

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990 c I.8
and Regulation 283/95

AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991,
s. 17;

AND IN THE MATTER OF an Arbitration

BETWEEN:

PERSONAL INSURANCE COMPANY OF CANADA LTD.

Applicant

and

SECURITY NATIONAL INSURANCE COMPANY

Respondent

ARBITRATION AWARD

The parties, two automobile insurers, have agreed to submit an issue to me for decision pursuant to the *Arbitrations Act*, and pursuant to Regulation 283/95 made under the *Insurance Act of Ontario*. This Arbitration is conducted in accordance with the written Arbitration Agreement of the parties dated May 25, 1998 and duly executed. The parties have submitted an agreed Statement of Facts and no viva voce evidence was offered. In accordance with the Arbitration Agreement, the parties reserve the right to appeal a decision without leave of the Court.

The parties to this arbitration are both insurers carrying on business as automobile insurance

carriers in the Province of Ontario. Personal Insurance Company of Canada ("Personal") provided insurance coverage under a standard automobile policy to Michelle Baker. Michelle Baker was the named insured under this policy. This policy applied with respect to a 1993 Honda automobile.

Security National provided insurance coverage under standard automobile policy to Tom Baker. This policy applied with respect to a 1994 Eagle Talon automobile and Tom Baker was the named insured under the Security National policy. Michelle and Tom Baker were married to each other and were spouses. They were married on November 4, 1994. They were spouses of one another as defined in the *Insurance Act* and pursuant to the Statutory Accident Benefit Schedule as of December 23, 1994 when the accident which gives rise to this arbitration occurred. Michelle Baker was a passenger in Tom Baker's motor vehicle insured with Security National when it was involved in a collision on Highway 16 in the Province of Ontario. Michelle Baker suffered significant injuries. The parties have submitted three issues for determination:

1. Which insurer has priority to respond to the accident benefit claims of Michelle Baker?
2. If the answer to question No. 1 is Security National, what is the amount required to be re-paid by Security National to the Personal?
3. The amount of interest payable and rate, if any.

The arbitration for this matter was originally scheduled to take place on May 29, 1998. Shortly before the scheduled arbitration hearing a significant volume of case materials and a Factum was delivered by one of the parties. I agreed to adjourn the hearing to June 3, 1998 to allow an appropriate response to the written materials to be prepared. On June 3, 1998, the parties appeared before me and made oral submissions. No viva voce evidence was offered.

The parties agreed that I am to make a decision on the first issue submitted in the Arbitration Agreement and that I am not functus upon giving that decision, for the purpose of dealing with issues two and three.

The priority issue

Michelle Baker was injured as a result of the use or operation of the an automobile. She has the status of being a "insured person" under policies issued by both insurers. She is the named insured under one policy (the Personal policy). She is the spouse of the named insured under the Security National policy. She is the occupant of a vehicle insured by Security National. In accordance with the definition of "insured person" applicable Michelle Baker would be regarded as an insured person under both coverages. The appropriate coverage can be found in the provisions of Ontario Regulations 776/93 which provides for statutory accident benefits with respect to accidents which occur on or after January 1, 1994.

In view of the potential application of both policies of insurance to the claims of Michelle Baker, it is necessary to determine which policy has the priority obligation to respond.

Legislative framework with respect to priority issues

Section 268 of the *Insurance Act* deals with statutory accident benefits and addresses priority issues. Subsection 2 of that section provides as follows:

- “(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.”

As can be seen, Michelle Baker appears to have access to two policies described in Section 268(2)1.i. She is an insured with respect to both the Personal policy and the Security National policy. She is a named insured under the Personal policy. She is the spouse of the named insured under the Security National policy and as such is be considered an insured person in accordance with the Regulation. Thus, I do not find that Section 268(2) of the *Insurance Act* effectively makes any distinction between these two insurers for the purpose of determining the priority of coverage. In addition, subsequent subsections of Section 268 make more specific provision with respect to these facts which are determinative of the priority issue.

Section 268(4) provides that a person who has access to more than one insurer in accordance with Section 268(2)1.i., then that person may decide the insurer from which he or she will claim the benefits.

More importantly, Section 268(5) provides as follows:

“(5) Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle 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.”

Furthermore, Section 268(5.2) further clarifies priority in a multiple coverage situation by providing as follows:

“(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.”

Personal takes the position that Michelle Baker is obliged, by the operation of the various provisions of Section 268 of the *Insurance Act*, to claim benefits from Security National. Security National argues that the intention of the legislation, as interpreted by various decisions, is to require individuals to claim benefits from the policies where they are a named insured. Michelle Baker is a named insured under the Personal policy and is not a named insured under the Security National policy.

Section 268(5) requires a named insured to claim statutory accident benefits from a policy where they are so named. The same subsection requires the spouse or dependant of a named

insured to claim benefits from the policy issued to that named insured. Security National argues that the second branch of subsection 268(5), referring to the spouse or dependant, only applies when the injured individual is not a named insured under some policy of insurance. I do not agree with this interpretation of the provision. Michelle Baker is the named insured under the Personal policy and she is the spouse of the named insured under the Security National policy. Therefore, pursuant to subsection 268(5) there is more than one insurer against which Michelle Baker is obliged to claim her statutory accident benefits.

In support of its argument, Security National has made reference to a Bulletin issued by the Ontario Insurance Commission describing these various statutory provisions. I do not find the comments contained in Ontario Insurance Commission Bulletin No. 3/94 to be helpful. The Bulletin appears to paraphrase the provisions of Section 268 and, in my view, adds nothing to the interpretation of those provisions. In any event, I note that the "Bulletin" is neither a "rule" nor a "guideline" under the *Insurance Act*. The *Insurance Act* does contemplate that rules may be issued which must be applied in interpretation of accident benefits issues. The legislation also contemplates that guidelines may be issued which must be taking into account in these kinds of disputes. The Bulletin is not presented either as a rule or a guideline and therefore has no statutory impact on the interpretation of the provisions. As a document the Bulletin cannot be regarded as anything more than an "administrative interpretation". If it clearly addressed the issue that is put before me, it would be a factor to be taken into account. However, the Bulletin does not add any clarification to the issue that is submitted in this arbitration and is of limited usefulness.

The parties have also put before me a further Bulletin from the Ontario Insurance Commission

No. A-5/95. This Bulletin also addresses priority of payment issues with respect to statutory accident benefits. For informational purposes the Bulletin has annexed several charts prepared by the Insurance Bureau of Canada to differentiate between the different priorities when an individual is involved in an accident.

Chart 1 is annexed to these reasons. In the first column of the chart the priority level is indicated. In the middle two columns, there is a list of the categories of the insured persons. The list differs for accidents which occur in 1994 as opposed to accidents which occur in 1995. In the fourth and final column there is a comment about the rule to apply when there are multiple insurers at the same response level under the legislation. Security National argues that the list of categories in the middle columns is a prioritization. I do not agree. The authors of the chart have clearly indicated that the priority level is set out in the first column of the chart. The individual listings in the middle columns of the chart identify the different categories of insured persons but do not purport to be a ranking. The fourth column which addresses multiple insurers at the same level contemplates that the various categories of insured person are at the same level. Note in particular that, at the highest level, the chart addresses the categories including named insured and the spouse or dependants of named insureds. In the fourth column the chart provides a rule to be applied when there is more than one insurer at the same level:

“Choice of insured [s.268 (5.1)] unless an occupant of the vehicle in which s/he is the named insured, person having regular use, person renting, spouse or dependant [s.268 (5.2)].”

Section 268 (5.2) of the *Insurance Act* addresses the case before me. Under subsection 268

(5) there is more than one insurer against which Ms. Baker might claim benefits. At the time of the accident she was the occupant of an automobile insured by Security National. At the time of the accident she was the spouse of the named insured under the Security National policy. Pursuant to subsection 268(5.2) of the *Insurance Act* she is required to claim statutory accident benefits against Security National.

The parties have referred me to numerous cases addressing priority issues under the various Statutory Accident Benefits schemes which have been in force in Ontario since 1990. Of the numerous cases referenced, only the case of AXA Insurance v. Old Republic Insurance Company [1998] O.J. No. 918, a decision of Justice Lax March 6, 1998, touches upon the issues before me. Justice Lax reviewed the same legislative provisions. Justice Lax held as follows:


“Section 268 (5.1) and (5.2) deal with the situation where a person is a named insured under more than one policy. Section 268(5.1) is similar to s. 268 (4) in that it permits a named insured, in his or her discretion, to decide the insurer from which he or she will claim benefits. However, by virtue of s. 268(5.2), if the claimant is an occupant of an automobile in respect of which the person is a named insured or the spouse or dependant of a named insured, the claim must be made against the insurer of the vehicle in which the person is occupant. “

The other cases assembled by parties deal with priority issues where there is a contest between a policy where an individual is a named insured and another policy where that individual is a regular user or has some other connection with the policy. None of those cases address a contest between insurers where the individual is a named insured under one policy and the spouse of a named insured under another policy. While many of the assembled decisions use language to suggest that a person must claim benefits against the policy where

they are "named insured", none of those decisions make such a statement with the intention of excluding the spouse of the named insured or the dependant of the named insured from that same priority.

The legislation contemplates that a named insured and a named insured's spouse and their dependants shall all be treated equally. In the first instance they are obliged to claim against the policy issued to the named insured. If there is more than one such policy, and the individual who is injured is an occupant of a vehicle insured by the one of those policies, then they must claim against the policy on that vehicle. I therefore conclude that the benefits in this instance ought to be paid by Security National Insurance Company which is the insurer which has priority to respond to the accident benefit claims of Michelle Baker. In accordance with the agreement of the parties, counsel fees fixed at \$1,500.00 should be paid by Security National to Personal. The costs of Arbitration shall be paid by Security National.

Dated at Toronto this 7th day of July, 1998



LEE SAMIS

Attachments:

1. Arbitration Agreement
2. Agreed Statement of Facts
3. Ontario Insurance Commission Bulletin No. 3/94
4. Insurance Bureau of Canada Chart I interpreting ranking provisions

