

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

THE CO-OPERATORS GENERAL INSURANCE COMPANY

Applicant

- and -

CIGNA INSURANCE COMPANY OF CANADA

Respondent

AWARD

This matter was put before me pursuant to the Arbitrations Act, 1991, to arbitrate a dispute between Co-Operators General Insurance Company and CIGNA Insurance Company of Canada.

This dispute involves a determination of which of the two insurers is obliged to pay auto accident benefits pursuant to the *Statutory Accident Benefits Schedule* under the Insurance Act to Mr. Shane McQuoid.

The parties agreed to submit the issue to me pursuant to the Arbitrations Act and have reserved the right to appeal without leave.

Factual Background

Shane McQuoid was injured in a motor vehicle accident which occurred on July 20, 1995. At the time of the accident, McQuoid was operating a vehicle owned by Bell Canada and insured by CIGNA Insurance Company under policy number CAC384067. At the time of the accident, McQuoid was named insured under a policy of insurance issued by Co-Operators being policy number Q-7000-645-01. The vehicle which was the subject matter of the Co-Operator's policy was not involved in the accident.

Mr. McQuoid's name does not appear on the CIGNA policy in any way.

It appears clear that Mr. McQuoid would be an insured person with respect to both policies of insurance. He is a named insured under the Co-Operator's policy. He is a person involved in an accident with the described vehicle on the CIGNA policy. He may have other status as well.

Since there is more than one insurer which is obliged to treat McQuoid as an insured person it is necessary to have reference to Part VI of the Insurance Act to sort out the priorities between the two insurers. Section 268 of the Insurance Act addresses these issues. Most importantly, section 268 (1) provides as follows:

"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*."

Section 121 (1), paragraph 9 provides that the Lieutenant Governor in Council may make regulations:

"establishing benefits for the purposes of Part VI that must be provided under contracts evidenced by motor vehicle liability policies and establishing terms, conditions, provisions, exclusions and limits relating to such benefits."

The *Statutory Accident Benefits Schedule* with respect to accidents on or after January 1st, 1994 has been promulgated as Ontario Regulation 776/93 and was subsequently amended by Ontario Regulation 781/94.

Section 268, in addition to setting out that motor vehicle liability insurance contracts must include the *Statutory Accident Benefits Schedule*, sets out the priority regime in order to distinguish between the obligation of insurers when more than one insurer is obliged to treat an injured victim as an insured person. Section 268 (5) provides as follows:

"Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is a 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."

Further the same section, in subsection (5.2), provides as follows:

"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."

In the circumstances of this accident, the priority rules would require Mr. McQuoid's claim to be advanced against Co-Operators unless it can be said that section 268 (5.2) applies to Mr. McQuoid thereby requiring his benefits to be paid by CIGNA. Section 268 (5.2) only requires CIGNA to pay these benefits if McQuoid is to be considered as a "named insured" in respect of the automobile which he occupied.

The automobile occupied was a vehicle owned by McQuoid's employer. The insurance documentation does not identify Mr. McQuoid by name in any respect.

Co-Operators concedes that in the ordinary sense of the words "named insured", McQuoid would not be considered a "named insured" under the CIGNA policy and Co-Operators would be obliged to pay the statutory accident benefits to which McQuoid is entitled.

However, the *Statutory Accident Benefits Schedule* offers the following provision in section 91 (4):

“Subject to subsection (7) if an insured automobile is made available for the regular use of an individual who is living and ordinarily present in Ontario by a corporation, unincorporated association, partnership, sole proprietorship or other entity, or if an insured automobile is rented for a period of more than 30 days to an individual who is living and ordinarily present in Ontario, the individual shall be deemed to be the named insured under the policy insuring the automobile for the purpose of payment of the statutory accident benefits set out in this regulation.”

This provision only applies to accidents which occur on or after January 1st, 1995.

It is conceded by CIGNA that the quoted provision, if valid, has the effect of making McQuoid a “named insured” under the CIGNA policy and, consequently, requiring CIGNA to pay the accident benefits pursuant to section 268 (5.2). Section 91 (4) also has the effect of defining entitlement for a person deemed to be a named insured and that person’s spouse and dependants as they all become “insured persons” as defined in section 1 of the regulation.

CIGNA challenges section 91 (4) on the basis that there is no statutory authority for a regulation such as contained in section 91 (4) to be enacted. Alternatively, if there is authority for enactment of such a regulation, the regulation contradicts or is inconsistent with the Insurance Act and therefore can have no effect.

CIGNA argues that the fundamental characteristic of the no fault insurance plan mandated by the Insurance Act is that insured persons acquire a personal and portable coverage which follows them as individuals and not their automobiles. The change attempted by section 91 (4) of the Regulation is said to offend this principle. Furthermore, it is argued that section 91 (4) defines “named insured” in a way which is inconsistent with the use of the term “named insured” in section 268.

Is There Statutory Authority to Allow s. 91(4) of the Regulation?

A number of authorities were referred to by the parties. Two are particularly germane. In an arbitration decision given by Arbitrator The Honourable Patrick Galligan, Q.C. on June 9th, 1997 (AXA Insurance Canada v. Old Republic Insurance Company), comments were made suggesting that section 91 (4) is not effective in law. Arbitrator Galligan dealt with a 1995 accident.

Arbitrator Galligan held as follows:

“In my view the sole question in the case is whether the Lieutenant Governor in Council, in the exercise of its power to issue regulations, had the legislative power to deem someone to be a named insured within the meaning of that term as used in Section 268 (5) of the *Insurance Act*.”

As I noted above, in the absence of Tony Hayward being a named insured, the statutory scheme would fix liability for the SABS on the Axa. By deeming him a named insured in the Regulation would change

the result envisaged by the statutory scheme and fixes liability upon the Old Republic.

The terms 'named insured' and 'insured' have long and specific meanings in the insurance industry. At their simplest the 'named insured' is the person named in the contract of insurance as the insured. The 'insured' means a person who, whether by statute or by contract, has some or all of the rights of the 'named insured'. This distinction is recognized in the definition of 'insured' contained in section 224 (1) of the *Insurance Act*.

The statutory scheme contained in section 268, indicates that certain circumstances, the Legislature intended different consequences to flow from situations involving named insureds and from situations involving insureds. I am driven to conclude that the words were intended to have their ordinary meanings as used in the insurance industry. Section 91 (4) of the Regulation purports to redefine the expression 'named insured' by deeming that in certain circumstances an unnamed insured, or an insured, shall be a named insured. In doing so, in my opinion, it has purported to define an expression used in a statute. It is trite that a statute cannot be amended by regulation. In my view the attempt to define the statutory term, 'named insured' by regulation is not effective in law."

Arbitrator Galligan made reference to the decision of Roberts J. in Axa Home Insurance Company v. Western Assurance [1994] O.J. No. 281 wherein Justice Roberts concluded that an attempt by an Ontario Insurance Commission arbitrator to extend the definition of named insured was incorrect in law. Arbitrator Galligan thought it implicit that Justice Roberts was saying that the Lieutenant Governor in Council had exceeded its legislative jurisdiction. I see no language in the decision of Justice Roberts that points to that conclusion.

Arbitrator Galligan has not made reference to the very extensive regulation making power which is found in the *Insurance Act*. Section 268 (1) of the Act [quoted above] deems contracts of the automobile insurance to contain the statutory accident benefits "subject to the terms, conditions, provisions, exclusions and limits set out in that *Schedule*." The *Schedule* is made or amended by regulation pursuant to section 121 of the *Insurance Act*.

In my view, the Legislature has specifically delegated to regulation making authorities the "terms, conditions, provisions, exclusions and limits" related to statutory accident benefits. A provision identifying parties entitled to the benefit of coverage such as "named insured" is an important "term" related to statutory accident benefits. Section 91 (4) of the Regulation purports to expand coverage by identifying a class of person who will be deemed to be a "named insured". In my view, a regulation to this effect is authorized by section 268 (1) and section 121 (9) of the Act.

In the decision of the Ontario Court of Appeal in Warwick v. Gore Mutual Insurance Company (1997) 32 O.R. (3d) 76, the court considered similar issues when interpreting the definition of "insured person".

Justice Laskin, delivering the judgment of the court, held as follows:

"Even if I accepted Gore's submission that Ms. Warwick is insured by State Farm using the definition in s. 224(1) of the Act, I reject its further submission that the arguably broader statutory definition prevails over the definitions in s. 2 of the Schedule. In some circumstances a definition in the statute will prevail over

a definition in a regulation. But that is not the case here because the legislature has expressly said otherwise. By making contractual entitlement to no-fault benefits 'subject to the terms, conditions, provisions, exclusions and limits' in the Schedule, the legislature, in s. 268(1) of the Act, intended that the entitlement to these benefits would be determined by the Regulation. Section 121(1), para. 9 of the Act expressly states that the Lieutenant Governor in Council may make regulations 'establishing benefits for the purposes of Part VI that must be provided under contracts evidenced by motor vehicle liability policies and establishing terms, conditions, provisions, exclusions and limits related to such benefits'. In short, the statute authorized the arguably narrow definition of 'insured person' in the Schedule.

Just as the statute authorizes a narrower definition of "insured person" to apply to Ms Warwick, I conclude that the statute authorizes a broader definition of "named insured" to apply to Mr. McQuoid.

Is Section 91 (4) of the Regulation Inconsistent with the Insurance Act?

Having concluded that there is sufficient legislative authority to permit the Regulation which is found in section 91 (4), I address the argument of CIGNA that section 91 (4) contradicts or is inconsistent with the Insurance Act.

Although the introduction of the accident benefits scheme originally promulgated in June of 1990 did change "no fault benefits" so that insured persons were generally dealing with their own insurers, I do not think that the introduction of "personal, portable, coverage" is such a fundamental characteristic of the scheme so as to require all interpretation of the statute and regulations to be governed accordingly.

However, it is troubling that section 268 (5.2) provides that certain obligations will arise when an individual is a "named insured" but section 91 (4) of the Regulation deems someone to be a "named insured" who would not be considered as such in any ordinary sense of the words.

Section 268 (5.2) of the Act identifies a class of person who must always first claim their benefits from their own insurer. The named insured and family are put in this class and this seems appropriate as it is the named insured who is the principal contracting individual with the insurer at point of sale. Section 268 (5.2) brings together the parties at the time of a claim. Accident victims are less likely to be dealing with the insurer of some stranger, but will be dealing with an insurer selected by them at the inception of coverage.

The Regulation addresses the less common situation where an individual is provided with a company vehicle for the person's regular use. In the company car situations, the "named insured" will not be an individual. The registered owner of the vehicle will be the business or organization. In some cases the regular user of the car may nonetheless be the person who selects the insurer and pays insurance premiums. As the "named insured" would not be an individual section 268 (5.2) of the Insurance Act would be meaningless. The Regulation addresses this concern. Section 91 (4) of the Regulation provides that the regular user is to be accorded the same treatment as a "named insured" is accorded when the vehicle is owned by an individual.

It seems appropriate for the definition of "named insured" to be expanded in those circumstances where a vehicle is owned by a corporate entity or organization. In such cases it is appropriate to identify regular users of such vehicles to be treated in a similar fashion to persons who are registered owners and become "named insureds" as a result of that status.

In my view, section 91 (4) of the Regulation is not inconsistent with the Act. Admittedly, the effect of 91 (4) is to change significantly the position of CIGNA in this case. I do not think that this forces one to conclude that the Regulation is unenforceable.


Unusual though it may be, the definition found in section 91 (4) addresses an essential term of the contract of insurance: the identity of the parties. Section 268 (1) expressly states that is the *Statutory Accident Benefits Schedule* which is the governing enactment with respect to such terms and provisions. The legislation has delegated to the regulation making authority the power to define these terms of the contract.

Therefore, to the extent that the Regulation endeavours to treat regular users of company cars similar to the treatment of individuals who own their own cars, this is consistent with the legislation.

Conclusion

The legislation delegates to the regulation making authority the jurisdiction to establish the terms of the contract of insurance. The Regulation contained in section 91 (4) is authorized by the legislation and is not inconsistent with the enabling legislation.

DATED at Toronto this 14th day of August, 1997.



LEE SAMIS

Attachment:
Agreed Statement of Facts