IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990, c. I8,
s.268 and REGULATION 283/95 there under;

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

AND IN THE MATTER OF AN ARBITRATION:

BETWEEN:

ENTERPRISE RENT A CAR

Applicant

- and -

ING INSURANCE COMPANY OF CANADA

Respondent

DECISION

COUNSEL:

Mark K. Donaldson for the applicant

William M. Sproull for the respondent

ISSUES:

1. Is Enterprise Rent A Car or ING responsible for payment of accident benefits to or on behalf of Thushianthan Thiyagarajah?

DECISION:

1. ING is responsible for payment of accident benefits to or on behalf of Thushianthan Thiyagarajah.

HEARING:

The hearing in this matter was held in the city of Toronto in the province of Ontario on October 12, 2006. No witnesses were called and the hearing proceeded by way of agreed facts and documents that were filed.

FACTS & ANALYSIS:

This priority dispute arises out of a motor vehicle accident which occurred on February 20, 2004. At that time Mr. Thushianthan Thiyaharajah was operating a motor vehicle rented from the applicant, Enterprise Rent A Car (Enterprise). Mr. Thiyaharajah suffered injuries in the accident and on March 12, 2004 submitted an application for accident benefits (OCF.-1) to Enterprise. After conducting an investigation, Enterprise's adjuster wrote to ING Insurance Company (ING) and advised them that the claimant was a listed driver on an ING policy issued to Mr. Thameshkumar Thiyaharajah. By letter dated May 5, 2004 ING indicated that they had reviewed the matter and would accept priority.

On June 2, 2004, ING wrote to the Enterprise adjuster and advised that they had "reviewed the coverage's on the policy for the above claimant. Although the policy was active at the time of the loss, there was only comprehensive collision available. As there was no liability carried on the vehicle, we can not accept this claim".

As a result of the above, Enterprise commenced this arbitration against ING. This dispute centres around two main issues, which are:

1. What is the effect of the letter from ING dated May 5 2004 indicating its acceptance of priority for Mr. Thiyaharajah's claim? And,

2. What is the effect, if any, of ING and it's insured purporting to alter its motor vehicle liability policy to one of just comprehensive coverage?

I will deal with each issue individually.

The effect of ING's letter of May 5, 2004 accepting priority

In order to properly analyze this issue it is first necessary to examine the facts more closely. As noted above, the application for accident benefits was received by Enterprise March 12, 2004. On March 17, 2004 Enterprise obtained a statement from the claimant wherein he indicated that he did not own a vehicle and "I am not a named insured under any automobile policy". Enterprise's independent adjusters, Shunka, Craig and Moore ("SCM"), conducted further investigation, however, and determined that the claimant was a listed driver under a policy of insurance held by his brother Thameshkumar Thiyaharajah.

On March 17, 2004 SCM forwarded to ING and the claimant's legal representative, a Notice of Intent to Dispute. In the letter to ING the SCM adjuster stated:

> If your company is presently denying coverage then we ask that you forward in writing details concerning the reasons for your denial and forward a copy of the underwriting file supporting your position. If you have no policy whatsoever on this date of loss please advise in writing.

On April 2, 2004 ING responded, and confirmed that the policy with Thushianthan Thiyaharajah was "active at the time of the above noted loss" and requested additional information in order "to determine if we have priority in this matter". By way of a letter dated April 14, 2004, SCM provided additional documentation. On May 5, 2004 ING responded indicating they had reviewed the information provided and stated:

> It appears that Thushianthan Thiyaharajah was a listed driver on the policy as (SIC) at the time of the loss. As the

> vehicle was a rented vehicle and he was not listed anywhere else, we accept priority.

As a result of further investigations, ING determined, in its view, that the coverage under the applicable policy was limited to comprehensive coverage and did not include accident benefit coverage which would be provided under a motor vehicle liability policy. While I will go into the changes in the coverage in greater detail later in my decision, it would appear that on or about November 6, 2003 the claimant's brother and the insurance broker involved, Ideal Insurance Brokers Inc., purported to change the applicable policy from a motor vehicle liability policy to a comprehensive only policy that would, in ING's view, not include accident benefit coverage.

After determining this, on June 2, 2004 ING wrote SCM and stated:

> I have reviewed the coverages on the policy for the above claimant. Although the policy was active at the time of the loss, there was only comprehensive coverage available. As there was no liability carried on the vehicle, we cannot accept this claim.

In light of this letter, Enterprise properly continued to pay accident benefits to the claimant, as the insurer who received the first completed application for accident benefits and proceeded with this arbitration. It is Enterprise's position that having accepted priority ING cannot resile from that position, given the facts of this case. In support of its position it cites my decision in the case of Motors Insurance Company vs. Co-operators Insurance Company (unreported decision, dated August 23, 2004). In that case Motors Insurance Company originally accepted priority in a dependency case but then approximately three weeks after doing so attempted to withdrawal the acceptance on the basis of new information being obtained and an allegation that the Co-operators adjuster withheld certain information from the Motors adjuster that would have been relevant to determining the dependency. In that case I stated:

> I am prepared to accept that I do have the equitable power to allow Motors to withdrawal the acceptance of priority if Co-operator's had acted in bad faith.

In my view, a company can withdrawal its acceptance when a party has acted in bad faith or, potentially, for other reasons. It is not a power to be used lightly, however. As the court of appeal in Kingsway General Insurance Company vs. West Wawanosh Insurance Company(unreported decision dated February 15, 2002) stated:

> The Regulation sets out in precise and specific terms a scheme for resolving disputes between insurers. Insurers are entitled to assume and rely upon the requirement for compliance with those provisions. Insurers subject to this Regulation are sophisticated litigates who deal with these dispute on a daily basis. The scheme applies to a specific type of dispute involving a limited number of parties involving a limited number of parties who find themselves regularly involved in disputes with each other. In this context, it seems to me that clarity and certainty of application are of primary concern……given this regulatory setting there is little room for creative interpretation or carving out judicial exceptions designed to deal with the equities of particular case.

While that case dealt with the 90 day notice provision in Regulation 283/95, I am of the view that the same approach is applicable in cases where an insurer has accepted priority but then attempts to withdraw from the agreement. Only in the most extreme situation should the withdrawal be permitted.

ING, in support of its position raises a number of reasons why it should be permitted to withdrawal its acceptance in this particular case. It relies upon section 5 of Regulation 283/95, which states:

> 5(1) an insured person who received a notice under Section 4 shall advise the insurer paying benefits in writing within 14 days whether he or she objects to the transfer of the claim to the insurers referred to in the notice.
>
> (2) If the insured person does not advise the insurer within 14 days that he or she objects to the transfer of the claim, the insured person is not entitled to object to any subsequent agreement or decision to transfer the claim to the insurers referred to in the notice
>
> (3) An insured person who has given notice of an objection is entitled to participate as a party in any subsequent proceeding to settle a dispute and no agreement between insurers as to which insurer should pay the claim is binding unless the insured person consents to the agreement or 14 days have pasted since the insured person was notified in writing of that agreement and the insured person ahs not initiated an arbitration under the Arbitration Act, 1991.

ING agues that pursuant to Section 5(1) the insured person gave notice that he objected to the transfer of the claim and that pursuant to Section 5(3) of the Regulation, "no agreement between insurers as to which insurer should pay the claim is binding unless the insured person consents to the agreement or 14 days have pasted since the insured person was notified in writing of an

agreement and the insured person has not initiated an arbitration under the Arbitration Act, 1991".

In order to rely upon Section 5 of the Regulation, ING must first show that the claimant objected to the transfer in writing within 14 days of receiving notice of the transfer. There is no doubt but that the claimant returned the "Notice of Applicant of Dispute between Insurers" to Enterprise. The document itself was filed as an exhibit. The form is a standard Ontario Insurance Commission form. Part 5 of that form states:

> You can object to your claim being transferred to the insurer (s) referred to in Part 2 by completing this section and returning the form to the insurer that you applied to in Part 1 within 14 days.
>
> If you object, you are entitled to participate in any proceeding that may take place to determine which insurer is responsible for paying accident benefits to you. If you do not object, you will not be permitted to dispute the transfer of your claim to another insurer.
>
> Please check in the box below and return this form to the insurer listed in Part 1, within 14 days, only if you wish to object to your claim being transferred to another insurance company.
>
> ☐ **I object to the claim being transferred**

_____ _____

Name **Date**

Signature

While the claimant signed and dated the form and returned it, he did not check the box that he objected to the transfer. I note that part is in bold print.

Counsel for ING submits that this should constitute an objection for the purposes of Section 5 of the Regulation. He suggests that even though the box was not filled in, the fact that claimant signed it and returned it is sufficient. Counsel suggests that there is no other reason why the claimant would sign it and return it. Despite the persuasive arguments put forward by counsel for ING I do not agree. The section of the Regulation clearly requires an objection and the form clearly sets out that you are to check the box if you wish to object. That was not done. The completed form is ambiguous at best. We can speculate why the form was signed and returned but it is only that. The form was not adequately filled in to constitute an objection for the purposes of Section 5 of the Regulation.

As there was no objection by the claimant, ING cannot rely on Section 5(3) of the Regulation to suggest that their agreement to take over priority is not binding until 14 days has passed since the insured was notified in writing of the agreement. Accordingly this argument on the part of the respondent fails.

ING also submits that this case is different from the Motors case in that in our case the acceptance and withdrawal occurred within the 90 day notice period whereas in Motors the withdrawal occurred outside the 90 day. While this distinguishes the two cases, I do not think that it makes a different. The 90 day provision speaks to the giving of notice, not the acceptance of priority.

Counsel for ING also submitted that in the Motors case the parties were dealing with the issue of dependency which counsel referred to as an "amorphous" issue, compared to the complex and complicated insurance coverage issue faced by ING in this case. While I am prepared to accept

that coverage issues are often complex, I do not think that this matters in this particular case. What appears to have happened in this case is that the original ING policy insured a 1993 Oldsmobile for one year from April 5, 2003. The policy was in the name of the claimant's brother and included the claimant as a listed driver. That motor vehicle liability policy included accident benefit coverage. On September 11, 2003, a 1989 Toyota was added to the policy. On November 6, 2003 the coverage was changed on the Oldsmobile at the request of the claimant's brother, to cover comprehensive only. On December 29, 2003 the coverage on the Toyota was cancelled completely as it had been sold. While the above coverage changes might be considered somewhat complex to a member of the general public, it must be remembered that we are dealing with insurance company adjusters who are expected to deal with issues of this sort in their ordinary course of business. A reasonable adjuster should know the difference between full motor vehicle liability insurance and comprehensive insurance and how it impacts on accident benefit availability. In this particular case, all the relevant facts were in the possession of ING.

In Cambrian Ford Sales (1975) Ltd. vs. Horner 69 O.R. (2^{nd}) 431, the Ontario Divisional Court held that a misapprehension of the underlying facts is not sufficient ground to set aside a settlement agreement. Counsel for ING suggests that in our case what transpired was not "a settlement agreement". While I am not sure that I am in agreement with counsel in this regard, even if I were, I do think that it would make a difference in this case. When dealing with priority disputes under Regulation 283/95 we must remember that the legislature set out a system that was to be quick, efficient and effective. It was to provide a speedy and relatively economical way of resolving priority disputes, I have already set out above, the Ontario Court of Appeal's view as to how disputes with regard to this regulation should be approached.

Once a company has agreed to take over priority, it is only in unusual and extreme circumstances that the company should be allowed to withdrawal that acceptance. To allow otherwise would be to encourage the uncertainty that the Regulation is attempting to avoid. I am not prepared to allow ING to resile from that acceptance in this case.

What is the effect of ING and its insured purporting to alter its motor vehicle liability policy to comprehensive coverage only?

As will become evident from my decision with regard to this issue, the question of the withdrawal of acceptance of priority by ING is academic.

As mentioned above, ING's insured Thameshkumar Thiyaharajah, the claimant's brother, in early November 2003 requested that the motor vehicle liability policy on the 1993 Oldsmobile be changed to comprehensive only. By way of a memo date November 6, 2003 Ideal Insurance Brokers Inc. requested ING change the coverage to comprehensive only. On November 7, 2003 ING sent a Certificate of Automobile Insurance to the insured and the independent broker, confirming the change. ING takes the position that at the time of the accident the motor vehicle liability policy had been properly changed to comprehensive only and therefore there was no accident benefit coverage under the policy and is not therefore responsible to pay accident benefits to the claimant.

It is clear that pursuant to Section 268 of the Insurance Act, every motor vehicle liability policy is deemed to contain statutory accident benefit coverage. It is also clear, however, that not every automobile insurance policy need contain statutory accident benefit coverage. Section 7 of the standard automobile policy provides for coverage to insure the automobile against damage only. It does not insure the owner, driver or other person "against liability arising out of bodily injury to or the death of a person or loss or damages to property caused by an automobile or the use or operation thereof" and is not therefore a motor vehicle liability policy under Section 268 of the Insurance Act and therefore does not include statutory accident benefits. See: Coseco Insurance Company vs. Pilot Insurance Company (unreported decision of arbitrator Torrie, dated May 11, 2000); Zurich Canada vs. Pilot Insurance Company and Royal and Sunalliance Insurance Company of Canada (unreported decision of arbitrator Malach, dated October 20, 2000) and York Fire Casualty Insurance Company vs. Economical Mutual Insurance Company (unreported decision of arbitrator Jones, dated September 5, 2003).

ING argues the certificate it forwarded to its insured on November 7, 2003 was sufficient to change the coverage to comprehensive only. Enterprise, on the other hand, argues that pursuant to Section 227(1) of the Insurance Act, the insurer shall not use a form related to an application for insurance, a policy, endorsement, or renewal unless the form has been approved by the Superintendent of Insurance. Enterprise argues that the Superintendent of Insurance approved the O.P.C.F 16 "Suspension of Coverage" form, and ING was required to use this form to change the coverage to comprehensive only, and by failing to do so, the accident benefit coverage that would have been available if the proper form were used should remain in place.

Arbitrator Samis in Certas vs. CGU (unreported decision dated December 5, 2005) dealt with a similar situation. In that case the named insured had a full motor vehicle liability policy with Certas. During the term of the policy the named insured advised Certas to delete all "road coverages" and continue only the "comprehensive coverage". Certas issued a "Certificate of Automobile Insurance" to affect the alterations and did not use the O.P.C.F 16 "Suspension of Coverage" form. A review of the O.P.C.F 16 form reveals that the form sets out, in very clear language, what coverage is cancelled. As arbitrator Samis noted:

> The approved endorsement which continues comprehensive coverage enforced, does not contemplate total elimination of liability coverage or accident benefit coverage. The approved endorsement would require an insurer to carry on with some residual risk at to the extent that there is limited coverage under the policy for statutory accident benefits or for liability that may arise out of the use or operation of some other automobile.

If one examines the Certificate by which ING purported to alter the policy, it is anything but a simple document and does not set out, in the straight forward terms that the O.P.C.F 16 does, what it purports to do. Importantly and unlike O.P.C.F 16, it removes all statutory accident benefits completely.

Counsel for ING argues that the policyholder got exactly what he wanted when he requested comprehensive insurance only. This may or may not be the case. Insurance coverage in Ontario is a highly complex and highly regulated industry. The average consumer will not necessarily have a complete understanding of the complexities of insurance coverage, including when accident benefit coverage continues and when it does not. Because of the complexities involved, the legislature, by means of Section 227 of the Insurance Act, has required that changes be made in accordance with the approved forms. Those forms make it relatively clear what coverage is being removed and accordingly what remains. It required that the policyholder sign and return the form.

There may be certain situations that a policyholder requests a change to his policy where there is not an appropriate form and the change can be done by way of a general certificate. That is not the case in this situation. It is far from clear that the policyholder wanted the changes set out in the certificate as oppose the O.P.C.F 16 form. In any event, the policy holder had the right to receive the information as set out in O.P.C.F 16 and either agree to it or not. By simply sending out the certificate, the insurer denied the policyholder the opportunity to review and choose the benefits as approved by the Superintendent.

Counsel for ING points out that in the Certas case, arbitrator Samis was dealing with a situation where the named insured was injured whereas in our case it was the listed driver. I do not think that this distinction makes a difference. The Insurance Act is clear as to what is required and it was not complied with. Counsel for ING points out that the claimant, when renting the vehicle from Enterprise paid a premium for the accident benefit coverage and that this indicates that he was aware of the need for accident benefit coverage and that none existed on the ING policy. I do not agree. We do not know what induced the claimant to get the additional coverage when he rented the car from Enterprise. In addition it was ING's insured, Thameshkumar Thiyaharajah, the claimant's brother, that requested the changes, not the claimant. It not particularly relevant what the claimant in this instance may have believed, even if we knew what that was.

In short, the legislature, by way of Section 227 of the Insurance Act, required that changes be made in accordance with the approved form. Because of the complexities of insurance coverage

in Ontario there are good reasons for the use of such forms. If ING had used the correct form the statutory accident benefit coverage would have continued to be in place for limited purposes including the factual situation presented in this case. ING cannot benefit by its failure to use the required form. Accordingly the benefits that would have been in place had the form been used should be deemed to have remained in place and accordingly ING is responsible for payment of accident benefits to or on behalf of the claimant.

I will deal briefly with one final argument put forward by counsel for ING. He submits that even if the required form was used and accident benefits were available through ING, they are at the same level on the "priority ladder" as Enterprise, and that pursuant to Section 268(4) of the Insurance Act, the claimant can choose which insurer it wants to pay the benefits. Since Enterprise received the first completed application, ING argues that the claimant chose Enterprise.

The difficulty that I have with this position is that it assumes that both insurers are at the same level on the priority ladder, being Section 268(1)(2)(1)(i). In my view Mr. Thiyaharajah was an insured pursuant to Section 268(1)(2)(1)(i) of the Insurance Act under the ING policy. Mr. Thiyaharajah was an "occupant" pursuant to Section 268(1)(2)(1)(ii) of the Enterprise policy. To consider the Enterprise policy applicable under Section 268(1)(2)(1)(i) would be to render Section 268(1)(2)(1)(ii) essentially meaningless. I dealt with this argument in greater detail and rejected it in my decision in AXA Insurance Company vs. State Farm Insurance Company and CGU Insurance Company of Canada (unreported decision released July 14, 2005).

Since ING rates higher in priority pursuant to Section 268 of the Insurance Act, it is responsible for payment of accident benefits to or on behalf of the claimant.

In the event that the parties are unable to agree with regard to the issue of cost I may be spoken to.

Dated at Toronto, this _____ day of November 2006.

_____

M. Guy Jones
Arbitrator