

***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, as amended;***

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

UNICA INSURANCE INC.

Applicant

- and -

CHUBB INSURANCE COMPANY OF CANADA

Respondent

DECISION

COUNSEL:

Greg Bailey for the Applicant

Michael Blinick for the Respondent

BACKGROUND:

1. Qianlong Li was struck by a vehicle insured by Unica Insurance as he was crossing Kennedy Road in Markham, Ontario on November 6, 2018. The accident occurred at 5:38 a.m., as he was on his way to work. Mr. Li had started working as a school bus driver for Stock Transportation approximately three weeks before the accident. He did not have a personal automobile insurance policy, nor was a spouse or dependent of anyone who did.

2. The Claimant submitted an application for payment of benefits under the *SABS* to Unica, the insurer of the vehicle that struck him. The school buses operated by Stock Transportation (“Stock”) were covered by a commercial auto policy issued by Chubb Insurance at the time of the accident. Unica claims that Mr. Li was a deemed named insured under that policy, as Stock made a vehicle available for his “regular use” at the time of the accident.

3. The parties agree that a school bus was made available for Mr. Li’s regular use by Stock, his employer. They do not agree, however, on whether a bus was made available for his use *at the time of the accident*, i.e. at 5:38 a.m. Mr. Li would generally leave the lot to start his route around 7:30 a.m., but would arrive earlier than that to do the required “pre-trip inspection” on his vehicle.

4. The parties agree that if I find that Stock made a bus available for Mr. Li’s regular use at the time of the accident, he would be a deemed named insured under their policy, and Chubb would be in higher priority to pay his claim.

ISSUE:

1. Was Mr. Li a deemed named insured under the Chubb policy by virtue of section 3(7)f (i) of the *SABS*, because Stock made a vehicle available for his regular use at the time of the accident ?

RESULT:

1. No. Stock did not make a bus available for Mr. Li’s regular use at the time of the accident, and he was therefore not a deemed named insured under its policy with Chubb.

THE EVIDENCE:

5. The parties agree on the relevant facts related to the dispute, and have recorded them in an Agreed Statement of Facts. Counsel also filed a Joint Document Brief containing transcripts both from the Examination Under Oath conducted of the Claimant and a representative of Stock Transport, as well as various other documents including Mr. Li's employment records and the Stock Employee Handbook. No *viva voce* evidence was called at the hearing, and counsel made detailed oral submissions via videoconference.

6. As noted above, Mr. Li was struck by a car insured by Unica Insurance early in the morning hours on November 6, 2018, as he crossed the street to catch a bus while on his way to work. He had started his training as a school bus driver with Stock in August 2018, and began driving full-time shifts on October 18, 2018, about three weeks before the accident. He picked up students each morning from Monday to Friday and drove them to school, and then drove them home from school at the end of the day. He travelled to the lot where the buses were kept each morning by public transit. He was not permitted to drive the buses that he was assigned for personal use.

7. The evidence suggests that Mr. Li's first pickup on his morning route was at 8:06 a.m. He testified that it took approximately a half hour to drive from the yard where the buses were parked to that pickup location. When asked whether there was a particular time that drivers were expected to arrive at the yard each morning, he responded "should be before 7:30 a.m." He explained that he was required to complete a "pre-trip inspection" each day before he drove the bus off the lot. He would also need to refuel the bus if the gas gauge showed that less than half a tank remained.

8. Each driver was required to do a "circle check" of their bus each morning. It involved checking the bus' engine, the fluids, the brakes, the tires, gauges and lights. They were required to start the vehicle, and to check whether anything was broken or loose under the hood. The parties agree that after completing the pre-trip inspection, the drivers were required to call the dispatcher on the lot to confirm that they had completed the inspection and all was in order. The dispatcher would then give them "clearance" to begin their route.

9. While Mr. Li testified that the dispatcher arrived at 5 a.m. each morning, documents subsequently obtained from Stock confirm that the morning dispatcher was actually scheduled to begin her shift at 6 a.m.

10. Mr. Li testified at his EUO that he could access the lot where the buses were parked at any time, and that he sometimes arrived as early as 5 a.m. to start inspecting his vehicle. He stated that if he was assigned to drive the same bus that he had the day before, he was permitted to take the keys home with him, and would then go directly to the bus to begin his inspection the next morning. If he was assigned to drive a different bus, he would need to get the keys from the dispatcher at the office. The evidence provided by Cecilia Bedard, the representative who was examined on behalf of Stock Transportation, indicated that Mr. Li drove five different buses over the course of the almost three weeks that he was employed with Stock.

11. The parties specified in the Agreed Statement of Facts that the drivers were not restricted in terms of the time they began their pre-trip inspection of the buses. The drivers were also expected to determine on their own when they had to leave the yard in order to get to the start of their route safely and on time. Mr. Li testified that his departure time depended on the weather, and on whether or not his bus needed to be refueled. He recalled that he had left the yard as early as 6:30 a.m. to start his route.

12. The Employer used an electronic vehicle inspection system called “Zonar” to record the results of the vehicle inspections performed by the drivers. Each driver was provided with a handheld unit, which they would use to log in to the system once they entered their bus in the morning. This provided the Employer with a record of the time that each driver began his or her inspection.

13. The records of Mr. Li’s log in times were filed into evidence. These varied widely, depending on the day. The parties agree that the Zonar records indicate that Mr. Li logged into the system as early as 6:03 a.m. and as late as 7:10 a.m. over the three weeks that he was employed with Stock prior to the accident. When she was asked whether it was possible that Mr. Li had

accessed his bus to begin the inspection before he logged into the Zonar system, Ms. Bedard responded that there was no way to determine that.

14. Ms. Bedard confirmed that it was up to the drivers to ensure that they arrived at work early enough to do what was required to get the bus ready to start their morning route on time. She acknowledged that if a driver had the key to the bus that they were assigned to drive, there was no restriction on when that would occur. She stated, however, that if a driver “would leave with the bus at a severely early time, that would be flagged as being not acceptable”.

15. I note that Mr. Li advised at his EUO that he had to take three different buses to travel from his home in Markham to where Stock’s buses were parked in Richmond Hill each morning.

RELEVANT PROVISIONS:

Statutory Accident Benefits Schedule

3. (7) For the purposes of this Regulation,

(f) an individual who is living and ordinarily present in Ontario is deemed to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,

(i) the insured automobile is being made available for the individual’s regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity,

Insurance Act – Section 268

(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,

PARTIES' ARGUMENTS:

16. As noted above, the parties agree that Stock made a school bus available for Mr. Li's regular use on weekdays, when school was in session. They do not agree, however, on whether a bus was made available to him *at the time of the accident*, as specified by the provision above and highlighted in Justice Belobaba's decision in *ACE INA Insurance v Co-operators General Insurance Company* (2009) CanLII 13625 (ONSC)

Unica's submissions

17. Counsel for Unica submitted that the legislation, the spirit of the "regular use" provision and the case law all support a finding that the Claimant had regular use of the buses he drove for Stock at the time of the accident, and that he was therefore a deemed named insured under the Chubb policy.

18. Counsel noted that Mr. Li was on his way to work when he was struck by the vehicle at 5:38 a.m. He also noted that drivers were required to inspect their buses each day before heading out on their routes, and submitted that this was as much part of a driver's "use" of a vehicle as was driving the route itself. He referenced the evidence of both the Claimant and Ms. Bedard that the drivers were not restricted in terms of when they could start their inspections, and that it was up to them to decide when to arrive at the bus each morning. He noted that while the Zonar records indicate that Mr. Li had not logged into that system before 6:03 a.m., he testified at his EUO that he sometimes arrived at the yard around 5 a.m.

19. Mr. Bailey cited Justice Belobaba's finding in *ACE INA v. Co-operators, supra*, that even if a claimant was a pedestrian when involved in an accident, he or she would be a deemed named insured under their employer's policy if the company's vehicle was accessible or available to them at that time. He emphasized that the phrase "being made available" was equated with "being accessible" to the individual in question.

20. Counsel also cited Arbitrator Cooper's decision in *Intact Insurance v. Old Republic* (June 5, 2016) in which a truck driver involved in an accident while driving a relative's vehicle to get to his workplace was found to have "regular use" of his employer's trucks at the time of the accident,

given that he was permitted to sleep in the truck that he was assigned to drive the night before a delivery. Counsel highlighted the fact that this decision was upheld on appeal on a standard of correctness, and that Goldstein, J. stated that the question of whether a vehicle was available to someone at the relevant time did not require actual use of that vehicle.

21. Counsel for Unica argued that Mr. Li clearly had access to the school buses that he drove well before the time that he left the lot to drive his route, and that I should find that these vehicles were therefore made available to him at the time of the accident. He highlighted the fact that drivers were permitted to decide when to arrive at the yard to begin their pre-trip inspections, and that they might choose to get to work earlier when the weather was poor. A new driver who was not yet familiar with all of the steps required to complete the “circle check” might also choose to arrive early. He stated that the employer could have easily told the drivers when to arrive at the lot each morning, but chose not to do so.

22. Counsel for Unica noted my decision in *TD v Dominion & Intact/Trafalgar* (September 30, 2017), upheld on appeal, (2018) ONSC 2594, in which I determined that a school bus driver who was involved in an accident on a Sunday was not a deemed named insured under her employer’s policy with Dominion, despite the fact that the bus she drove was parked outside of her home on weekends. He submitted that the fact that that driver was not permitted to use the bus on Sundays distinguishes that decision from this case, given that Mr. Li was injured while he was on his way to the employer’s lot, to drive the vehicle that he was permitted to access at that time.

Chubb’s submissions

23. Counsel for Chubb pointed out that Mr. Li had only been working for Stock Transportation for less than three weeks before the accident. He noted that while he drove the same route each day, the evidence indicated that he was assigned to drive five different buses over that period, and would have been required to get the keys from the dispatch office on many occasions. Counsel also noted that Mr. Li’s first pickup was scheduled for 8:06 a.m., and that it took approximately thirty minutes to drive to that location from the employer’s lot.

24. Mr. Blinick referred to the evidence that the drivers were required to log into the Zonar system to perform their pre-trip inspections, and submitted that Mr. Li would have “swiped” his card when he first accessed the bus before beginning his inspection. He pointed out that while the Claimant testified that he occasionally arrived at the yard around 5 a.m. to begin his inspection, the records filed indicate that he had never logged into the system before 6:03 a.m. He argued that this makes it clear that Mr. Li had never accessed any of Stock’s buses at 5:38 a.m., the time of the accident, and I should so find.

25. Counsel pointed out that the morning dispatcher’s shift started at 6:00 a.m., rather than 5:00 a.m. as Mr. Li suggested in his evidence. Drivers had to contact the dispatcher to report that they had completed their inspections, and to obtain clearance to move their bus, before they were permitted to drive the vehicles off the lot. Mr. Blinick contended that as Mr. Li’s principal duty as a school bus driver was to drive his assigned route to pick up the children, the fact that he could not do so before 6 a.m., when the dispatcher came on shift, was a significant fact.

26. Counsel cited the appeal decision in *Continental Casualty Company v Chubb Insurance* (2019) ONSC 3773, reversing Arbitrator Bialkowski’s finding that a business owner enjoyed regular use of the company’s trucks at the time that he was struck by a car as he was jogging near his summer cottage, because as owner of the company, he could access those trucks whenever he wanted to. He noted that Justice Stinson determined found that as the owner had never actually drove the trucks, his regular use of those vehicles should not be imputed, and that only actual use of the vehicles should be considered.

27. Finally, counsel for Chubb noted my finding in *TD v. Dominion & Intact, supra*, that the words “being made available” in section 3(7)f(i) of the *Schedule* require an intention on the part of an employer or company, followed by some action on their part, to make a vehicle available to a claimant. He suggested that applying that principle to the facts here, I should find that Stock had not made the buses available to Mr. Li at 5:38 a.m., both because the Zonar records indicate that he had not accessed the vehicles before 6 a.m., and he was not permitted to move his bus before receiving clearance to do so from the dispatcher, who only arrived at 6:00 a.m.

Reply submissions – Unica

28. In response to Chubb’s argument above, counsel for Unica highlighted the fact that drivers were permitted to access the buses whenever they chose to do so in order to complete their inspections, whether or not the dispatcher had arrived at the yard.

ANALYSIS & FINDINGS:

29. Any analysis involving the application of a statutory or regulatory provision must begin with a clear appreciation of the underlying facts. The relevant facts in this case are –

- The accident occurred at 5:38 a.m., as Mr. Li was on his way to work as a bus driver
- The first pickup on Mr. Li’s bus route was scheduled at 8:06 a.m., and was approximately a 30 minute drive from the lot where the buses were parked
- Before leaving the lot, drivers had to do a “circle check” of the bus, and possibly refuel
- Drivers were encouraged to refuel at the gas pump on the lot, but were also permitted to do so at gas stations on the way to their first pickup
- Drivers had to pick up keys for the bus that they were assigned from the dispatch office, unless they were scheduled to drive the same bus as the prior day (and they kept keys)
- Records filed indicate that Mr. Li began driving on October 19, 2018 and drove each weekday until (and including) November 5, 2018, for a total of twelve days
- Mr. Li was assigned to drive five different buses over those twelve days
- Mr. Li testified at his EUO that he occasionally arrived at the lot around 5 a.m., but the Zonar records reveal that the earliest that he logged into the system to begin his bus inspection was 6:03 a.m., and that he logged in most days between 6:30 and 7 a.m.
- The drivers were required to get “clearance” from the dispatcher to move their buses once the inspection was complete, and the morning dispatcher’s shift began at 6 a.m.

30. The language in section 3(7)f(i) of the *Schedule* must be assessed with the facts above in mind, as well as the principles expressed in the case law. The seminal case on “regular use” is Justice Belobaba’s decision in *ACE v. Co-operators, supra*, which reversed the arbitrator’s finding that an employee of a car rental agency who worked during the week was a deemed named insured under the employer’s policy when he was injured in an accident on a weekend, while he was a

passenger in a friend's vehicle. Justice Belobaba emphasized that the clear language of the provision requires us to focus on whether a vehicle is being made available to a claimant at the time of the accident, regardless of whether the claimant is driving a vehicle belonging to his employer at that time or not.

31. Justice Belobaba included three examples to illustrate the application of the section. In the first one, an employee driving a company vehicle during work hours stops to buy a coffee, and is struck by another vehicle as he crosses the street. Assuming his use of the employer's vehicle was "regular", Justice Belobaba stated that the employer's policy would be in priority, as a vehicle was being made available for his use at the time of the accident. The same would be true if a sales representative with permission to drive a company car for personal use over the weekend, is involved in an accident in a friend's car while on a social outing on a Saturday night, given that the company vehicle was still being made available for his use at that time.

32. Justice Belobaba went on to state that there is no need for a specific vehicle to be made available to an employee. He gave the example of someone who started his shift at a car rental agency, and was struck by a vehicle as he crossed the street to buy a coffee before being assigned to drive a particular vehicle. Again, the employer's policy would be in priority, given that the employee had started his shift. He contrasted these examples with the circumstances in the case before him, where the employee was not at work on Saturday night at the time of the accident.

33. The clear message that emerges from these examples is that if an employee is involved in an accident while in the midst of his or her work day, or has explicitly been given use of an employer's vehicle during off-work hours, they will be deemed to be a named insured under the employer's policy.

34. Both parties in this case cited the decision in *Intact Insurance v Old Republic, supra*. Arbitrator Cooper was faced with the question of whether a truck driver who was involved in an accident while driving his relative's car to the employer's yard to pick up the truck he was assigned to drive later that day, was a deemed named insured under the employer's policy. The evidence was clear that the driver in that case was permitted to pick up the keys and sleep in the truck the

night before a delivery, if he chose to do so, Arbitrator Cooper determined that given that fact, the employer had made a vehicle available for his regular use at the time of the accident.

35. That decision was appealed. Justice Goldstein determined that the fact that the claimant had permission to sleep in the truck the night before the delivery brought the circumstances “within the spirit of the examples” cited by Justice Belobaba in *ACE INA v. Co-operators, supra*, and justified the finding that he was a deemed named insured under the employer’s policy.

36. Mr. Li was also on his way to work at the time of his accident. However, unlike the claimant in the *Intact v Old Republic* case, he was not permitted to spend the night before his shift in the school bus that he would be driving the next day. In my view, it would be stretching the meaning of the provision unduly to say that anyone who drives for a living and is involved in an accident while they are on their way to pick up the vehicle that they will be driving later that day fits within the definition. The words of section 3(7)f(i) are clear: they do not provide that an employee will be a deemed named insured under a company’s policy if the company will be making a vehicle available for their regular use at some point on the day of the accident. Rather, they state that the vehicle must be made available *at the time of the accident*, and those words must guide the analysis.

37. As noted above, I have addressed the question of whether a school bus driver was a deemed named insured under her employer’s policy in *TD v. Dominion & Intact, supra*, when she was involved in an incident that did not involve the school bus. While the facts in that case differ than those here, as that incident took place on a Sunday, when she was not permitted to drive the bus that was parked outside her home, the same approach is called for.

38. Counsel in the TD case argued that as the driver had the keys for the bus in her possession at the time of the accident, she clearly had access to the bus and should be found to be a deemed named insured under the Dominion policy. I rejected that argument, and noted that the test requires that a vehicle must be “*made available*” for an individual’s use at the time of the accident. I interpreted that to mean that an employer, or whatever entity is providing the vehicle, must take active steps to make the vehicle available to that person.

39. The evidence in the TD case indicated that the bus company did not permit their drivers – whether or not they had the keys to the buses or parked them outside of their homes – to drive the buses on Sunday. I determined that given this rule, it could not be said that the bus company was making the vehicle available at the time of the accident. I did not accept the argument that mere potential access to the vehicle was enough to ground a finding that the driver was a deemed named insured under the company’s policy. The decision was upheld on appeal.

40. In this case, counsel for Unica argues that the fact that Stock permitted its drivers to decide when they should arrive on the lot to begin their daily pre-trip inspections justifies a finding that a vehicle was available for Mr. Li’s regular use at the time of the accident. He noted Mr. Li’s evidence that he had arrived on the lot as early as 5 a.m. on some days to begin his inspection, and submitted that a vehicle was therefore available to him at 5:38 a.m., the time of the accident.

41. I do not agree. I must heed Justice Stinson’s direction in *Continental Casualty v Chubb, supra*, that use of a vehicle should not be imputed, and that it is actual, rather than theoretical, use that must be considered. Mr. Li’s evidence that he arrived at the lot at 5 a.m. on some days is not borne out by a review of the Zonar records filed, that reveal that his earliest “log in time” is 6:03 a.m., and that he first “swiped in” most mornings between 6:30 and 7:00 a.m. While it is possible that Mr. Li arrived on the lot before he logged into the Zonar system, I have no evidence to suggest, and would have difficulty accepting that, he would have arrived at the bus he was assigned to drive almost a full hour before his first “swipe” was recorded.

42. Given that his first pickup was scheduled for 8:06 a.m., and it was a thirty-minute drive from the lot where the buses were parked, Mr. Li would have to leave the lot around 7:30 a.m. Even accounting for the pre-trip inspection, refueling the bus, and leaving a buffer for delays due to poor weather, it is difficult to imagine that these steps would require almost two additional hours of Mr. Li’s time.

43. One of the main areas of dispute between the parties was whether the dispatcher’s start time of 6 a.m. was relevant to whether Mr. Li had a vehicle made available to him at 5:38 a.m. Counsel for Chubb noted that drivers could not begin their routes until they contacted the dispatcher and were given clearance to proceed. Counsel for Unica acknowledged this, but argued

that there was nothing to stop a driver from starting the “circle check” of the bus before the dispatcher began her shift.

44. There is another factor to consider. I note that Mr. Li drove for only twelve days before the accident on November 6th. Ms. Bedard advised that the records indicated that he had been assigned to drive five different buses over that period. This means that almost half of the mornings he would have arrived on the lot, Mr. Li was required to get the keys from the dispatch office in order to access the bus that he was assigned to drive. There is no evidence to suggest that this took place before 6 a.m., and is unlikely to have occurred before 5:38 a.m.

45. As I stated in *TD v Dominion & Intact, supra*, my view is that the phrase “being made available” in section 3(7)f(i) of the Schedule requires the entity making the vehicle available to the individual in question to be taking active steps to do so, at the time of the accident. Mere theoretical access is not enough. On the evidence before me, I find that Stock Transportation did not make a vehicle available for Mr. Li’s regular use at the time of his accident on November 6, 2018, and accordingly, he is not a deemed named insured under their policy with Chubb.

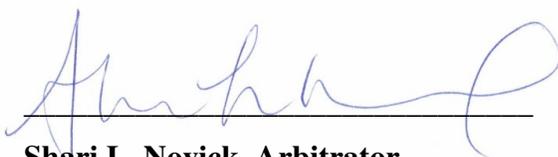
ORDER:

Unica’s application for arbitration is hereby dismissed.

COSTS:

Given the result, Chubb is entitled to its legal costs of this proceedings on a partial indemnity basis. If the parties cannot agree on the quantum of costs payable, I invite them to contact me and a further teleconference will be arranged to discuss this issue.

DATED at TORONTO, ONTARIO this ___18th___ DAY OF DECEMBER, 2020

A handwritten signature in blue ink, appearing to read 'Shari L. Novick', is written over a horizontal line.

Shari L. Novick, Arbitrator