COURT FILE NO.: 53141

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: THE PERSONAL INSURANCE COMPANY (Applicant) (Respondent on Appeal) – and – ING INSURANCE COMPANY OF CANADA (Respondent) (Appellant on Appeal)

BEFORE: MADAM JUSTICE J. N. MORISSETTE

COUNSEL: Douglas A. Wallace, for the Appellant

Ryan Naimark, for the Respondent

HEARD: June 1, 2007

ENDORSEMENT

[1] The appellant (respondent) appeals from the award of the arbitrator J.T. Glass dated January 4th, 2007 following one day of arbitration on December 12th, 2006.

[2] The issue for the arbitrator was to determine which insurance company is liable to pay statutory accident benefits to Jonathan Shaw arising out of injuries he sustained as a pedestrian, in a motor vehicle accident on November 27th, 2003. The arbitrator found that ING the appellant is liable to pay those benefits in priority to Personal.

[3] The issue for the arbitrator was whether or not, at the time of the accident, Pylon Electronics Inc (Pylon) made available to Andrew Shaw (Shaw), the father of Jonathan, an automobile for his "regular use" in accordance with section 66 (1) of O. Reg. 403/96 – Statutory Accident Benefits Schedule ("SABS"). The arbitrator found that it did.

[4] Neither Shaw nor his wife owned a motor vehicle at the time of the accident that was insured under a policy of automobile insurance.

Standard of Review:

[5] Recently the Ontario Court of Appeal in *Oxford Mutual Insurance Company v Co-Operators General Insurance Company*[1], found that deference is owed to an arbitrator's expertise in the area. Specifically it stated:

> In those circumstances, the question became one of applying the correct legal principles to his factual findings about the particular circumstances of Mr. Williams' relationship with his mother. Accordingly, the question before the arbitrator was one of mixed fact and law and was closer to a factual determination. See *Liberty Mutual Insurance C. v. Federation Insurance Co of Canada*, [2000] O.J. 1234 (C.A.). Given the special expertise of arbitrators in evaluating facts for a determination of dependency for statutory accident benefits entitlement, unless the arbitrator's decision was unreasonable, it was entitled to deference. In any event, in my view, the arbitrator's decision was also correct.

[6] Counsel for the appellant, argues that the proper standard of review is "correctness" as there is no special expertise required by an arbitrator to judicially interpret a regulation. Because in the *Oxford* case there was a required determination of "dependency", that requires some expertise, he argues. In that type of case he concedes that the standard of review is reasonableness. However, in this case the appellant argues that the arbitrator failed to correctly apply the two part legal analysis required by the regulation and as a result his conclusions are incorrect and the appeal should be allowed.

[7] In the case before this Court, the arbitrator was determining a question of priority dispute between two insurance companies in relation to the payment of accident benefits arising from an issue of "regular use" within the meaning of the SABS. Similarly, the question before the arbitrator in *Oxford Mutual*, as in this case, is of mixed of fact and law.

[8] I fail to see how there is a difference between a determination of section 2 or section 66 of the regulation, as both are questions of priority. Both require an arbitrator to address his or her mind to findings of fact and apply a proper legal principle to that finding. Given the special expertise of arbitrators in assessing facts for the determination of "regular use" as it is for "dependency issues" for statutory accident benefits entitlement, I cannot see why deference ought not be afforded to arbitrators, unless that application or conclusion is unreasonable.

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[1] [2006] O.J. No 4518 (C.A.)

[9] Accordingly, in my opinion, the proper standard of review is one of reasonableness and for the reasons set out herein, I find that the conclusion of the arbitrator is one that is reasonable and in any event is also correct and therefore the appeal is dismissed.

Facts:

[10] The parties had filed before the arbitrator an agreed statement of facts. Further there was an issue and argument as to the credibility of Shaw as there was conflicting evidence from him and his supervisor and the vice president of Pylon, as to the number of times that Shaw made deliveries for Pylon.

[11] Shaw changed positions in May of 2001, from a delivery driver to an office job as a Temmis clerk (Test Equipment Maintenance Management information system). No additional driver was hired after Shaw changed positions. Another occasional driver left Pylon in March of 2003 and was not replaced either.

[12] Pylon employed at that time, between 47 and 50 people in the business of calibrating and repairing physical properties testing equipment for companies including Nortel and the Department of National Defence. Admittedly the business at Pylon was fairly steady from 2000 to 2003 with on average an equal number of deliveries from May of 2001 until November of 2003.

[13] At the time of the accident, eleven of the employees were listed on a "Schedule of Drivers" prepared by Pylon's insurance broker, which included Shaw. The previous Temmis clerk, Shaw replaced in May of 2001, was never listed on the Pylon fleet policy because she never did any deliveries as a Temmis clerk, unlike Shaw.

[14] Although there is some conflicting evidence in relation to the frequency of Shaw's use of a company vehicle after he changed positions to a Temmis clerk in May of 2001, the evidence does support the finding by the arbitrator that Shaw made deliveries three to four times per month. Based on the evidence before the arbitrator, that finding was reasonable.

[15] The question then is whether that amounts to regular use under the regulation?

Analysis:

[16] Under section 66 of the SABS, an individual shall be deemed for the purposes of the SABS to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident, the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity.

[17] Therefore the analysis that one must engage in, is whether the Pylon company vehicles were being made "available" for Shaw's "regular use". This connotes a two part test. The first requires an analysis of whether the vehicle was "made available" and the second for "regular use".

[18] In this case we are dealing with a coverage clause as opposed to an exclusionary clause. As the case law has set out, the interpretation differs. As a general rule, clauses in an insurance policy providing coverage are interpreted liberally or broadly in favour of the insured; conversely, clauses excluding coverage are interpreted strictly against the insurer.[2] The fact that it is a priority battle between two insurance companies does not change the interpretation rule.

"Made available"

[19] Pylon operated three delivery vehicles and employed at the time of the accident three drivers and Shaw in addition. In 2001, the company had five drivers (including Shaw) with only three trucks.

[20] The appellant argues that because at the time of the accident, Shaw was the only individual that was not a full time driver, that the vehicle in question was not made available to him.

[21] The fact that Shaw was specifically listed as an insured driver and the fact that the previous Temmis clerk was not, is indicative that a vehicle from time to time was made available to Shaw specifically.

[22] I believe that the fact that the other three drivers were using the three trucks does not preclude the availability of one of those vehicles to Shaw from time to time.

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[2] Schneider et al. v. Doe, Administrator of the Estate of William Maahs et al. (2001), O.R.(3d)321 (C.A.) at para 22.

[23] As stated in *State Farm Mutual Automobile Insurance Co. v. Kingsway General Insurance*, [3] "actual use is evidence of the availability of the vehicle".

[24] A reasonable common sense liberal interpretation of this part of the analysis can only mean that this vehicle was at Shaw's disposal when asked to perform deliveries and therefore the first part of the analysis has been met.

"Regular use"

[25] The second part of the analysis requires one to examine what "regular use" means.

[26] The Ontario Court of Appeal stated that "regular" is intended to describe "periodic, routine, ordinary or general" as opposed to "irregular, or out of ordinary, or special".[4]

[27] In *Dominion of Canada General Insurance Company and General Accident Assurance Company of Canada*[5], arbitrator Flanigan found that the driver in question was an extra driver who was on call to replace other drivers as needed and that was found to be "regular use".

[28] Then in *State Farm Mutual* decision of 1999, arbitrator Samis stated the following with respect to the meaning of "regular use" under section 66 of SABS:

> The language employed by the regulation does not require that the use be frequent, exclusive, or personal. The mere fact that there was some use which can be said to be regular is sufficient to give the individual status under the policy.[6]

[29] In 2004, arbitrator Robinson in *Economical Mutual Insurance Company v. Wawanesa Mutual Insurance Company*[7] considered the issue of "regular use" and found that in that case the baker for Tim Horton did not have regular use of the motor vehicle and in fact found that the baker had very rare occasions to use the vehicle. This is not the findings of fact made by arbitrator Glass in the case before me.

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[3] 20 October 1999: Arbitrator Samis at pg 4
[4] Canadian General Insurance Company v State Farm Mutual Insurance [1957] O.R. 257 (C.A.)
[5] Ont Ct (Gen Div) Arbitrator K.A. Flanigan (Nov 12th 1997)
[6] State Farm Mutual Automobile Insurance Company v Kingsway General Insurance Company, October 20th, 1999.
[7] October 8th, 2004: arbitrator Bruce R. Robinson

[30] Further when conducting this analysis, the term "regular use" does not require "personal use", nor does it mean "exclusive use" in cases of fleets. Further there is no requirement of possession of your own keys or a gas card.[8]

[31] Arbitrator Glass found that making deliveries three to four time per month, is "regular use" in this case and this Court cannot find that conclusion to be unreasonable.

Disposition:

[32] Accordingly, the decision by the arbitrator Glass in this case was reasonable and should be given the appropriate deference it deserves and accordingly, the appeal is dismissed with costs.

Costs:

[33] Should the parties be unable to agree on the issue of costs, I may review brief written submissions on costs within 30 days hereof.

Madam Justice J. N. Morissette
Madam Justice J. N. Morissette

DATE: June 12, 2007

[8] Schneider supra note 6, State Farm v Kingsway supra note 2 and Reisno v. Liao [1993] O.J. no 805 (Gen Div)