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:

GORE MUTUAL INSURANCE COMPANY

Applicant

- and -

STATE FARM AUTOMOBILE INSURANCE COMPANY

Respondent

ARBITRATION AWARD

COUNSEL:

Chris T. Blom for the Applicant

D'Arcy McGoey for the Respondent

BACKGROUND :

This arbitration arises out of a motor vehicle accident that took place on August 27, 2006, in which Rosemary Brown was struck by a vehicle insured by Gore Mutual Insurance

("Gore") while she was crossing the street. Ms. Brown applied to and has received accident benefits from Gore.

Gore takes the position that State Farm Mutual Insurance ("State Farm") is in higher priority to pay benefits to Ms. Brown, pursuant to section 268(2) of the *Insurance Act.* The basis for this argument is that State Farm insures a Honda Civic owned by the spouse of Steve Csordas, who works as a case manager for Community Living Brant ("CLB"), an organization that provides assistance to people with developmental disabilities. Ms. Brown is one of Mr. Csordas' clients, and he has used the Honda in the course of his employment to transport Ms. Brown to appointments and to accompany her on various errands. Gore asserts that CLB therefore makes the vehicle available for Ms. Brown's regular use within the meaning of section 66 of the *Statutory Accident Benefits Schedule*, and that she is therefore deemed to be a "named insured" under the State Farm policy.

Pilot Insurance was also initially named as a Respondent in this arbitration, and participated in some pre-hearing discussions. It was agreed prior to the arbitration hearing that they would be let out of the proceeding, and they did not participate in the hearing.

ISSUE IN DISPUTE:

1. Was the Honda Civic, owned by Shelley Koehler and driven by her spouse, Steve Csordas, made available for the regular use of Rosemary Brown by Community Living Brant, so as to deem her a "named insured" under Ms. Koehler's policy with State Farm, pursuant to section 66(1) of the *Statutory Accident Benefits Schedule ?*

RESULT:

1. The vehicle was not made available by Community Living Brant for Ms. Brown's regular use. Ms. Brown is therefore not a named insured under the

State Farm policy insuring the Honda vehicle, and Gore Mutual is the priority insurer responsible for paying her accident benefits claim.

Consequently, the application for arbitration against State Farm is dismissed.

HEARING:

The hearing took place in Toronto, Ontario on November 17, 2008, before me, Shari L. Novick, pursuant to the provisions of the *Arbitration Act,* S.O. 1991, c. 17 and *Regulation 283/95* of the *Insurance Act,* R.S.O. 1990, c.I.8.

RELEVANT PROVISIONS:

The following provisions are relevant to my determination of this matter:

Section 66(1) – Statutory Accident Benefits Schedule

> ***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; or*
> >
> > *(b) the insured automobile is being rented by the individual for a period of more than 30 days*

Section 268(2) – Insurance Act

> ***(2)*** *The following rules apply for determining who is liable to pay statutory accident benefits:*
>
> > ***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.*

EVIDENCE:

Counsel agreed on the relevant facts, and no witnesses were called to testify at the hearing. Steve Csordas was examined under oath prior to the hearing, and a transcript of his evidence was filed at the hearing and relied on by counsel in their submissions.

The relevant facts are as follows:

Ms. Brown was struck by a vehicle driven by Benjamin Woodhouse as she was crossing the street on August 27, 2006. Mr. Woodhouse is insured by Gore Mutual. Ms. Brown does not have a vehicle of her own, and is not insured as a spouse or a dependent under any other policy. She sent an Application for Accident Benefits to Gore, and has received benefits from them.

Ms. Brown lives on her own in Brantford, but has some limitations and requires assistance. Steve Csordas works as a case manager for Community Living Brant, an organization that provides assistance to people with developmental difficulties. CLB is an incorporated company, without shares. In his role as case manager, Mr. Csordas provides

a variety of services to various clients, including Ms. Brown, with whom he worked from 2003 up to the date of her accident in 2006.

Mr. Csordas explained that he assisted Ms. Brown with various tasks, including managing her finances, monitoring her medication intake, and providing guidance with various "life skills". He also accompanied her to appointments with her psychiatrist, and occasionally on other errands or outings. He explained that he spent approximately 10 to 15% of his time at work transporting clients like Ms. Brown to appointments or on outings.

Mr. Csordas lived with his common-law spouse Shelley Koehler at the relevant time. In the period leading up to the accident, she owned a Honda Civic, and he owned a Suzuki Sidekick. He replaced the Suzuki with a Windstar van in July of 2006, approximately one month before the accident. Both of his vehicles were insured by Pilot Insurance. The Honda was insured by State Farm. He estimated that while he owned the Suzuki, he drove it and Ms. Koehler's Honda with equal frequency. He explained that after purchasing the Windstar van, he drove the Honda 90% of the time, and the Windstar only 10% of the time. It was on this basis that Pilot was let out of the arbitration.

When he accompanied his clients to appointments or took them on outings Mr. Csordas had the option of either driving his own vehicle, or using one of the vans owned by CLB that were available for this purpose. If he chose to use his own car to transport a client, he was paid 36 cents per kilometer traveled, pursuant to the collective agreement between the company and the union that he belonged to.

Ms. Brown was not fully dependent on Mr. Csordas to transport her around the community. She also bought a monthly bus pass and used taxis. Mr. Csordas estimated that he used his vehicle to transport Ms. Brown to appointments twice or three times per month, on average. The type of outings varied, but he stated that he typically drove Ms. Brown to her psychiatrist's appointment once per month.

In late May of 2006, a few months before the accident, Mr. Csordas' spouse gave birth to their child. He explained that the baby suffered from medical complications after the delivery, and that he took time off work to care for his spouse and child. He estimated that he worked the equivalent of three weeks time between late May and the date of the accident in August, and that he would have transported Ms. Brown a total of three times in his personal vehicle during that period.

Mr. Csordas stated at his examination that he occasionally denied Ms. Brown access to his vehicle, because she suffered from incontinence and "there were hygiene issues".

ARGUMENTS AND ANALYSIS:

Section 66(1)(a) of the *Statutory Accident Benefits Schedule* provides that a person who is living in Ontario is deemed to be a named insured under a policy if, at the time of the accident, the automobile covered by the policy "is being made available for the individual's regular use by a corporation" or other entity. It is agreed that Community Living Brant is a corporation, so the dispute here centers on whether the organization made the Honda owned by Ms. Koehler and driven by Mr. Csordas available to Ms. Brown, and if so, whether her use of that vehicle was "regular". If both branches of the test are met, State Farm, as the insurer of the Honda, would be in higher priority to pay Ms. Brown's accident benefits claim under section 268(2) of the *Insurance Act*, as she would be deemed to be a named insured under that policy.

I will analyse each of these two issues separately.

(i) Was the Honda Civic made available to Ms. Brown by Community Living Brant?

I am not satisfied on the evidence that the Honda Civic owned by Ms. Koehler was "made available" to Ms. Brown by Community Living Brant.

Counsel for Gore contended that a broad interpretation is called for in these circumstances, as the phrase "made available" is broad on its face, and that given the remedial nature of the *SABS*, its provisions should be interpreted broadly. He also noted that section 66 does not require that the corporation own the vehicle in question, citing the decision of Arbitrator Jones in *Co-operators' General Insurance Company v. Lloyd's of London,* (unreported decision, August 2002), and submitted that that must also be considered when analysing whether the facts here fit within the definition.

Mr. Blom noted that case managers at CLB had the option of either using their own vehicles to transport clients, or driving the vans provided by CLB, and submitted that if the focus here was on the CLB vans, it would be clear that these vehicles were being "made available" by the corporation. He argued that as the case managers were entitled to choose which vehicle to use to transport clients, it is fair to say that transportation in either form was "made available" to the clients by CLB, and that there should be no distinction between whether private vehicles or the vans provided were used.

State Farm took a fundamentally different view of the issue. Counsel submitted that the intent behind the deeming provisions in section 66 is to address the "company car" scenario, in which an employee who drives a car owned by his employer, but otherwise made available for his use, would be a named insured under the policy. He stated that the circumstances here were quite different, and emphasized the fact that no control was exercised by CLB over Ms. Csordas' spouse's Honda Civic. He submitted that as it was left entirely up to Mr. Csordas to decide whether or not to use his vehicle, his spouse's car or the CLB vans on any given day, it could not be said that CLB made the Honda available to Ms. Brown.

Counsel for State Farm acknowledged that section 66 does not require that the corporation own the vehicle, but submitted that it implicitly requires some "action" on the company's part, which he submitted was not present in these circumstances. He contended that the fact that Mr. Csordas was paid for the kilometers he drove while transporting his clients was not sufficient in this regard.

I agree with State Farm's position on this issue. While section 66 does not require that the corporation own the vehicle in question, and the phrase "being made available" is clearly more broad than the terms "providing" or "furnishing" that appear in some of the other provisions analysed in the cases submitted by the parties, I find that the section requires an active element on the part of a corporation in order to make a vehicle available to someone. I find that element to be lacking, in the circumstances of this case.

The evidence is clear that the decision of whether or not a personal vehicle is used to transport clients to appointments rests entirely with the case managers. Mr. Csordas stated that his decision in this regard would typically depend on a number of factors, such as the distance required to travel, the reason for traveling and the number of clients he had to transport. He stated that Ms. Brown's level of hygiene varied, and that that also would affect his decision on whether to transport her in his vehicle. In essence, he had the option of making his personal vehicle available to Ms. Brown and his other clients if he chose to do so; the fact that he was reimbursed by his employer for expenses in accordance with the collective agreement does not, in my view, impart the level of action required by the provision.

I accept that the provisions of the *SABS* are to be interpreted broadly. However, I find that the connection between CLB, as the payor of mileage expenses and employer of Mr. Csordas who provided him the option of using his personal vehicle if he chose to, to Ms. Brown, the client who was occasionally transported to appointments by Mr. Csordas in his spouse's vehicle, is too remote to trigger the deeming provisions in section 66 that would result in Ms. Brown becoming a named insured under Mr. Csordas' spouse's policy.

Given my finding on this issue, I need not consider the second branch of the test regarding whether or not Ms. Brown's use of the Honda was "regular". However, in view of the fact that counsel devoted a fair bit of attention to the case law and arguments on this issue, I will make some brief comments.

(ii) Was Ms. Brown's use of the Honda Civic "regular" ?

Counsel for Gore cited the decisions in *Reisner v. Liao* (1994) 4 M.V.R. (3d) 154, and *Jager v. Libert Mutual Fire Insurance Co.* (2001) 31 C.C.L.I. (3d) 159 as authority for the proposition that a person need not be the driver of the vehicle in question in order to enjoy its "regular use". I accept this proposition. The real question in this part of the analysis is whether the level of frequency and predictability of use can be considered "regular".

The court's decisions in *Yamada v. Canadian General Insurance Co.* (1981) 129 D.L.R. (3d) 509 and *Schneider v. Maahs Estate* [2000] O.J. No. 4050 (reversed on different grounds by the Court of Appeal at [2001] O.J. No. 4308), provide that constancy of use need not be shown, and that the use of a vehicle can be considered to be "regular" if it is "habitual, normal, and recurs uniformly according to a predictable time and manner".

Counsel for Gore contended that given that Mr. Csordas had transported Ms. Brown to her psychiatrist appointment once per month over the three years that he worked with her, along with one or two other trips each month, that pattern suggested habitual and normal use of the vehicle that could be described as "regular".

It is now a well-accepted principal that exclusionary clauses in contracts of insurance are to be interpreted strictly, while clauses designed to provide coverage are to be interpreted broadly (See *Chilton v. Co-operators* (1997) 143 D.L.R. (4^{th}) 647 (Ont. C.A.)). With this principle in mind, I accept that the monthly trips to the psychiatrist, as well as the two or three other instances per month that Mr. Csordas transported her in this vehicle are sufficient to consider Ms. Brown's use of the Honda to be "regular". While I acknowledge that this use is relatively infrequent, the court decisions cited above make it clear that it is the predictability or the pattern of the use, as opposed to the actual number of times used, that determines whether or not the test is met.

I also note Arbitrator Samworth's comments in *Unifund Assurance Company v. St. Paul Fire & Marine Insurance Company,* (unreported decision, August 2000) filed by counsel for Gore. She states that along with the frequency of use of a vehicle, the focus must also be on whether "that frequency in and of itself was uniformly arranged in that there was a predictable time and manner, or whether there was a habitual and normal use". I find that when Ms. Brown's use of the Honda vehicle is examined against this backdrop, it meets the second branch of the test.

In any event, as stated above, I find that Gore has not proven that CLB made the vehicle in question available to Ms. Brown, and the application for arbitration is therefore dismissed.

DATED at TORONTO, ONTARIO this _____ DAY OF JUNE, 2009.

_____

Shari L. Novick
Arbitrator