

IN THE MATTER OF SECTION 268 OF THE *INSURANCE ACT*,
R.S.O. 1990, c.1.8,

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

AXA ASSURANCE COMPANY

Applicant

and

ING INSURANCE COMPANY OF CANADA

Respondent

AWARD

Introduction

The parties to this arbitration are insurance companies carrying on business as automobile insurers in the Province of Ontario. They have submitted this dispute to me pursuant to section 268 of the *Insurance Act* and Ontario Regulation 283/95. These provisions of the *Insurance Act* address the obligation of insurers to pay Statutory Accident Benefits to motorists who are injured as a result of car accidents.

In these proceedings Axa Assurance has been represented by Mr. John McNeil and Mr. Peter Trueman represented ING Insurance Company of Canada.

Arbitration Agreement

Exhibit 1 to this proceeding is the Arbitration Agreement entered into by the parties. Pursuant to that agreement the parties have asked me to determine the entitlement, if any, of Axa to be indemnified by ING in respect of Statutory Accident Benefits paid to Michael Yelin arising out of a motor vehicle accident which occurred May 24, 2003. The Arbitration Agreement also contemplates findings with respect to the amount of indemnity but at the hearing in this matter the parties asked me to deliver my decision with respect to the indemnity and costs.

Factual Background

An agreed Statement of Facts was marked as Exhibit 2 to these proceedings. Those agreed facts disclose that Michael Yelin was injured in a motor vehicle accident which took place May 24, 2003. Michael Yelin had a business relationship as a driver for C&G

Freight Systems. The applicant, Axa Assurance Inc., insured C&G Freight Systems. Coverage was provided in accordance with Ontario Auto Policy, number 1, the standard policy in force in the Province of Ontario.

ING Insurance Company provided insurance to Michael Yelin with respect to two personally owned automobiles.

The transactions involving Yelin and C&G Freight are complex and are the subject of considerable evidence in this record. Essentially Yelin acquired a 1994 Volvo tractor vehicle. In May of 2003 Yelin and C&G Freight Systems entered into a sub-contractor agreement, which is described as "the standard contract that C&G Freight Systems would have their owner-operators execute". C&G Freight Systems arranged for the 1994 Volvo Tractor to be added to its insurance policy with Axa. If that transaction has the effect of making Yelin a "named insured" under the Axa policy, then Axa is the insurer having the obligation to pay the Statutory Accident Benefits.

A separate issue, of equal importance, requires consideration of whether or not C&G Freight made the Volvo vehicle available for Yelin's regular use. If so, the Statutory Accident Benefits Regulation would deem Yelin to be a named insured and would require Axa to accept responsibility for payment of the Statutory Accident Benefits.

The Record of these Proceedings

In addition to the Arbitration Agreement that was marked as Exhibit 1 to these proceedings, the parties entered into an Agreed Statement of Fact that was marked as Exhibit 2.

A document brief submitted by the applicant was marked as Exhibit 3 to the proceeding and a further document brief was marked as Exhibit 4 to the proceedings.

The Statutory and Regulation Background

Persons injured in automobile accidents in the Province of Ontario are entitled to Statutory Accident Benefits. To make those benefits broadly available policy makers have seen fit to define the categories of insured persons entitled to such benefits very broadly. Accordingly, under any given standard automobile policy, there are many categories of individuals who might be entitled to claim benefits from an insurer. This would include a named insured, a dependent of a named insured, an occupant of an insured vehicle and a person struck by an insured vehicle. Necessarily, when a person is injured in a car accident in Ontario, they may have standing to claim benefits from many different insurers.

Section 268 of the *Insurance Act* has anticipated this and has set out priority rules for determining which insurer has obligations to pay the Statutory Accident Benefits.

The key provisions of section 268 applicable to these issues are:

268. (1) Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the *Statutory Accident Benefits Schedule* is made or amended, shall be deemed to provide for the statutory accident benefits set out in the *Schedule* and any amendments to the *Schedule*, subject to the terms, conditions, provisions, exclusions and limits set out in that *Schedule*.

[Inapplicable subsections omitted]

Liability to pay

(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.
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.

Liability

(3) An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits. R.S.O. 1990, c. I.8, s. 268 (3); 1993, c. 10, s. 1.

Choice of insurer

(4) If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits

Same

(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.

Same

(5.1) Subject to subsection (5.2), if there is more than one insurer against which a person may claim benefits under subsection (5), the person, in his or her discretion, may decide the insurer from which he or she will claim the benefits

Same

(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.

[Inapplicable subsections omitted]

In a small number of cases insurers are unable to agree about the obligation to pay Statutory Accident Benefits. By Ontario Regulation 283/95, the process for dealing with such disputes has been prescribed, requiring the parties to submit these disputes to arbitration pursuant to the *Arbitrations Act*, as the parties have done in this instance.

The parties do not dispute the legal framework. The effect of the legislative provisions is that Axa must pay the benefits if Michael Yelin was a "named insured" under the Axa policy at the time of this accident. Additionally, and alternatively, Axa must pay the benefits if C&G Freight made its vehicle, insured by Axa, available for the regular use of Michael Yelin.

The latter issue arises because of the following "deeming" provision in the Statutory Accident Benefits regulation:

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.

The parties disagree as to the characterization of the circumstances here, with respect to both of these issues.

The "Named Insured" Issue

It is clear that under automobile insurance policies, and many other policies, a person can be entitled to benefits and be an "insured" without being the "named insured". Insurance contracts need to distinguish persons who are entitled to benefits from those who are in a contracting status. One way of doing this is to designate certain individuals to be the "named insureds" and give those individuals different status than would be available to other beneficiaries. That is what happens in automobile insurance in the Province of Ontario.

If a person is a named insured they are entitled to certain benefits, as is their spouse and their dependants. There is "portability" for Statutory Accident Benefits coverage, which follows the named insured, spouse, and dependant regardless of the vehicle involved in the accident.

In the case at hand we are asked to consider whether or not Michael Yelin is a named insured under the Axa policy. There is no definition under the Ontario Standard Policy of the term "named insured". There is no statutory provision that defines the use of the term "named insured". The "named insured" is determined entirely by looking at the contract documents.

In this instance the relevant contract document is an endorsement amending the Axa policy. This document is reproduced at Tab 2 of Exhibit 4. As evidenced by the Agreed Statement of Facts, this is an endorsement which was procured by C&G at the

commencement of its relationship with Yelin. It was evidently obtained for the purpose of providing the mandatory insurance coverage that would be required to operate Yelin's vehicle. The key part of this form is a box in the upper left of the form, excerpted below. This is the space on the form where there is opportunity for the documentation to identify a named insured.

NAME OF INSURER AXA Insurance (Canada)		POLICY NO. 7508273	ADD. PREMIUM 4325 \$	RETURN PREMIUM
BROKER WILLIAM E. BURROWS INC.	AGENCY NO. 438000	Effective date : 2003-05-22 To : 2004-02-10		At 12:01 A.M. standard time At 12:01 A.M. standard time
Name of insured : C & G Freight Systems Inc. 86 Guided Court Units G,H,I Toronto, Ontario M9V5H1 Registered Owner : Michael Yelin 50 Inverlochy Blvd. Apt 305 Thornhill, Ontario L3T 4T6		N/A CERTIFIED COPY BY: <i>[Signature]</i> DATE: <i>3/9/04</i> <i>MP 11.9.03</i>		
OWNER-OPERATOR ENDORSEMENT				
It is agreed that the above mentioned registered owner is added as additional insured with respect to the vehicle described below.				
Addition of vehicle				
Automobile Insurance Policy - Ontario OAP 1 (Owner's form) - Coverage				

In the space provided there are two "headings". Within the box the form purports to identify "name of insured" and indicates C&G Freight Systems Inc. Also, in the same box, there is a heading "registered owner:" followed by Michael Yelin's name and address.

Further in the endorsement we find the following:

"It is agreed that the above mentioned registered owner is added as additional insured with respect to the vehicle described below."

Based on this evidence I am asked to conclude that Michael Yelin is a "named insured" under the Axa policy.

In my view, the evidence does not establish this status. The Axa policy goes no further than to identify Yelin as the registered owner and to grant him status as a "additional insured". Being an "additional insured" is not the same as being the "named insured" and I find no basis to infer any intention to grant Michael Yelin the status that would be accorded to a "named insured" in this transaction.

In my view neither the documentation nor the intention of the parties supports an argument that Michael Yelin should be considered a "named insured" under the Axa policy and I find that he is not a "named insured" under the Axa policy.

Whether C&G Freight Systems Inc. made the 1994 Volvo available to Michael Yelin for his regular use

Pursuant to the Statutory Accident Benefits Regulation, if C&G Freight Systems made a vehicle available to Michael Yelin for his regular use, then the regulation would "deem" Michael Yelin to be a named insured and that would have the effect of making Axa the insurer liable for the Statutory Accident Benefits.

This issue necessarily involves a consideration of the relationship between C&G and Yelin and that relationship is defined by a contract document found at Tab 1 of Exhibit 4. This document purports to set up a subcontracting relationship between Michael Yelin and C&G Freight Systems Inc. This contract clearly contemplates that Yelin was coming to this arrangement with his vehicle and providing his vehicle for the purpose of transporting goods on behalf of C&G. Yelin was responsible for the selection and supervision of all drivers of the vehicle.

However, clause 3(a) does require Yelin to give the exclusive use of the vehicle to C&G. In my view, the essence of this agreement is that Yelin is to provide the vehicle and drivers, and C&G is to provide loads of freight, and insurance, for Yelin and his vehicle.

In this circumstance I am asked to determine whether or not this arrangement can be characterized as C&G Freight making Yelin's vehicle available to Yelin for Yelin's regular use. In my view, that is a characterization that the facts cannot reasonably support. Yelin comes to the transaction with the vehicle and he gives to C&G rights with respect to the vehicle. While Yelin may have contractual obligations to C&G that limit the use that might be made of the vehicle, I do not think that it is an appropriate characterization to say that C&G has made this vehicle available for Yelin's use at any time. I agree that it is the contrary situation that prevails. Yelin made the vehicle available for C&G.

In addition, I do not find the facts of this case sufficiently different from the facts in the *Axa v. Markel* decision so as to justify a different conclusion. *Axa v. Markel* was a decision of Arbitrator J.T. Fidler upheld on appeal by Mr. Justice Day. It involved consideration of similar transactions between a transport company and an individual who owned a truck.

As argued by counsel for ING, there are distinguishing features between the two cases in the particulars of the contractual arrangements. However the essence of the transactions remains the same. The differing details of the transactions in the *Axa v. Markel* case are not material to application of the legal principles. I concur with the outcome reached by Arbitrator Fidler and Justice Day.

Conclusion

In accordance with the priority rules set out in section 268 of the *Insurance Act*, ING Insurance Company, as the insurer of a policy where Michael Yelin is a "named insured", has the highest priority of coverage to respond to his claims for accident benefits, unless

Yelin is a named insured in respect of the policy in force on the vehicle he was operating at the time of the accident. As I have concluded that Michael Yelin is not a named insured under the Axa policy and not deemed to be a named insured under the Axa policy, the ING policy is the higher-ranking policy and has the obligation to deal with the accident benefits in this case.

In my view costs should follow the event and therefore ING has the burden of costs in these proceedings.

If the parties are unable to resolve the issues of costs I may be contacted within 30 days for the purpose of addressing those issues.

Dated at Toronto this 25th day of May, 2006

A handwritten signature in black ink, appearing to read "Lee Samis". The signature is written in a cursive, flowing style.

Lee Samis

