

IN THE MATTER OF THE INSURANCE ACT, R.S.O,
c. I. 8, s. 268 and REGULATION 283/95 thereunder;

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

CO-OPERATORS GENERAL INSURANCE COMPANY

Applicant

- and -

ZURICH INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Mark K. Donaldson for the applicant

David Dinner for the respondent

ISSUES:

1. Is Co-operators or Zurich responsible for payment of accident benefits to or on behalf of Christopher Thompson, arising out of the accident of July 31, 2005?

DECISION:

1. Zurich is responsible for payment of accident benefits to or on behalf of Christopher Thompson.

HEARING:

This hearing in this matter took place in the city of Toronto in the province of Ontario on February 1, 2007. No witnesses were called and the hearing proceeded on the basis of agreed facts and documents filed at the hearing.

FACTS AND ANALYSIS:

This priority arbitration arises out of a motor vehicle accident that occurred on July 31, 2005. At that time Christopher Thompson was operating his parents' 1996 Nissan Altima. The vehicle was insured by Co-operators. Christopher's father was the owner of the car and the policyholder with Co-operators.

Christopher was injured in the accident and as a result applied to Co-operators for accident benefits, as Christopher was a listed driver under that policy. Co-operators commenced payment of the accident benefits but subsequently served Zurich with a Notice of Dispute Between Insurers, taking the position that Christopher had the regular use of his employer's vehicle which was insured with Zurich and pursuant to section 66 of the Statutory Accident Benefits Schedule was therefore a "deemed named insured" and pursuant to section 268 of the Insurance Act was in priority to Co-operators. Zurich maintains that as a listed driver of a vehicle in which he was an occupant of the vehicle involved in the accident, Co-operators would be in priority.

Section 268(2) of the Insurance Act sets out the hierarchy to be followed when determining priority for payment of accident benefits. When dealing with an occupant, the claimant's first

recourse is against the insurer of an automobile in respect to which to the occupant is an insured. If recovery is unavailable at that level, then one has recourse to the insurer of the automobile in which he was an occupant.

In determining what constitutes an “insured” with respect to entitlement of accident benefits, the applicable definition of “insured person” is found in the Statutory Accident Benefits Schedule, which states:

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 or same sex partner of the named insured, and any dependant of the named insured, spouse or same sex partner, if the named insured, specified driver, spouse, same sex partner or dependent,
 - (i) is involved in an accident in or outside of Ontario that involves the insured automobile or another automobile or.....
- (b) in respect of accidents in Ontario, a person who is involved in an accident involving the insured automobile;.....

Section 66 of the Statutory Accident Benefit Scheduled states that:

An individual who is living and ordinarily resident in Ontario shall be deemed for the purposes of this Regulation to be the named insured under the policy insuring an automobile at the time of the accident if, at the time of the accident,

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

In this matter, Christopher Thompson would be an “insured person” under both the Co-operators and Zurich policies. He is so under the Co-operator’s policy as “a person specified in the policy as a driver of the insured automobile”. He is, as agreed between the parties, a “deemed named insured” under the Zurich policy pursuant to section 66 of the Statutory Accident Benefits Schedule.

Pursuant to section 268(4) of the Insurance Act, the claimant has the discretion to decide which insurer they wish to claim accident benefits from where they are considered an insured person at the same level. This is, however, subject to the provisions of section 268(5) which states:

Despite subsection (4), if a person is a named insured under a contract of insurance evidenced by a motor vehicle liability policy or the person is the spouse or the same sex partner or a dependent, 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.

The term “named insured” is not defined in the Insurance Act although it is defined in the Standard Automobile Policy (SAP 1) as “ the person or organization to which the certificate of automobile insurance is issued”.

Arbitrators have drawn a distinction between the “named insured” and those that are simply a driver of the automobile or listed driver, see: The Co-operators Insurance Company vs. Lombard Insurance of Canada, (unreported decision of Arbitrator Malach, released August 10, 2006); and Liberty Mutual Insurance Company vs. Markel Insurance Company, (unreported decision of Arbitrator Jones dated July 2006).

Simply stated, Co-operators takes the position that Christopher Thompson was a deemed “named insured” pursuant to section 66 and pursuant to 268(2) and (5) is accordingly Zurich is in priority to the Co-operators’ policy.

Zurich takes a number of positions. To begin with it took the position that the term “deemed named insured” as set out in section 66 of the Statutory Accident Benefits Schedule is used for the purpose of entitlement only and not for the purposes of determining priority, which is governed in its view by the Insurance Act, rather than the Regulation. I do not agree. The Court of Appeal in Warwick vs. Gore Mutual (1997), 32 O.R. (3rd) 76(C.A.) made it clear that one would have recourse to the definition in the Statutory Accident Benefit Schedule. This was reiterated in AXA Insurance Canada vs. Old Republic Insurance Company [1998] O.J No. 918 (O.C.J.); The Co-operators Insurance Company vs. AXA Boreal Assurance, (Ontario Court of Appeal, Docket C32635, released September 25, 2000) and a number of other cases.

Zurich also suggested that there was a distinction to be made between the “named insured” and a “deemed named insured”. Again, I do not agree. Section 66 simply specifies a group that is to be dealt with as “named insured”. Once that designation is achieved the section 66 “named insured” is treated exactly the same as any other named insured. See: The Wawanesa Mutual Insurance Company vs. The Co-operators General Insurance Company (unreported decision of Arbitrator Malach dated September 4, 2003).

Zurich's final position is that there is a distinction to be made when the claimant is an occupant of the vehicle in which he was a listed driver. Counsel for Zurich points out that in the cases relied upon by Co-operators: The Co-operators vs. The American Home Company (unreported decision of Arbitrator Robinson, dated October 10, 2002); The Wawanesa Insurance Company vs. Co-operators General Insurance Company (unreported decision of Arbitrator Malach dated September 4, 2003); and AXA vs. State Farm Mutual Automobile Insurance Company and CGU Insurance Company of Canada (unreported decision of Arbitrator Jones, dated July 14, 2005), the occupant was not the driver of the vehicle involved in the collision. In our case Christopher Thompson was an occupant and listed driver of the vehicle involved in the collision.

In my view this distinction does not assist Zurich. One must look at the priority system as a whole. Section 66 makes Christopher Thompson a deemed named insured and pursuant to section 268(5) of the Insurance Act, the claimant must claim statutory accident benefits against the named insured. In my view this is the end of the matter.

At best, only by way of a very difficult and tenuous interpretation would Zurich's submission apply. Co-operator's position fits into the overall scheme of the priority system. One must remember that the priority system was set up to establish a relatively straight forward and simple system for determining priority in accident benefits cases. Co-operator's position is consistent with such a system whereas Zurich's position is not.

Accordingly, Zurich is responsible for payment of the accident benefits to or on behalf of Christopher Thompson and Zurich must reimburse Co-operators for benefits paid to date.

In the event that the parties are unable to agree on the issue of costs, I may be spoken to.

Dated this _____ day of March 2007 in Toronto, Ontario.

M. Guy Jones
Arbitrator