IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, section 268 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:

THE ECONOMICAL INSURANCE GROUP

Applicant

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE, SECURITY NATIONAL INSURANCE COMPANY and KINGSWAY GENERAL INSURANCE COMPANY

Respondents

ARBITRATION DECISION

COUNSEL:

Christopher J. Schnarr for the Applicant

John Friendly for the Respondent (Minister of Finance)

ISSUE:

1. Does section 2.2.3 of Ontario Automobile Policy 1 ("standard owner's policy") operate to extend accident benefits coverage from Steven Warren's spouse's policy issued by Security National to insure her vehicle, to Shilpa Shingara, a

pedestrian who was struck by Mr. Warren on September 20, 2006, while he was driving an uninsured BMW ?

The parties agree that if the answer to the above question is yes, Economical Insurance will step into the shoes of Security National and accept priority of Ms. Shingara's claim.

There were initially three other issues raised involving both Kingsway Insurance and Security National. Both Economical and the Motor Vehicle Accident Claims Fund agreed to let those two insurers out of the arbitration prior to the hearing taking place, and as a result, I will not address those issues.

RESULT:

Section 2.2.3 of OAP 1 does extend accident benefits coverage in these circumstances to Ms. Shingara, and consequently, Economical is liable to pay her claim.

HEARING:

The hearing was held on August 12 and 13, 2008 in the City of Toronto, in the province of Ontario, before me, Shari L. Novick, Arbitrator.

BACKGROUND FACTS:

None of the relevant background facts are in dispute. Steven Warren was driving an uninsured 1995 BMW vehicle owned by his uncle Rodney Warren, when he struck a pedestrian on September 20, 2006. The accident occurred near the intersection of Hurontario Street and Dundas Street in Mississauga, and the person struck was Shilpa Shingara.

Ms. Shingara was injured in the accident, and submitted an application for accident benefits to Economical on September 25, 2006. Ms. Shingara was not a named insured on any auto policies, nor was she a spouse or dependant of a named insured.

Economical had at one time insured the BMW that was involved in the accident, but it was agreed by the parties that that vehicle was removed from the policy by Rodney Warren and was replaced by a 2001 Jaguar in July of 2005, over a year prior to the accident in question.

Steven Warren, the driver of the vehicle, was a listed driver on a policy issued by Security National to Sherrydawn Warren, his spouse. That policy insured her vehicle, a 1996 Ford Explorer. The BMW that Steven Warren was driving at the time of the accident was not a described automobile on that policy. It is unclear why Mr. Warren was driving his uncle's uninsured BMW on the day of the accident, but for the purpose of this hearing, that fact is immaterial.

Once Economical determined that the BMW was no longer insured under its policy on the date of the accident, it sent a Notice of Dispute Between Insurers form to the Fund on October 10, 2006.

Economical subsequently also sent a Notice of Dispute form to Kingsway General Insurance on March 16, 2007, after obtaining information that suggested that Kingsway had issued a policy to Ms. Shingara's father, upon whom she was dependent. It was later determined that the Kingsway policy had been cancelled prior to the accident, and Kingsway was let out of the arbitration.

Economical also provided notice of its intent to dispute its obligation to pay benefits to Security National on March 23, 2007. As this notice was provided well beyond the ninety-day period set out in section 3 of Regulation 283/95, counsel agreed, after conducting examinations under oath of the relevant parties, that Economical could not invoke the "saving provisions" contained in subsection 3(2) of the regulation and continue to pursue Security National. Security National was also then let out of this proceeding.

As stated above, it was agreed that the effect of this agreement is that if I determine that the Security National policy provided coverage for Ms. Shingara's accident benefits claim, Economical will 'step into the shoes' of Security National and become the priority insurer.

SECTION 2.2.3 OF OAP 1:

2.2.3 Other Automobiles

Automobiles, other than a described automobile, are also covered when driven by you, or driven by your spouse who lives with you.

The following coverages apply to other automobiles if a premium is shown for the coverage on the Certificate of Automobile Insurance for a described automobile:

- Liability,
- Accident Benefits,
- Uninsured Automobile, and
- Direct Compensation - Property Damage.

Special Conditions: For other automobiles to be covered, the following conditions apply:

1. Both the other automobile and a described automobile must not have a manufacturer's gross vehicle weight rating of more than 4,500 kilograms.

2. The named insured is an individual, or if the described automobile is owned by two people, the named insureds are spouses of each other.

3. Neither you nor your spouse is driving the other automobile in connection with the business of selling, repairing, maintaining, storing, servicing or parking automobiles.

4. The other automobile is not being used to carry paying passengers or to make commercial deliveries at the time of any loss.

5. **For all coverages, except Accident Benefits,** the other automobile cannot be an automobile that you or anyone living in your dwelling owns or regularly uses. (For the purposes of this paragraph, we don't consider use of an automobile rented for 30 or fewer days to be regular use.) Nor can the other automobile be owned, hired or leased by your employer or the employer of 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 **Uninsured Automobile Coverages** while you drive that automobile.

ADJOURNMENT REQUEST:

At the start of the hearing, Mr. Schnarr requested an adjournment on behalf of Economical, which was opposed by counsel for the Fund. I denied the request, and the hearing proceeded as scheduled. The parties' arguments on the adjournment, and my oral ruling delivered after considering these arguments, are set out below.

Counsel for Economical acknowledged that the Fund asserts that the "other automobile" provisions set out in section 2.2.3 of OAP 1 apply and extend accident benefits coverage to Ms. Shingara through Steven Warren's spouse's policy with Security National. Mr. Schnarr noted that in order for section 2.2.3 to apply, two preconditions must be met – that the vehicle in question is driven by the named insured's spouse, and that the spouses live together. He submitted that there was no reliable evidence on these points, and that in order for me to determine whether this section can be applied, the hearing should be adjourned in order to gather this evidence.

Mr. Friendly advised that he only first became aware of this adjournment request on the afternoon before the start of the arbitration, when he received a call from Mr.Schnarr. He noted that the question of the sufficiency of the evidence had not been raised earlier, and that the parties had proceeded with the understanding that Sherrydawn and Steven Warren were spouses. He referred to the factum filed by Economical, and filed copies of correspondence that was exchanged between counsel in the lead up to the hearing date, in which counsel for Economical essentially confirmed that the matter was going forward on the basis that "there is no issue that Security National did insure Sherrydawn Warren, the spouse of Stephen Warren, at the time of the MVA."

He also referred to my first pre-hearing letter confirming the discussions held between counsel in January 2008, which contains two references to Steven Warren's spouse being

insured by Security National. Mr. Friendly also pointed to various references in the documentation filed that suggest that the two were spouses and lived together on Hemstreet Crescent in Milton.

Mr. Schnarr responded that the Fund's 2.2.3 argument had always been directed at Security National, until approximately two weeks before the hearing when the decision was made to let them out of the arbitration. He contended that no undue harm or prejudice would result from a brief adjournment, as Economical would continue to respond to the claim in the interim.

As stated above, I denied the request for an adjournment. I stated that the arbitration system under Regulation 283/95 is designed to be a quick and expeditious process to resolve disputes between insurers. I found that the Fund's position that the provision in section 2.2.3 of the OAP 1 applied to extend the coverage was clear from the outset, and consequently, the relationship between Steven Warren and Sherrydawn Warren was also considered from the outset. I stated that while I appreciated the fact that Economical only stepped into the shoes of Security National two weeks prior to the arbitration hearing, the dates for the examinations under oath that led to the agreement to let Security National out of the proceeding had been set three months earlier, and that Economical would have known that there would only be a "two week window" between the examinations and the arbitration hearing.

I also noted that the alleged 'factual gaps' relating to section 2.2.3 were not mentioned either in the Applicant's factum, or in the emails sent between counsel two weeks prior to the hearing. Given the nature of the arbitration process and the fact that the parties clearly operated under the assumption that Steven and Sherrydawn Warren were spouses who lived together all through the process, I was not prepared to grant a late-breaking adjournment request in order to essentially confirm that information, in view of the Respondent's strenuous objection.

EVIDENCE:

The hearing then proceeded with the evidence of two witnesses – Mary Meany, the accident benefits adjuster at Economical who was involved in the Shingara claim, and Pierre Gravesande, a Claims Technical Advisor with Economical who was consulted on the claim. Ms. Meany had also been examined under oath earlier on in the proceeding.

Ultimately, none of the evidence tendered was determinative of the issues I must resolve.

Ms. Meany reviewed the steps that she took in investigating the claim. She testified that once she determined that Economical's policy no longer covered the BMW that Steven Warren was driving on the date of loss, and that Ms. Shingara was also uninsured, she concluded that the claim should be paid by the Fund. The evidence indicates that Ms. Meaney put the Fund on notice the same day that she received a letter from the Claimant's representative, advising of the claim for benefits. She stated that prior to this case, she had never encountered the argument that the "other automobile" provisions in section 2.2.3 would extend coverage to an uninsured pedestrian, in the manner suggested by the Fund.

Ms. Meaney was asked in cross-examination whether she was familiar with "drive by searches" as a method of investigation. She responded that she was not, although she had come to understand that the Fund's adjuster's and those of Security National use this routinely as an investigative technique. I was advised that this was how the Fund determined the existence of the Security National policy.

Mr. Gravesande also testified that he had not encountered the Fund's arguments relating to section 2.2.3 of OAP 1 prior to this case. When asked for his views on Ms. Meany's decision to put the Fund on notice of the claim so early on in the process, he stated that Ms. Meany had acted as he would have expected her to. He noted that she had continued her investigation to determine whether there were any other potential insurers after providing notice to the Fund, in light of the position they were taking.

RELEVANT PROVISIONS:

This issue arises in the context of the priority scheme set out in section 268 of the *Insurance Act*. The relevant parts of that section provide:

Section 268 (2) (2)

> **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.

OAP 1

I set out the relevant part of section 2.2.3 of the Owner's Policy once more for convenience, as well as section 4.1 relating to accident benefits coverage.

> **2.2.3 Other Automobiles**
>
> Automobiles, other than a described automobile, are also covered when driven by you, or driven by your spouse who lives with you.
>
> The following coverages apply to other automobiles if a premium is shown for the coverage on the Certificate of Automobile Insurance for a described automobile:

- Liability,
- Accident Benefits,
- Uninsured Automobile, and
- Direct Compensation - Property Damage.

Section 4 – Accident Benefits Coverage

4.1 Who is Covered

For the purposes of Section 4, insured persons are defined in the Statutory Accident Benefits Schedule. In addition, insured persons also include any person who is injured or killed in an automobile accident involving the automobile and is not the named insured, or the spouse or dependant of a named insured, under any other motor vehicle liability policy, and is not covered under the policy of an automobile in which they were an occupant or which struck them.

ARGUMENTS & ANALYSIS:

The main focus of the parties' arguments was on whether or not Section 2.2.3 of OAP 1 should be applied to extend accident benefits coverage to Ms. Shingara through the Security National policy issued to Steven Warren's spouse. However, counsel also made detailed submissions on the question of who bore what onus, and on whether or not I had the jurisdiction to order Economical to pay the Fund's investigative costs, in the event that I found that the Security National policy covered Ms. Shingara's claim.

Who bears the onus of proof?

Economical submits that it is a well-accepted rule that "he who alleges must prove", and cited the decision in *DeFranco* v. *General Accident Assurance Co*. [1997] O.J. No. 2875 in support of this argument. Counsel contended that as the Fund is alleging that the "other automobile" provisions apply, it is their onus to prove that they do. Counsel argued that once Economical provides evidence to show that their policy did not insure the BMW that struck the claimant, as they have, it is up to the Fund to prove that there is an insurer that would be in higher priority than it would be to pay the claim.

Counsel for the Fund takes a different view. He submits that it is incumbent upon Economical to prove that there is no valid insurance policy in force before recourse can be had to the Fund. And, given that the Fund alleges that the Security National policy does apply, it is up to Economical to prove that it does not.

I agree with Economical's position on this issue. When the words of section 268(2)(2) are considered against the factual backdrop in this case, they suggest *prima facie* that there is no "insurer of the vehicle." If the Fund asserts that that phrase should be extended to capture Security National, through the driver of the uninsured vehicle, through his spouse, as they do in this case, in my view it is incumbent upon them to prove that assertion.

Does section 2.2.3 of OAP 1 extend accident benefits coverage to Ms. Shingara?
The parties made detailed and well-thought out submissions on this issue.

Economical repeated their argument that there was no reliable evidence that the preconditions to section 2.2.3 applying – namely that Steven Warren and Sherrydawn Warren were spouses who lived together – were met in this case.

The gist of Economical's legal argument on this point is that a "plain language" interpretation of the section 268(2) priority ladder results in the payment of the claim defaulting to the Fund under clause (iv). Counsel submitted that the searches conducted confirm that there was no motor vehicle liability policy in effect on the date of loss on which the BMW was a described automobile, and that it could therefore not be said that there was an "insurer of the automobile" under clause (ii). He contended that a contextual analysis as well as the parties' reasonable expectations also supports this approach.

Mr. Schnarr also argued that if the intention of the drafters was to provide the Claimant with access to the Security National policy, they would have explicitly said so. He contended that it could simply not have been intended that an uninsured pedestrian would

have the same access to benefits under the policy as Mr. Warren, a listed driver on the policy, would.

The Fund contends that the language in section 2.2.3 is clear, and provides that "other automobiles" are also covered when driven by the named insured or her spouse. Counsel submits that none of the "Special Conditions" requirements set out in the provision are applicable, and notes that paragraph 5 specifically excludes accident benefits coverage from the scenario outlined, and consequently, that coverage would be available in this circumstance.

Counsel for the Fund cited the decisions in *Winch v. Keough* [2005] O.J. No. 4759 and *Avis Rent-a-Car Systems Inc. v. Certas Direct Insurance Co.* [2004] O.J. No. 2275, in support of his argument. He also referred to section 4.1 of the OAP 1 Owner's Policy, reproduced above, which specifies that accident benefits coverage is available to insured persons as defined in the *Statutory Accident Benefits Schedule*, but also to "any person who is injured …in an automobile accident involving the automobile" who is not otherwise covered by a policy. He argued that this was clear evidence of the drafters' intention that someone in Ms. Shingara's circumstances be covered under the policy.

The Fund also made the same arguments on this issue in another case I heard, a few months after this arbitration took place, but before I began to write this decision. One of the counsel involved in this second matter filed the case of *Co-operators General Insurance Co. v. Pilot Insurance Co.* [1998] O.J. No. 5551, upheld by the Court of Appeal, that addresses this issue. As this case had not been filed at this arbitration, I forwarded a copy of it, along with the Court of Appeal's endorsement, to counsel in this case for comment.

The *Co-operators v. Pilot* case involves an occupant of a vehicle, Ms. Capelazo, who is injured when the vehicle in which she was driving collided with another vehicle. Ms. Capelazo was not a named insured on any policy, nor a spouse or dependant of a named insured. The vehicle in which she was driving, owned by a Mr. Sobka but being driven

with his consent by a Mr. Huard, was not insured on the date of loss. Mr. Huard, the driver, had a policy insuring his own vehicle with Co-operators' Insurance. The second vehicle involved in the accident was insured by Pilot Insurance. The question of which insurer was in higher priority under the section 268 priority scheme arose, and Co-operators' brought a court application, upon agreed facts, seeking a determination of whether or not it was "the insurer of the automobile" in which Ms. Capelazo was an occupant.

Justice Browne determined that Co-operators' was the "insurer of the automobile" in which Ms. Capelazo was an occupant. After referencing section 268(2), he states:

> **5.** In an examination of sub-para. ii. I was urged to consider the wording of the policy, the regulations and the scheme of the Act and I have done so. From s. 1 of the Insurance Act…an insurer is defined as one who undertakes or agrees to offer to undertake a contract of insurance, and from the statutory accident benefits schedule "insured automobile" is defined in s. 1, referable to liability policy coverage, as meaning any automobile covered by the policy. As indicated, these considerations of the Act as a whole and regulations assist with reference to the otherwise undefined meaning of "insurer of the automobile". It is clear that from the perspective of Huard other automobiles driven by him are insured automobiles. The wording of the policy from s. 2.2.2 [now 2.2.3] extends accident benefit coverage to Huard for automobiles driven by him. By extension, it is my conclusion that further to the policy as issued, Co-Operators is the "insurer of the automobile" in which Capelazo was an occupant.

In the result, he issued an order declaring that Co-operators' was liable to pay accident benefits to the occupant, Ms. Capelazo. That decision was upheld by the Court of Appeal on September 10, 1999, with the brief endorsement "The judge below did not err in his conclusion".

Both counsel involved in the instant case responded to my invitation to comment on this decision, and its application to this arbitration. Counsel for the Fund submitted that Justice Browne's decision was consistent with the reasoning in the *Winch* and *Avis Rent a Car* cases he had filed. Counsel for Economical contended that the *Co-operators'* case

was distinguishable from the instant case, and was not binding upon me. He noted that the decision involved an occupant of an uninsured vehicle, whereas our case involved a non-occupant. He stated that Justice Browne did not provide particulars of his analysis as to why the OAP provision extended coverage to the occupant and not just to the driver. He also pointed out that no explanation was provided for why the phrase "insurer of the automobile" required reference to any other regulation or statutory provision for clarification, when it is clear and unambiguous.

I have considered counsel for Economical's comments in this regard, but in my view, the facts in the instant case cannot be distinguished from those in the *Co-operators v. Pilot* decision. I therefore find that I am bound by the court's determination, and the Court of Appeals' endorsement of it, in that case.

While I agree that it would have been preferable to have had a more detailed analysis from the court on the key issue of how coverage under the policy is extended to the occupant of the uninsured vehicle and not just the driver who was the named insured under the Co-operators policy, I cannot simply ignore the court's finding because it is stated briefly and succinctly. I also do not see any basis for distinguishing the decision simply because the Claimant in that case was an occupant of the vehicle, whereas in the instant case, Ms. Shingara is a non-occupant. Counsel for Economical did not provide any reasons why this was a distinguishing fact, and I note that the language in both branches (ii) of section 268 – dealing with occupants and non-occupants – contains the identical phrase "the insurer of the automobile".

I also appreciate Economical's argument that this interpretation does not fit neatly within the broader context of the scheme of motor vehicle insurance in the province. Vehicles are required to be insured, and an interpretation that essentially provides a "loophole" that extends coverage to uninsured vehicles should not be sustained. However, the court's pronouncement is clear, and as mentioned, I am bound by it. As well, I find that paragraph 5 of section 2.2.3 and section 4. 1 of the OAP 1 policy send a clear signal that

accident benefits coverage under an owner's policy, both for drivers and uninsured pedestrians, should be included whenever possible. I specifically note that in the first section of section 4 – titled Accident Benefits Coverage – under the heading of "Who is Covered", the policy is very clear that beyond those who qualify under the *SABS* definition of an "insured person", those who are injured in accidents involving **the automobile** (to be distinguished from the "described automobile") and are not named insureds, spouses, or dependants under other auto policies, and are "not covered under the policy of an automobile in which they were an occupant or which struck them" are also covered under the policy at hand for accident benefits coverage. Ms. Shingara fits within this definition. This, in my view, is clear evidence of an intent to cast the coverage net under the policy as wide as possible, when it comes to accident benefits.

The effect of all of this is that Security National is deemed to be "the insurer of the automobile" driven by Mr. Warren, and the Fund is not required to pay the claim, despite the fact that an uninsured vehicle struck an uninsured pedestrian. While I appreciate that that result might seem unusual to people, and specifically to insurance adjusters as the evidence in this case suggests, it appears that if section 2.2.3 can link to another policy, that is what the courts and the drafters of the OAP 1 policy, a legal contract, have determined should occur.

The one remaining question is whether the preconditions to applying section 2.2.3 have been met in these circumstances. I have already determined that the parties have agreed earlier that Steven Warren and Sherrydawn Warren are spouses. The question then becomes whether they were living together on the date of loss. I am satisfied that they were. The Security National policy, the police report of the accident, and the MTO driver's abstract for Steven Warren all contain the 1033 Hemstreet Ave address in Milton, and I find this to be persuasive evidence of this fact.

I therefore find that the Security National policy issued to Sherrydawn Warren provides coverage for accident benefits to Ms. Shingara through the operation of section 2.2.3 of the OAP 1 Owners' Policy. As a consequence of the agreement cited earlier, Economical

Insurance becomes the priority insurer, and is therefore liable to pay her accident benefits claim.

Can the Fund recover its investigation expenses ?

Mr. Friendly submitted that in the event of my finding as I have, the Fund should be entitled to recover not only its arbitration expenses, but also any expenses it incurred in investigating Ms. Shingara's claim. He argued that if Economical had done the "driveby search" that the Fund's adjusters had done, the Security National policy would have been discovered much earlier on in the process, and they would have become involved at the outset. He stated that the Fund would therefore not have had to incur the expenses that it did.

Mr. Schnarr responded that the Fund was not entitled to recover these expenses for various reasons, one of which was that I did not have the jurisdiction to hear arguments on this point, as it had not properly been raised in the course of our various pre-hearing discussions. I agree with Mr. Schnarr on this point. The original four issues were clearly set out in my pre-hearing letter of January 28, 2008, and this was not among them. In light of the novelty of the claim, I am not prepared to entertain it in the absence of the issue having been properly identified at the appropriate time, with the responding party having had time to consider it and prepare its responses.

While arbitrations conducted under Regulation 283/95 are intended to be an expeditious method of resolving disputes and a summary process to some extent, parties involved in an arbitration hearing have the right to expect that the issues identified at the outset of the process shape the dispute, and are the ones that they will be required to address.

In the result, I find that Economical Insurance is obliged to continue to respond to Ms. Shingara's claim.

DATED AT TORONTO, ONTARIO this _____ day of January, 2009.

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Shari L. Novick

Arbitrator