IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, and REGULATION 664, s. 9

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ZURICH INSURANCE COMPANY OF CANADA

Applicant

- and -

AVIVA INSURANCE COMPANY OF CANADA

Respondent

AWARD

COUNSEL:

Heather Kawaguchi for the Applicant
Rob Rogers and Cara Boddy for the Respondent

BACKGROUND:

On September 16, 2002 the minivan driven by John Miller and insured by Zurich Insurance Company of Canada ("Zurich") was struck by a trailer that had detached from the truck that was hauling it, while both vehicles were travelling on Winston Churchill

Boulevard in Mississauga. The truck in question was driven by Norbert Nanke and was proceeding in a northbound direction, while Mr. Miller's van was travelling in a southbound direction. The trailer separated from the truck, crossed the centre line of the roadway, and struck the Miller vehicle "head on". Mr. Miller was seriously injured in the accident, and is receiving accident benefits from Zurich.

The Nanke truck is owned by Excell Excavating, and insured by Aviva Insurance Company of Canada ("Aviva"). The trailer is owned by a different entity, but appears not to be the subject of a separate insurance policy. It is agreed that under the rules of the standard insurance policy, Aviva's policy insuring the truck would cover the trailer.

Aviva does not deny liability for the accident, but contends that as the trailer that detached from the truck weighs less than 4,500 kilograms, it does not qualify as a "heavy commercial vehicle" under *Regulation 664* of the Insurance Act. It takes the position that the Loss Transfer provisions accordingly do not apply, and argues that Zurich is not entitled to seek indemnity from Aviva for the benefits paid out to Mr. Miller.

ISSUE:

1. Do the Loss Transfer provisions of *Regulation 664* to the *Insurance Act* apply to the accident that occurred between John Miller's vehicle and the vehicle driven by Norbert Nanke on September 16, 2002 in Mississauga? Specifically, was the Nanke vehicle a "heavy commercial vehicle" within the meaning of section 9 of *Regulation 664*?

2. If so, which of the Fault Determination Rules contained in *Regulation 668* apply?

RESULT:

The Nanke vehicle was a "heavy commercial vehicle" as defined in the regulation. Consequently, subsection 12(4) of the Fault Determination Rules applies, resulting in Mr. Nanke being 100 per cent at fault for the collision.

HEARING:

The arbitration hearing took place on January 12, 2007 in the City of Toronto, before me, Shari L. Novick, Arbitrator.

THE FACTS:

The parties filed an Agreed Statement of Facts, which I attach as Schedule "A" to this award.

The key facts, as highlighted above, are as follows: The trailer being hauled by the truck Mr. Nanke was driving detached from the truck, crossed the centre line in to the southbound lanes, and struck Mr. Miller's vehicle. The truck itself did not make contact with Mr. Miller's vehicle. Both the truck and trailer were being used for commercial purposes at the time of the collision. The truck weighed 4173 kilograms. The trailer was not loaded at the time, and weighed 1341 kilograms. Therefore, the combined weight of the two vehicles exceeded the 4,500 kilograms set out in section 9 of the Regulation, but if taken separately, neither vehicle's weight exceeded that amount.

Finally, the police report indicates that the pintel hook used to attach the trailer to the truck was not properly secured, and was the cause of the trailer becoming detached from the truck.

RELEVANT PROVISIONS:

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

Regulation 664 s. 1:

> "commercial vehicle" means an automobile used primarily to transport materials, goods, tools or equipment in connection with the insured's occupation, and includes a police department vehicle, a fire department vehicle, a driver training vehicle, a vehicle designed specifically for construction or maintenance purposes,

a vehicle rented for thirty days or less, or a trailer intended for use with a commercial vehicle;

Regulation 664 s. 9(1):

"heavy commercial vehicle" means a commercial vehicle with a gross vehicle weight greater than 4,500 kilograms.

Regulation 664 s. 9(3):

A second party insurer under a policy insuring a heavy commercial vehicle is obligated under section 275 of the Act to indemnify a first party insurer unless the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a heavy commercial vehicle

Regulation 668 s. 2(1):

An insurer shall determine the degree of fault of its insured for loss or damage arising directly or indirectly from the use or operation of an automobile in accordance with these rules.

Regulation 668 s, 12(4) Fault Determination Rules:

If automobile "B" is over the centre line of the road when the incident occurs, the driver of the automobile "A" is not as fault and the driver of automobile "B" is 100 percent at fault for the incident.

Insurance Act – s. 1 definition:

"automobile" includes a trolley bus and a self-propelled vehicle, and the trailers, accessories and equipment of automobiles, but does not include railway rolling stock that runs on rails, watercraft or aircraft; ("automobile")

PARTIES' ARGUMENTS:

Both parties presented various arguments and cited several cases in support of their respective positions. In essence, Zurich argues that as the combined weight of the Nanke truck and the trailer it was hauling exceeded 4,500 kilograms on the day of the accident, it meets the definition of a "heavy commercial vehicle" and triggers the application of the Loss Transfer provisions. Counsel contends that the fact that the trailer separated from the truck does not preclude the availability and applicability of the loss transfer scheme.

Zurich then argues that as section 2 of the regulation mandates that fault be apportioned in accordance with the Fault Determination Rules, Rule 12 (4) would apply. That rule addresses the scenario of one vehicle crossing over the centre line of the road and striking an oncoming vehicle. Counsel argues that it applies to this accident, and results in a finding that the vehicle insured by Aviva is 100% at fault.

Zurich's alternative argument is that if Rule 12(4) does not apply, the same result is achieved if the ordinary rules of law, as provided for in Rule 5, are applied.

Counsel for Aviva contends that the primary issue to be determined is whether or not the Nanke vehicle is a "heavy commercial vehicle" as defined in the Regulation, noting that if it does not fit within that definition, liability for the accident and hence the Fault Determination Rules, are irrelevant.

Counsel also points out that when applying definitions or discussing cases that have been decided under the *Statutory Accident Benefits Schedule,* it must be remembered that the *SABS* is remedial legislation that calls for a broad or expansive interpretation, while the regulation providing for the loss transfer scheme is not. He argued that the purpose behind the Loss Transfer provisions must be kept in mind when analysing this issue, namely that the legislature has chosen to spread the costs of accidents caused by heavy commercial vehicles among insurers, as they are more likely to cause greater injury than ordinary vehicles. He also emphasized that the loss transfer scheme is premised upon the parties being sophisticated litigants with defined rights and obligations, and contended that this mandates an objective approach.

Counsel noted that the definition of a "commercial vehicle" in section 1 of *Regulation 664* includes both a truck, and a trailer hauled by a truck, and contended that this means that each vehicle can qualify as a "commercial vehicle" on its own. In response to the Applicant's contention that the case law mandates calculating the combined loaded weight of both a tractor and a trailer to determine whether a vehicle is a "heavy commercial vehicle", counsel argued that this approach should not be followed in a

situation where the vehicles become detached from each other, as happened here. He cited the decision in *Co-operators v. Gore Mutual Insurance Company* (May 13, 2003) which focuses on the weight of the commercial vehicle that comes into contact with the other vehicle at the time of the accident, and argued that the decision clearly implies was that if the actual vehicle that strikes the Applicant's car weighs less than the established yardstick of 4500 kilograms, it should not be considered to be a "heavy commercial vehicle".

FINDINGS/ANALYSIS:

Despite the able arguments of counsel for the Respondent, and my agreement with this contention that the Loss Transfer provisions should not be applied in the same manner as remedial legislation such as the *SABS*, I cannot accept the position taken by Aviva in this matter. In my view, the Nanke vehicle was a "heavy commercial vehicle" as defined in the Regulation.

Counsel for both parties referred to a variety of cases decided by other arbitrators and the courts touching on this issue. While none of the facts of those cases are on all fours with this case, some general principles emerge which in my view form the cornerstone of the analysis required here.

As a starting point, I turn to the decision in *Co-operators v. Gore Mutual Insurance Company* referenced above. In that case, a cube van carrying a loaded trailer struck the Applicant's vehicle, when it failed to stop at an intersection. Both counsel in this case agreed with the general proposition outlined by Arbitrator Robinson that a "realistic and reasonable interpretation of section 9(1) leads logically to the conclusion that it is the combined weights of the van and trailer that render it a "heavy commercial vehicle". Each unit on its own weighed less than 4,500 kilograms, but their combined weight exceeded that amount. The two units were attached at the time of the collision, but counsel for Gore Mutual contended that the combined weight should not be taken into account when considering the requirements of section 9 of the Regulation. The arbitrator

found that as the van and the trailer were "operating as one single unit at the time of the accident", while being used in a commercial venture, their weight should be combined. He also considered the statutory definition of "motor vehicle", which includes "trailers and accessories" in arriving at his decision.

Both the Applicant and the Respondent relied on the above decision in support of their respective positions. Counsel for Aviva contended that the clear implication from the words used by the arbitrator is that when two vehicles are *not* operating as a single unit at the time of the accident, their weights should not be combined. Given the different factual context within which the arbitrator's comments were made, I cannot accept this argument, and ultimately, do not find Arbitrator Robinson's analysis to be helpful in this case.

The parties referred to other cases in which various parts of vehicles became detached during travel. One of them was Arbitrator Malach's decision in *Wawanesa Mutual Insurance Co. v. Kingsway General Insurance Company* (November 7, 2002), in which the wheel of a large truck became dislodged and crossed the median of the 400 Highway, striking a vehicle travelling in the opposite direction. The Respondents argued in that case that the Loss Transfer provisions should not be invoked, as Rule 12(4) does not apply when only a portion of a heavy commercial vehicle crosses the centre line. The arbitrator rejected that argument, and noted that the definition of "automobile" in section 1 of the *Insurance Act* includes "equipment of automobiles". He found that as a wheel of a truck is a piece of equipment, that position could not be sustained.

And, while he did not make an express statement in that regard, it is clear that Arbitrator Malach implicitly recognised that the wheel of the truck was part of a "heavy commercial vehicle", and that the Loss Transfer provisions were therefore triggered.

Perhaps the closest decision factually to the instant case is *Aviva v. Lombard Canada and Liberty Mutual Insurance* (April 18, 2005), another decision of Arbitrator Malach. In that case, a loaded trailer separated from the tractor that was hauling it, and blocked a

lane of traffic in conditions of extreme fog and poor visibility. The Applicant was unable to see that the trailer was blocking her path of travel, and her vehicle collided with the trailer. Both the trailer and the tractor weighed in excess of 4500 kilograms on their own, so would each be considered a "heavy commercial vehicle". The dispute between the parties was essentially over whether the insurer for the tractor that had been hauling the trailer should be responsible to pay the first party benefits under the Loss Transfer provisions, or whether it should be the insurer of the trailer. The Respondents in this case contend that while the facts are different than in the instant case, it is important to note that the arbitrator approached the question of liability as requiring a finding that either the tractor or the trailer was liable, as opposed to treating them as one vehicle, given that they had become detached.

I note, however, that in Arbitrator Malach's liability analysis, he relied on case law that stands for the proposition that a trailer cannot cause an accident because it is not independently operated, and that it is the negligent operation of the truck or tractor part of the vehicle that creates the situation of danger that causes the collision. He states " it was the operation of the tractor which put the trailer into motion …in the final analysis, the operation of the tractor by Mr. Voakes created the situation which caused the accident" (at p. 23).

While I appreciate that there is a distinction between the above situation, in which Arbitrator Malach was asked to make a liability determination, and the situation here, where the dispute invokes the question of whether or not the Loss Transfer provisions are triggered, I find that the same underlying logic should apply. Although at the moment of impact it was the trailer alone that struck Mr. Miller's van, there is no evidence to suggest that the independent action of the trailer caused the accident with Mr. Miller's vehicle. The cause of that occurrence was the manner in which the tractor was operated, or more specifically, the fact that the hook linking the trailer to the truck was attached in a negligent manner.

For this reason, I disagree with the Respondent's contention that as the trailer weighed less than the specified weight for a "heavy commercial vehicle", the consequences of it crossing the centre line and striking the Miller vehicle should be the same as if that had happened with a passenger car. The very nature of heavy commercial vehicles is that they cause more damage and injuries than do regular vehicles, not only because of their great weight relative to ordinary vehicles, but also because they often carry heavy loads. That fact alone often causes accidents in a way that regular passenger vehicles do not. Unfortunately, it is not uncommon for a hitch connecting a tractor and trailer to either break or detach, as happened here. The Loss Transfer scheme is designed to spread the inherently higher risk that heavier commercial vehicles pose among many insurers, and the weight of the component or part of a vehicle that comes into contact with another vehicle at the moment of impact is not determinative of the issue.

I find that the approach urged on me by the Respondent, namely that only the weight of the actual vehicle that struck the Miller vehicle at the moment of impact be considered when determining whether a "heavy commercial vehicle" is involved, is unduly technical, and I do not accept it.

Finally, I note that the definition of "commercial vehicle" contained in section 1 of *Regulation 664* includes "a trailer intended for use with a commercial vehicle". In my view, this is a clear indication from the legislators that a trailer is not intended to be treated as a regular passenger vehicle, as suggested above, even if it does not meet the specified weight of 4,500 kilograms.

For all of the above reasons, I find that the Nanke vehicle insured by Aviva was a "heavy commercial vehicle" as defined in the regulation, and consequently, subsection 12(4) of the Fault Determination Rules contained in *Regulation 668* applies.

The result of this finding is that Mr. Nanke is 100 percent at fault for the accident of September 16, 2002, and Zurich is therefore entitled to be indemnified by Aviva for the

benefits it has paid out to John Miller, in accordance with subsection 9(3) of *Regulation 664* of the Act.

I was not advised of the quantum of benefits Zurich sought to be reimbursed, and leave that issue to the parties to resolve. I may be spoken to if the parties cannot agree on the quantum payable.

As agreed, Aviva shall pay Zurich its costs of this arbitration. If the parties cannot agree on the quantum of costs payable, I may be spoken to on this issue as well.

DATED THIS _____ day of April 2007 in the City of Toronto, Province of Ontario.

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Shari L. Novick
Arbitrator