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:

DOMINION OF CANADA INSURANCE COMPANY

Applicant

- and -

ZURICH INSURANCE COMPANY

Respondent

ARBITRATION DECISION

COUNSEL:

Neil Colville-Reeves for the Applicant

Gregory Houser for the Respondent

ISSUE:

1. Was the Claimant's employer's vehicle being made available for his regular use at the time of the accident pursuant to section 66 of the *Statutory Accident Benefits Schedule*, such that he is deemed to be a named insured under the Zurich policy insuring that vehicle?

RESULT:

1. Yes. Zurich is therefore in priority to pay the claim, pursuant to section 268(5.2) of the *Insurance Act*.

BACKGROUND:

1. John Jacobs was involved in an accident on October 23, 2009, while driving a Ford F-150 pickup truck owned by his employer, Scotlynn Commodities Inc. ("Scotlynn") He was on his way to purchase some hardware supplies for his personal use at the time. The accident took place on a Friday afternoon. Mr. Jacobs had received permission to finish work early that day and to use the company vehicle to run his errand.

2. Mr. Jacobs owned a Chrysler Sebring at the time of the accident. That vehicle was insured by Dominion of Canada ("Dominion"). The company pickup truck that was involved in the accident was insured by Zurich Insurance Company ("Zurich").

3. Mr. Jacobs submitted an application for payment of accident benefits under the *Statutory Accident Benefits Schedule* ("the *Schedule*") to Dominion, the insurer of his personal vehicle. Dominion accepted the claim and has paid benefits to him and on his behalf. It contends, however, that Zurich is in higher priority to pay his claim under section 268(5.2) of the *Insurance Act* by virtue of his employer having made the vehicle available for his regular use, resulting in his being deemed to be a "named insured" under that policy in accordance with section 66 of the *Schedule.*

EVIDENCE:

4. The parties filed an Agreed Statement of Facts setting out the basic facts underlying this dispute, which I have appended to this decision. Counsel also conducted an examination under oath of the Claimant, and filed a transcript of the evidence provided. I have considered all of the information contained in both of these documents in reaching my decision.

The relevant facts are as follows:

5. Mr. Jacobs was employed by Scotlynn Commodities, a family-run business owned by his nephew. He explained that this company is involved in both farming and transporting products for companies in the food industry, and operates in conjunction with other corporate entities. At the time of the accident, the Claimant was the Maintenance Manager of Scotlynn's trucking shop, and also managed the company's farming operations, which included corn, pumpkin, watermelon and ginseng crops.

6. Mr. Jacobs lives on the edge of the farm owned by his employer. He testified that he worked long hours, which varied with the season. He estimated that he worked from 5:30 a.m. to 9 or 10 p.m. during the summer months, seven days per week. He worked approximately between 7:30 a.m and 5:30 p.m, six days per week, over the winter months.

7. As Maintenance Manager of the trucking shop, he had keys for, and enjoyed access to, the company's fleet of vehicles, which he estimated included one-hundred transport trucks and ten to fifteen pickup trucks.

8. Mr. Jacobs explained that he would usually drive his personal vehicle to and from work at the farm. He stated that he would then use the company's vehicles during the course of the day when carrying out his various work duties, which often required him to travel off of the farm. He stated that he would occasionally drive one of the company's trucks to his home if it was convenient to do so when he went home for lunch or dinner, after which he would drive it back to the farm to return to work. On the rare occasion that his personal vehicle needed repairs or servicing, he would keep a company vehicle at his home overnight.

9. The Claimant explained that the vehicle that he was driving at the time of the accident was designated as the "shop truck". While it was available for the use of other employees working out of the shop, he drove it often and other employees would speak

to him before taking the truck out of the shop "in case I needed to go anywhere or anything".

10. The accident took place on a Friday afternoon. Mr. Jacobs had sought and received permission to finish work early that day, and to use the company's pickup truck to pick up hardware supplies in the next town. He had planned to purchase some lumbar and drywall for renovation work that he was doing on his garage. He intended to pick up the supplies, unload them at home, drive the Ford pickup back to the shop and then drive his own car home. The accident happened as he was on his way to the hardware store.

RELEVANT PROVISIONS:

Insurance Act - Section 268

> (2) The following rules apply for determining who is liable to pay statutory accident benefits:
>
> 1. In respect of an ***occupant*** of an automobile,
>
> i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,
>
> ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,
>
> iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other 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 occupant has recourse against the Motor Vehicle Accident Claims Fund.
>
> (5) Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant, 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.

(5.2) If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant.

Statutory Accident Benefits Schedule – Section 66

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:

PARTIES' ARGUMENTS:

Dominion's position

11. Counsel for Dominion contended that Mr. Jacobs should be deemed to be a 'named insured' under the Zurich policy issued to Scotlynn in accordance with section 66, and that by application of subsection 268(5.2) of the *Act*, Zurich would be in priority to pay his claim for benefits. He highlighted the fact that as Maintenance Manager of the trucking shop, Mr. Jacobs had access to all of the company's vehicles, including the Ford pickup truck that he was in at the time of the accident, and submitted that that clearly satisfies the "regular use" requirement in section 66 of the *Schedule.* He also noted the Claimant's statement that he often drove the pickup truck in question during the course of his workday.

12. Counsel referred to the appeal decision in *ACE INA Insurance v. Co-operators General Insurance Company* (2009) 77 C.C.L.I. (4th) 272, specifically noting Mr. Justice Belobaba's comments that the focus of the analysis under section 66 should be on whether the vehicle in question was being made available to a claimant at the time of the accident. Counsel emphasized that the accident in question took place at a time at which

Mr. Jacobs would normally have been at work. He contended that the fact that the Claimant was operating the vehicle at the time of the accident, with his employer's permission, must lead to the conclusion that it was being "made available" to him.

13. Mr. Colville-Reeves submitted that even if Mr. Jacobs had not obtained express permission to use his employer's vehicle at the time, he would still meet the requirements of section 66. He referred to Arbitrator Samis' comments in his decision in *State Farm Mutual Insurance v. Kingsway General Insurance* (October 20, 1999) to the effect that actual use of a vehicle is evidence of its "availability", and that the regulation "does not require the use to be frequent, exclusive or personal."

14. Finally, counsel also referred to the appeal decision in *Zurich Insurance v. The Personal Insurance* (2009) C.C.L.I (4^{th}) 301, noting Justice Brown's approval of Arbitrator Bialkowski's statement that the only cases in which individuals have been found <u>not</u> to be "regular users" of a vehicle are those "where the characterization of the use was irregular at best and out of the ordinary". He submitted that the evidence in this case clearly indicates Mr. Jacobs' use of the vehicle in question could not be described in this restrictive manner.

Zurich's position

15. Counsel for Zurich contended that Mr. Jacobs did not meet the requirements set out in section 66 of the *Schedule* that would deem him to be a 'named insured' under its policy. He acknowledged that the evidence suggested that the Claimant had "regular use" of the company vehicles during his work hours, but emphasized that he was driving to the next town to do a personal errand and was not working at the time of the accident.

16. Counsel submitted that the evidence indicated that Mr. Jacobs' personal use of company-owned vehicles during non-work hours was "irregular and out of the ordinary". He specifically referred to the Claimant's evidence that he usually drove his own private vehicle to and from his work at the farm, and that his use of a company vehicle to stop at his home for lunch or dinner was only occasional. He also noted Mr. Jacobs' statement

that Scotlynn did not provide him, or any other employee, with a vehicle for his or their personal use on a regular basis outside of working hours.

17. Mr. Houser noted Mr. Justice Belobaba's emphasis in *ACE v. Co-operators, supra*, on the fact that the phrase "at the time of the accident" did not appear in the predecessor section to section 66. He submitted that it indicates the legislators' intention that coverage should only be extended to an individual under a corporation's (or other entity's) policy "where the insured vehicle is contemporaneously being made available for his regular use".

18. He contended accordingly that Mr. Jacobs would only be deemed to be a named insured under Zurich's policy if, at the time of the accident, the company's vehicle was being made available to him, and that his use of that vehicle at that time was "regular". He suggested that in light of the fact that the Claimant had to ask permission to use the company truck for a personal errand, it is clear that he did not have regular use of the vehicle during non-work hours.

Dominion - Reply:

19. Counsel for Dominion submitted in reply that Zurich's argument essentially "reads in" a distinction or dichotomy between an employee's business use and personal use of a vehicle, that does not appear in the section. He submitted that the focus should be on the Claimant's use of the vehicle at the time of the accident, and that although the accident occurred while Mr. Jacobs was driving to the next town for personal reasons, he would normally have been at work at that time on a Friday afternoon.

ANALYSIS & CONCLUSION:

20. I find that the vehicle that Mr. Jacobs was driving was being made available for his regular use by his employer at the time of the accident, and that he is therefore deemed to be a named insured under Scotlynn's policy with Zurich Insurance. While he was also a named insured under his personal policy with Dominion, section 268(5.2) of the *Act* provides that a claimant must claim accident benefits against the insurer of the

automobile in which he was an occupant at the time of the incident, leading to the conclusion that Zurich is in higher priority to pay Mr. Jacobs' claim.

21. As stated by Mr. Justice Belobaba in *ACE Ina v. Co-operators Insurance, supra,* the meaning and intent of section 66(1)(a) of the *Schedule* is clear. It provides that if an automobile is being made available for the individual's regular use at the time of the accident by a corporation or other entity, that individual (if living and ordinarily present in Ontario) is deemed to be a named insured under the policy insuring that automobile. Two questions generally arise in the analysis of section 66 cases – whether the vehicle in question is being "made available" for a claimant's use at the time of the accident, and whether that use can be considered "regular".

22. While the facts in *ACE v. Co-operators, supra,* are quite different than the circumstances in the instant case, the principles enunciated by the court are applicable. The employee in that case worked for a car rental agency as a 'customer service representative' and his use of his employer's vehicles was restricted to the hours during which he was at work. He was involved in an accident while a passenger in a friend's vehicle, as they were heading downtown late on a weekend night. He was clearly not at work at that time. The arbitrator initially hearing the case found that as the claimant did qualify as a named insured under the employer's policy while he was at work, that status remains with him "even if at the time of the accident the employer is not making a specific vehicle available to the employee".

23. Justice Belobaba disagreed with that finding, and reversed the arbitrator's decision. He stated that section 66 was not like a "floating charge", and while that provision may apply to an employee at one point, it does not confer a "portable status that remains with the insured" at all times. He emphasized that the key question is whether *at the time of the accident* a company-insured car was being made available to the employee.

24. In this case, Mr. Jacobs was driving the vehicle owned by his employer, with consent, at the time of the accident. He therefore clearly meets the requirement that the vehicle be "made available" to him at the time of the accident.

25. The question then becomes whether the vehicle was being made available for his "regular use" at that time. Zurich contends that Mr. Jacobs did not regularly use his employer's vehicles for personal reasons, noting that he was not working at the time of the accident. I agree, however, with counsel for Dominion's submission that section 66 does not distinguish between an employee's business use and personal use of a vehicle. As Maintenance Manager of the trucking shop in his nephew's company and a key member of the management team, there was clearly a fair bit of flexibility both in the Claimant's work hours and his use of the company's vehicles insured under the Zurich policy.

26. While Mr. Jacobs may not have spent every Friday afternoon running personal errands with one of these vehicles, I am not satisfied that his use of the Ford pickup truck on that day can be described as "irregular at best and out of the ordinary", the test approved by Justice Brown in the *Zurich v. Personal, supra,* decision. Ultimately, the fact that Mr. Jacobs was driving the Ford pickup truck owned by his employer at the time of the accident, at a point in the day that he would normally be using that same vehicle to carry out his work duties, persuades me that he fulfils the criteria set out in section 66(1)(a) to be deemed to be a named insured under Zurich's policy.

27. In the result, I find that Zurich is in higher priority to pay Mr. Jacobs' claim for accident benefits under the Schedule.

ORDER:

28. Zurich is hereby ordered to repay Dominion for any benefits reasonably paid out to Mr. Jacobs or on his behalf to date, with interest. If Mr. Jacobs' claim is ongoing, Zurich shall assume the adjusting of the claim in accordance with the *Schedule*.

29. I remain seised of this matter in the event that the parties experience any difficulties in implementing this part of the decision.

LEGAL COSTS AND ARBITRATION FEES:

30. Given Dominion's success in this case, I order Zurich to pay legal costs incurred by Dominion on a 'partial indemnity' basis. If counsel cannot agree on the amount of costs payable, I invite them to contact me in order to arrange a telephone call at which I will hear submissions on the issue.

29. I also find that Zurich is responsible to pay all arbitration fees and expenses incurred in the course of this proceeding. I will forward my account to counsel for Zurich along with this decision.

Finally, I am grateful to counsel for their thorough and well-considered submissions and the efficient manner in which they presented this case.

DATED at TORONTO, ONTARIO this ____ DAY OF OCTOBER, 2013.

_____

Shari L. Novick
Arbitrator

Appendix 1

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c. I.8, as amended
AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c.17, as amended
AND IN THE MATTER OF an Arbitration

BETWEEN:

DOMINION OF CANADA GENERAL INSURANCE

Applicant

-and-

ZURICH INSURANCE COMPANY

Respondents

AGREED STATEMENT OF FACTS

Insurance and Ownership Matters

1. On October 23, 2009, John Jacobs was involved in a motor vehicle accident ("the Accident") while operating a 2007 Ford F-150 ("the F-150"). His claim for accident benefits arose from this Accident.

2. At all material times, including October 23, 2009, Mr. Jacobs was a named insured in respect of a 2001 Chrysler Sebring under Dominion of Canada General Insurance ("Dominion") policy number APP-1144809-00-05-67, which contained coverage for statutory accident benefits ("SABS").

3. At all material times, including October 23, 2009, the F-150 was owned by Scotlynn commodities and insured under Zurich Insurance Company ("Zurich") policy 9800033 ("the Zurich Policy") which contained coverage for SABS.

4. As a result of the Accident, Mr. Jacobs applied to Dominion for accident benefits. Dominion takes the position that Zurich is the priority insurer. Dominion served Zurich with a Notice to Applicant of Dispute Between Insurers within the 90 day period mandated by Ontario Regulation 283/95 and initiated arbitration within 1 year thereafter. As a result, there are no section 3 compliance issues in play..

5. The F-150 was owned by Mr. Jacobs' employer, Scotlynn Commodities, which operated in association with several other entities, including but not limited to Scotlynn Investments and various numbered companies (together "Scotlynn").

6. The vehicles referred to by Mr. Jacobs' as "company vehicles" during his examination under oath were owned by Scotlynn at all material times.

Facts

7. Prior to the accident Mr. Jacobs lived near his employer's location, at 12 Rebecca Street, Vittoria, Ontario and was therefore "living and ordinarily present" in Ontario at the time of the accident, within the meaning of section 66 of the SABS.

8. Mr. Jacobs had a variety of responsibilities with Scotlynn. In part, he was involved in managing Scotlynn's expansive agricultural operations. This job entailed communicating with people working in the various fields and traveling to wherever his services were required.

9. Secondly, he managed the mechanical shop which serviced and repaired Scotlynn's vehicles. In association with this position he had the keys to approximately 100 transport trucks and 10 to 15 other Scotlynn-owned vehicles. John was in charge of managing and assigning the 10-15 Scotlynn vehicles as well as maintenance for those vehicles.

10. From April to mid-November Mr. Jacobs estimated that he would split his time evenly between his farming and mechanical responsibilities. During these months he worked Monday to Saturday and sometimes Sundays. His average day began at 5:30 a.m. and ended as late as 9:00 or 10:00 p.m.

11. In the remaining months, Mr. Jacobs worked from about 7:30 a.m. until 5:30 p.m.

12. On a daily basis, Mr. Jacobs would drive his personal vehicle to work and park it there for the day. Mr. Jacobs had access to many company vehicles during work hours. He used a Scotlynn company vehicle, including the F150, for virtually all tasks that required driving during the workday.

13. When Mr. Jacobs finished work for the day, he would almost always drive his personal vehicle home. There were rare exceptions when Mr. Jacobs would take a company

vehicle home for the night although generally the company did not provide employees with a vehicle to take home for personal use.

14. Mr. Jacobs's evidence was that he knew it was important to return company vehicles to the shop overnight for use by the night shift workers because the operation ran 24 hours.

15. On October 23, 2009, Mr. Jacobs asked Scott Biddle, a representative of Scotlynn, if he could finish work early and use the F-150 to pick up hardware supplies for his home renovations. Mr. Biddle agreed.

16. After completing his workday, Mr. Jacobs was on his way to a Home Hardware store in Delhi at 2:20 p.m. when he was involved the Accident.

Date:

Neil Colville-Reeves, Samis & Company
Lawyers for Dominion of Canada General Insurance, Applicant

Date: NOV 2, 2012

Gregory Houser, Houser Associates
Lawyers for Zurich Insurance Company, Respondent