a vehicle before determining who is in priority to pay. Clearly, as a "named insured" under the Pembridge policy, Chad Carpenter potentially has recourse to that policy, pursuant to subsection 268(2)(1)(i). However, all other possibilities must be canvassed before arriving at that conclusion.

Pembridge alleges that Chad meets the definition of a "dependant" under subsection 2(6) of the *Statutory Accident Benefits Schedule*. While that has not yet been established, it may well be at the end of the day. If Mr. Carpenter is found to be dependent on his

parents, the situation would then be governed by subsection 268(5) of the Act, which mandates that people who are either named insureds or spouses or dependants of named insureds must claim against those insurers. Section 268(5.1) then provides the person with discretion to claim benefits against either insurer, except in a case where subsection 268(5.2) applies. As set out above, that section specifies that in the instance where a person is both a named insured and a spouse/dependant of a named insured, as would be the case here in the event that dependency is found, benefits must be claimed against the insurer of the vehicle in which the person was an occupant.

On that basis, if Mr. Carpenter were to be determined to be a dependant of his parents, I would be required to find that he should have claimed accident benefits from AXA, the insurer of the vehicle he was driving at the time of the accident. Consequently, an inquiry into the dependency issue is required before a final priority determination is made.

Three cases were relied on by the parties in their written submissions. I find that the *Portch v. Markel* and *AXA vs. State Farm Insurance* decisions filed by counsel for AXA are not helpful to the analysis, as neither of them address the situation in which a person is both a named insured under one policy, and a spouse or dependant of a named insured under another policy. However, the situation in *AXA Insurance vs. Old Republic Insurance Co.* is somewhat analogous to the facts of this case, and I find it to be instructive.

In that case, the issue of priority under section 268 of the Act was placed squarely before the arbitrator. The matter proceeded by way of agreed facts, and the relevant facts can be summarized as follows - Pauline Hayward is the spouse of Tony Hayward. She suffered injuries in an accident that occurred while she was traveling in a car owned by her husband's employer and made available for his regular use. That vehicle was insured by Old Republic Insurance. Ms. Hayward owned her own vehicle, which was insured by AXA, and she was a named insured on that policy. Mr. Hayward called Old Republic to report that his wife had been injured, and was advised to submit her claim to AXA, which he did. AXA paid benefits and filed a notice of dispute against Old Republic.

The arbitrator framed the issue as whether or not Tony Hayward was in fact a "named insured" under the Old Republic policy within the meaning of that term as it appears in section 268(5) of the Act. He determined that the Lieutenant Governor in Council acted beyond his jurisdiction to issue regulations when he enacted section 91(4) (now s. 66) of the *Statutory Accident Benefits Schedule* that deems someone to be a "named insured". The result of that finding was that AXA was responsible to pay Ms. Hayward's claim.

The focus of the appeal decision was on that jurisdictional point. Justice Lax overturned the arbitrator's ruling, finding that his *ultra vires* finding was an error in law, but agreed with his statement that section 268(5.2) dictates that Old Republic was liable for the payment of benefits, if Tony Hayward was a named insured under the Old Republic policy. The result of her finding was that Old Republic was ordered to pay Ms. Hayward's accident benefits claim, despite the fact that she was a named insured under the AXA policy.

Counsel for AXA emphasized in his Reply submissions that Mr. Carpenter was not a named insured under the AXA policy, and that Pembridge's reliance on this decision was therefore misplaced. I find that the real point to be gleaned from this decision is that Justice Lax confirmed that as a spouse of a named insured, Pauline Hayward was required to claim benefits from the insurer of the vehicle in which she was a passenger, despite the fact that she was a named insured on another policy. The wording of section 268(5.2) places spouses of named insureds and dependants of named insureds on equal footing, and it is for that reason that I find this decision to be compelling authority on the issue before me.

Accordingly, I do not accept AXA's assertion that as Mr. Carpenter is a name insured on the Pembridge policy, Pembridge is automatically in higher priority to pay his accident benefits claim. I find that the arbitration must proceed on the question of whether he is "dependant" of his parents, and if he is determined to be, AXA would be in higher priority than Pembridge to pay his claim by virtue of section 268(5.2) of the Act.

I will have my assistant contact counsels' offices to arrange for a further pre-hearing teleconference, so that the process can continue as outlined.

DATED AT TORONTO, ONTARIO THIS _____ DAY OF SEPTEMBER, 2008.

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Shari L. Novick

Arbitrator