

**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, c.17

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

ROYAL AND SUNALLIANCE INSURANCE COMPANY

Applicant

- and -

ZURICH INSURANCE COMPANY

Respondent

PRIORITY DISPUTE ARBITRATION DECISION

COUNSEL

Robert P. Bowman
Counsel for the Applicant, Royal & SunAlliance Insurance Company
(hereinafter referred to as "Royal")

Mark K. Donaldson
Counsel for the Respondent, Zurich Insurance Company
(hereinafter referred to as "Zurich")

ISSUE

Which of Royal or Zurich has priority to adjust and fund the accident benefits claim of Maral Kalfayan, arising out of the December 19, 2008 motor vehicle accident.

AGREED STATEMENT OF FACTS

Maral Kalfayan was injured in the December 19, 2008 accident while she was a passenger in a 2008 Toyota Sienna, operated by her brother, Meguedigch Kalfayan.

The 2008 Toyota Sienna was a short term rental vehicle at all material times.

The Toyota Sienna was rented by Meguedigch Kalfayan on December 19, 2008 until December 29, 2008.

The owner of the Toyota Sienna was Eagle North Leasing Inc.. That vehicle's licence plate was owned by 2147084 Ontario Inc., operating as United Car & Truck Rental. The Toyota Sienna was insured by Zurich under a standard fleet policy of automobile insurance.

At the time of the accident, Meguerdigch Kalfayan had his own policy of motor vehicle insurance, in respect of his personal vehicle, a 1990 Pontiac TranSport which was insured under a standard policy of automobile insurance by Royal.

There is no issue as to dependency.

Maral Kalfayan is married to Hagop Jack Hekimian and resided with her husband and one of their daughters at the time of the accident. She did not reside with her brother, Meguerdigch Kalfayan, at the time of the accident.

Neither Maral Kalfayan nor Hagop Jack Hekimian held driver's licences at the time of the accident, nor did they own any vehicle.

Maral Kalfayan did not hold her own policy of motor vehicle insurance at the time of the accident. Her spouse was not covered under any policy of motor vehicle insurance. She was not listed under any policy of motor vehicle insurance as a dependent, a driver, under any employer's policy or spouse's employer's policy, or any policy insuring long-term rental cars exceeding 30 days.

Maral Kalfayan submitted her claim to Royal and Royal has paid her benefits. On or about March 19, 2009, the Applicant notified the Respondent of the dispute between insurers, which gives rise to this Arbitration.

ANALYSIS

This Arbitration involves the issue as to which of two insurers has priority to pay statutory accident benefits to the claimant, Maral Kalfayan, who suffered personal injuries when involved in a motor vehicle accident on December 19, 2008, while a passenger in a motor vehicle owned by Eagle North Leasing Inc. and rented by the claimant's brother, Meguerdigch Kalfayan, who was also the operator of the rented vehicle at the time of the accident. Accident benefits to date have been paid by Royal, the insurer of the personal automobile owned by the driver of the United Car & Truck Rental vehicle.

Section 268 of the Insurance Act, R.S.O. 1990, c.l.8, as amended, sets out the rules for establishing which insurer is liable to pay statutory accident benefits when coverage might be available to a claimant under two or more policies of insurance. Section 268 reads as follows:

Section 268 (2) – Liability to pay – 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 non-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 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 non-occupant has recourse against the Motor Vehicle Accident Claims Fund.

(3) Liability – An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits.

(4) Choice of insurer – 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.

(5) Same – 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.

(5.1) Same – 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 own discretion, may decide the insurer from which he or she will claim the benefits.

(5.2) Same – 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.

On the basis of the Facts, written submissions and caselaw provided by the parties, I am of the view that the claimant, Kalfayan, is an insured under both the Royal and Zurich policies. By reason of Section 268(2)(4), the insured has absolute discretion with respect to deciding from which insurer he or she will claim the benefits. In this case, Kalfayan has

chosen to pursue accident benefits from Royal. Section 268(2) does not provide for a tie-breaking mechanism where an individual is “an insured” under more than one policy. Section 268(2) does provide a tie-breaking mechanism where an individual is a “named insured” under more than one policy, but Kalfayan was not a “named insured” under either policy.

It is clear that the claimant Kalfayan is an “insured person” through the Zurich policy. The Statutory Accident Benefits Schedule – Ontario Regulation 403/96 provides a definition for “insured person”:

“Insured person” in respect of a particular motor vehicle liability policy, means,

(a) the named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured and any dependant of the named insured or spouse, if the named insured, specified driver, spouse or dependant,

(i) is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or

(ii) is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse’s dependant.

(b) in respect of accidents in Ontario, a person who is involved in an accident involving the insured automobile, and

(c) in respect of accidents outside Ontario, a person who is an occupant of the insured automobile and who is a resident of Ontario or was a resident of Ontario at some point during the 60 days before the accident.”

Kalfayan meets the definition outlined in subsection (b) of the definition of “insured person”. The accident occurred in Ontario. The claimant was “a person involved in an accident involving the insured automobile”.

I also find that the claimant Kalfayan is an “insured person” through the Royal policy issued to the driver of the vehicle in which he was a passenger. Recent caselaw and priority dispute Arbitration decisions make it clear that accident benefit coverage can be extended to passengers in a vehicle driven by him or her, or a pedestrian struck by a vehicle driven by him or her.

The extended accident benefit coverage referred to above flows from the Ontario Court of Appeal decision in Co-operators General Insurance Co. v. Pilot Insurance Co. (1998) (O.J.) No.5551. The decision involved an occupant of a vehicle, Ms. Capelazo, who was injured when the vehicle in which she was an occupant collided with another vehicle. Ms. Capelazo was not a named insured on any policy, nor a spouse or dependant of a named insured. The vehicle in which she was an occupant, owned by a Mr. Sobka, but being driven with his consent by a Mr. Huard, was uninsured. Mr. Huard, the driver, had a policy insuring his own vehicle with Co-operators Insurance. The second vehicle involved in the accident was insured by Pilot Insurance. The question of which insurer was in higher priority under Section 268 of the Insurance Act arose, and Co-operators brought an application seeking a

determination of whether it was not the “insurer of the automobile” in which Ms. Capelazo was an occupant. The Court of Appeal concluded that it was. The Court held that from the perspective of the driver of the “uninsured” automobile that “other automobiles driven by him are insured automobiles”. The wording of the policy from Section 2.2.2 (now 2.2.3) extended accident benefit coverage to Huard (driver) for automobiles driven by him. By extension, it was concluded that Co-operators was the “insurer of the automobile” in which Capelazo (the passenger) was an occupant.

Two recent Arbitration decisions of Arbitrator Shari Novick have extended accident benefits coverage to individuals being struck by an uninsured vehicle, driven by an individual who was a named insured on another policy insuring a vehicle that he owned. The two decisions of Arbitrator Novick are as follows:

The Economical Insurance Group v. Her Majesty the Queen in Right of Ontario, represented by the Minister of Finance, Security National Insurance Company and Kingsway General Insurance Company, decision of Arbitrator Shari Novick, dated January 2009.

Perth Insurance Company v. State Farm Automobile Insurance Company and Her Majesty the Queen in Right of Ontario, as represented by The Minister of Finance, decision of Arbitrator Shari Novick, dated May 2009.

In Economical Insurance Group v. HMQ, et al. (supra), Arbitrator Novick was presented with a situation where a claimant was a pedestrian struck by an automobile which was uninsured. She concluded that the provisions of Section 2.2.3 of the Standard Automobile Policy (OAP 1) extended accident benefits coverage to the claimant through the driver’s spouse’s policy with Security National. The Fund, in that case, took the position that Section 4.1 of the Standard Automobile Policy (OAP 1) extended accident benefits coverage to all of those individuals outlined in that section. Section 4.1 of the Ontario Automobile Policy states as follows:

Section 4 – Accident Benefits Coverage:

4.1 – Who is covered – For the purposes of Section 4, insured persons are defined in the Statutory Accident Benefits Schedule. In addition, insured persons also include any person who is injured or killed in an automobile accident involving the automobile and is not the named insured, or the spouse or dependant of a named insured, under any other motor vehicle liability policy and is not covered under the policy of an automobile in which they were an occupant, or which struck them.

Essentially, Section 4.1 of the Standard Automobile Policy provides accident benefits coverage to “insured persons” as defined in the Statutory Accident Benefits Schedule. “Insured person” so defined includes “in respect of accidents in Ontario, a person who is involved in an accident involving the insured automobile”. The “insured automobile” is defined in the Statutory Accident Benefits Schedule as being “any automobile covered by the policy”. I therefore find that the claimant Kalfayan was a “insured person” for the purposes of accident benefit coverage through the driver’s policy of her brother, insured with Royal.

The Applicant Royal takes the position that the Ontario Court of Appeal decision in Co-operators General Insurance Co. v. Pilot Insurance Co. (supra) and the two Arbitration decisions of Arbitrator Novick (supra) are distinguishable from the present case. The Applicant submits that the plain wording of Section 4.1 of the Standard Automobile Policy

(OAP 1) does not extend accident benefits coverage to Maral Kalfayan under the Royal policy, because she was covered for accident benefits by the policy in which she was an occupant. The Applicant places emphasis on the following words as contained in Section 4.1:

*4.1 – Who is covered – For the purposes of Section 4, insured persons are defined in the Statutory Accident Benefits Schedule. In addition, insured persons also include any person who is injured or killed in an automobile accident involving the automobile and is not the named insured, or the spouse or dependant of a named insured, under any other motor vehicle liability policy **and is not covered under the policy of an automobile in which they were an occupant, or which struck them.***

The Applicant also refers to a paragraph contained in Arbitrator Novick's decision in Economical Insurance Group v. HMQ, et al. (supra):

*“As well, I find that paragraph 5 of Section 2.2.3 and Section 4.1 of the OAP 1 policy send a clear signal that accident benefits coverage under an owner's policy, both for drivers and uninsured pedestrians, should be included whenever possible. I specifically note that in the first section of Section 4 – titled Accident Benefits Coverage – under the heading of “Who is Covered?”, the policy is very clear that beyond those who qualify under the SABS definition of an “insured person”, those who are injured in accidents involving the automobile (to be distinguished from the “described automobile”) and are not named insureds, spouses or dependants under other automobile policies **and are “not covered under the policy of an automobile in which they were an occupant or which struck them”, are also covered under the policy at hand** for accident benefits coverage. Ms. Shingara fits within this definition.”*

The Applicant takes the position that the claimant, Kalfayan, does not meet the extended definition of insured as Kalfayan was “covered under the policy of an automobile in which she was an occupant” at the time of the accident, by Zurich.

I would have to agree with the submissions of the Applicant if it were not for the fact that Kalfayan, in my view, falls into the primary category of “insured persons” as set out in the Statutory Accident Benefits Schedule in the first sentence of Section 4.1 above. As I have indicated previously, I believe Kalfayan was “a person who is involved in an accident involving the insured automobile”, keeping in mind that “insured automobile” is defined in the Statutory Accident Benefits Schedule as meaning “any automobile covered by the policy”. In light of the Ontario Court of Appeal decision in Co-operators General Insurance Co. v. Pilot Insurance Co. (supra), Royal's driver's policy provided accident benefit coverage to those occupants or pedestrians involved in an accident involving the vehicle driven by Royal's insured (but still subject to the priority scheme set out in Section 268(2) of the Insurance Act with respect to the payment of accident benefits).

I must say that I am somewhat troubled as to why the description of additional insureds is set out in the second sentence of Section 4.1 of the Standard Automobile Policy (OAP 1) when pedestrians (without other available insurance) and occupants (without other available insurance) appear to have coverage given the basic definition of “insured person” as contained in the Statutory Accident Benefits Schedule. I am concerned that Arbitrator Novick used the second sentence of Section 4.1 to qualify the pedestrian as an individual entitled to

accident benefit coverage from the driver's policy, when in my view the pedestrian would have qualified under the definition of "insured person" as set out in the first sentence of Section 4.1 of the Standard Automobile Policy (OAP 1).

In all of the circumstances, I find that the claimant Kalfayan was "an insured" under both the Royal and Zurich policies and therefore fitting into the description set out in Section 268(2)(1)(i) as "an insured" under more than one policy, Kalfayan would have absolute discretion in choosing the insurer from which she would claim benefits as outlined in Section 268(2)(4). Kalfayan chose to seek benefits from Royal. Hence, it is Royal's obligation to continue to adjust and fund the accident benefits claims of Maral Kalfayan.

ORDER

I hereby order that Royal continue to adjust and fund the accident benefits claim of Maral Kalfayan as it is the priority insurer. I order that Royal pay to Zurich the costs of this Arbitration on a partial indemnity basis. I order that Royal pay the Arbitrator's costs.

DATED at TORONTO this 7th)
)
 day of February, 2011.)

 KENNETH J. BIALKOWSKI
 Arbitrator