IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 18, as amended, and ONTARIO REGULATION 283/95;

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

AND IN THE MATTER OF AN ARBITRATION;

BETWEEN:

THE WAWANANESA MUTUAL INSURANCE COMPANY

Applicant

- and -

ROYAL AND SUNALLIANCE INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Jamie R. Pollack for the Applicant

Kevin D.H. Mitchell for the Respondent

ISSUES:

1. Was a motor vehicle insured by the Royal and SunAlliance Insurance Company made available for Mr. Andy Cina's regular use by his employer at the time of his accident, thereby making Royal and SunAlliance liable to pay his accident benefits pursuant to Section 66 (1) (a) of the Statutory Accident Benefits Schedule?

DECISION:

1. A motor vehicle insured by Royal and SunAlliance was made available for the regular use of Mr. Andy Cina by his employer and accordingly pursuant to Section 66 (1) (a) of the Statutory Accident Benefits Schedule, Royal and SunAlliance is responsible for payment of accident benefits to or on behalf of Andy Cina.

HEARING:

This hearing in this matter was held in the city of Toronto, in the province of Ontario on April 3, 2009.

FACTS & ANALYSIS:

This arbitration arises out of a motor vehicle accident that occurred on August 20, 2002. At that time Mr. Andy Cina was a passenger in a 1986 GMC commercial class dump truck, owned/operated by Tropical Pools and Leisure, which was owned by Giovanni General Contracting. Mr. Giovanni Borelli was president of that company. Mr. Cina was injured in the accident. He did not have a motor vehicle liability policy of his own nor was he a named or listed driver in any motor vehicle liability policy. Accordingly, he claimed statutory accident benefits from his mother's motor vehicle liability insurer, the Wawanesa Mutual Insurance Company ("Wawanesa"), claiming that Andy was a dependant of his mother. Wawanesa paid the accident benefits, however, they took the position that Mr. Cina was an employee of Tropical Pool and Landscaping/Giovanni General Contracting ("Tropical Pool") at the time of the accident and he had available to him one of the company vehicles for his regular use at that time. Accordingly they argue that pursuant to Section 66 (1) (a) Mr. Cina became a "deemed named insured" under the Royal and SunAlliance ("Royal") policy that insured the dump truck involved in the accident as well as a number of other vehicles owned by Tropical Pool.

Wawanesa had earlier taken the position that if Royal did not insure the vehicles in question then the Motor Vehicle Accident Claims Fund ("the Fund") was responsible for payment of the accident benefits. In an earlier decision, however, I found that Royal did insure the vehicles in question and accordingly the Fund is no longer involved in the arbitration. It now remains to be determined if Mr. Cina was a deemed named insured pursuant to Section 66 (1) (a) of the Statutory Accident Benefits Schedule. That section states:

> **66.** (1) An individual who is living and ordinarily present in Ontario shall be deemed for the purpose of this Regulation to be the named insured under the policy insuring an automobile at the time of an 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;

Wawanesa submits that Mr. Cina was a Section 66 a deemed named insured in two ways:

(1) As having available for his regular use, the 1986 GMC dump truck owned by Tropical Pools in which he was a passenger when injured;

(2) As having available for his regular use a Chevy van owned by Tropical Pools and insured by Royal at the time of the accident.

In order to determine if Section 66 (1) (a) applies in this case it is first necessary to review the facts of the case and apply them to the law in this area.

As mentioned above, at the time of the accident Mr. Cina was employed as a general labourer at Tropical Pools. It was a seasonal position and he had worked there from roughly April through December 2001 and from April 2002 until the accident which occurred on August 20, 2002. Tropical Pool's business involved the installation of in ground pools in the greater Toronto area. Mr. Cina's job included, among other things, removal of earth in order to put in the pool, the removal of the earth to various dump sites and the actual building of the pool. The earth from the pool sites was removed by the 1986 dump truck insured by Royal, which Mr. Cina was a passenger in at the time of the accident.

The evidence before me was that Mr. Cina that did not drive the dump truck nor did he have a set of keys for it. At all times he was simply a passenger in the truck that would be used to haul the soil and presumably other chores associated with the business. It is not entirely clear how often Mr. Cina was a passenger in the truck. At his examination for discovery for the purposes of this arbitration, Mr. Cina was questioned on this point and stated:

> **Q:** ….how often would you be in that truck as a passenger? Everyday?
> **A:** I couldn't say everyday, but maybe out of a week, maybe three times, twice, at the most, I guess.

Mr. Giovanni Borelli gave a signed statement dated March 12, 2009 apparently to or at the request of Wawanesa's solicitor in a tort action arising out of the accident. In that statement, Mr. Borelli indicated that on the day of the accident:

> "The dump truck had a full load of soil that had been excavated from one of our pool job sites and was being transported to a land fill dump site. This task was a regular part of both of these individuals' employment duties at Tropical Pools and Leisure at this time…."

Based on the evidence before me, I conclude that Mr. Cina was a passenger in the Royal insured dump truck two to three times per week from April to December 2001 and April to August 20, 2002. The question then becomes whether that meets the test as set out in Section 66 (1) (a). I note that Mr. Cina, in a hand written statement dated February 18, 2003, stated:

> "At the time of accident I did not have regular use of any vehicle….."

While this may be some evidence to consider it is certainly not determinative of the issue before me. Mr. Cina was speaking only in a general sense and would not, of course, be expected to know the legal test for the purposes of Section 66 of the Statutory Accident Benefits Schedule.

While the question of the application of Section 66 (1) (a) is very much dependant upon the facts of each particular case, arbitrators and the courts have provided some guidance in this area. As

was noted by Madame Justice Morissette, in The Personal Insurance Company vs. ING Insurance Company of Canada, (June 12, 2007), 53141 (Ont. S.C.J), the test is two fold:

(1) the vehicle must vehicle must available and;

(2) for regular use.

Dealing first with issue of availability there is little doubt but that the vehicle in question was made available to Mr. Cina. Mr. Borelli, in his statement, made it clear that transporting the soil in the truck formed part of Mr. Cina's employment duties.

The more difficult issue is whether being a passenger in the dump truck two to three times a week constituted "regular use". Justice Morissette noted that the Ontario Court of Appeal in, Canadian General Insurance Company vs. State Farm Mutual Insurance, [1957] O.P.R 257, stated that:

> "Regular" is intended to describe "periodic, routine, ordinary or general" as opposed to "irregular or out of the ordinary or special".

Justice Morissette also noted that the term "regular use" does not require "personal use", nor does it mean "exclusive use" in cases of fleets, nor does it require "possession of your own keys or gas card".

It is to be noted that Justice Morissette upheld the decision of Arbitrator Glass, wherein he found that a delivery driver who made deliveries three to four times per month in a vehicle, was found to have "regular use" of a company vehicle for the purposes of Section 66 (1) (a).

The law is also clear, in my view, that the person in question need not be driving or operating the vehicle. In Reisner vs. Leia et al, the Ontario Divisional Court found that an employee situated on the back of a garbage truck who was not operating any of the controls, nonetheless had the truck "furnished for regular use by him".

Counsel for Royal, in his vigorous submissions, drew my attention to the decision of Schneider vs. Maahs Estate et al., (2001) 56 O.R. (3rd) 321 (C.A.). In that case the motion judge stated:

> "In the case at bar, the plaintiff uses a cruiser every working shift. Her use is therefore habitual, normal, and reoccurs uniformly according to a predictable time and manner. While her use is not constant, I am of the view that constancy is not required to satisfied the ordinary meaning of the word "regular"……I conclude that the plaintiff regularly uses "a described automobile by virtue of her normal habitual and long standing use of an assigned cruiser for the duration of every working shift, in accordance with a predictable time and manner."

Counsel for Royal submits that this should be the test. I note that the court of appeal overturned the motion court judge in this matter. In any event, I do not think the motion court judge completely and accurately set out the test.

The issue of what constitutes regular use was also examined by the Alberta Court of Appeal in Jager vs Liberty Mutual Fire Insurance Company, 2001, A.B.C, 163. In that case, the plaintiff was a passenger in a company car, which was used to transport cleaning staff to houses. The court held that the plaintiff need not be a driver to have use of the automobile and the passenger was found to have regular use.

In State Farm Mutual Automobile Insurance Company vs. Kingsway General Insurance Company, (unreported decision of Arbitrator Samis dated October 20, 1999), Arbitrator Samis stated in dealing with Section 66 (1) (a):

> "The language employed by the Regulation does not require that the use be frequent, exclusive or personal. The mere fact that there is some use, which can be said to be regular, is sufficient to give the individual status under the policy."

In our case, Mr. Cina has the use of the vehicle two to three times per week from April to December 2001 and April to August 20, 2002. I am satisfied, on all the evidence, that this constitutes regular use for the purposes of Section 66 (1) (a) of The Statutory Accident Benefits Schedule and accordingly Royal is responsible to pay accident benefits to or on behalf of Andy Cina.

In light of my findings regarding the use of the dump truck, it is perhaps unnecessary for me to deal with the further submissions regarding regular use made by Wawanesa, however the parties raised the issue and therefore I will deal with it.

At his examination for discovery, Mr. Cina indicated that when working at Tropical he would either go to the Borelli's in the morning and be driven to the worksite in a Tropical van, or alternatively, he would take the van home at night and pick up the Borellis and take them to the worksite in the morning. When questioned as to what type of vehicle it was he indicated that it was a van and thought "it was a Chevy first or something like that". He then went on to say "I'm guessing, I don't know".

Mr. Borelli in his signed statement of March 12, 2009, stated:

> "he [Mr. Cina] was required to find his own way to and from our job sites….at no time was he transported to our sites in my dump truck".

Counsel for Wawanesa pointed out at the time of the accident Royal insured a 1989 Chevy van owned by Giovanni General Contracting and submitted that this would have been the vehicle used to transport Mr. Cina to and from work.

Counsel for Royal submits that there is insufficient proof, firstly that Mr. Cina in fact did drive a van to work, and secondly, that it was insured by Royal at the time of the accident.

There is conflicting evidence as to whether or not Mr. Cina went to work in a company van. Mr. Cina certainly indicated that he did, however, his credibility was question by counsel for Royal as he pointed out that Mr. Cina had revised his previous income tax returns in an effort to prove a higher income for income replacement benefits.

Counsel for Royal also points out that while Royal did insure a Chevy van of the Borelli's at the time of the accident, Mr. Cina was far from sure that it was a Chevy van that he used.

The onus of proving that Mr. Cina was riding in a van and that it was insured by Royal at the time of the accident rests with Wawanesa. I am not satisfied, based on all the evidence before me

that Mr. Cina was in fact using a Chevy van to get the worksite or that it was insured by Royal at the time of the accident.

In light of my finding that Mr. Cina had available for his regular use the Royal insured dump truck at the time of the accident, I find that he was a deemed named insured pursuant to Section 66 (1) (a) of the Statutory Accident Benefits Schedule. Accordingly Royal is responsible for payment of accident benefits to or on behalf of Mr. Cina.

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

Dated at Toronto, this _____ day May 2009.

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M. Guy Jones
Arbitrator