

***IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, SECTION 268 and REGULATION 283/95***

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

AVIVA INSURANCE COMPANY OF CANADA

Applicant

- and -

ALLSTATE INSURANCE COMPANY OF CANADA

Respondent

DECISION

COUNSEL:

Jessica Rogers for the Applicant

Ryan Kirshenblatt for the Respondent

BACKGROUND:

1. Jason Prasad was injured when the vehicle in which he was an occupant was involved in an accident on April 11, 2016. That vehicle was insured by Aviva Insurance Company of Canada (“Aviva”). He submitted an application for payment of accident benefits to Aviva, and they have paid benefits to him and/or on his behalf.

2. At the time of the accident, Mr. Prasad’s parents were both named insureds on a policy issued by Allstate Insurance Company of Canada (“Allstate”). Jason was added as a driver on that policy prior to the accident, but signed an Excluded Driver Endorsement (OPCF 28A form) for the two vehicles described on the policy. A further OPCF 28A form was executed when a third vehicle was added to the policy a few months before the accident.

3. Aviva contends that in accordance with the Court of Appeal’s decision in *Belair Direct Insurance v. Dominion of Canada* (2017) ONSC 367 Jason would be considered “a person specified in the policy as a driver” (i.e. a “listed driver”) on the Allstate policy. It claims that Allstate is therefore the “insurer of an automobile in respect of which the occupant is an insured” referenced in section 268(2)1(i) of the *Insurance Act*, and is in higher priority to pay the claim.

4. Allstate concedes that Jason was a listed driver on its policy at the time of the accident. It contends, however, that its policy does not extend accident benefits coverage to Jason in these circumstances, relying on Arbitrator Jones’ finding in *Unifund Assurance Company v. Zurich Insurance* (September 11, 2017) that the “Other Automobile” provisions in section 2.2.3 of the OAP 1 must be considered. Under those provisions a “listed driver” on a policy would not be covered when injured while an occupant of a vehicle not described in the policy.

ISSUE:

1. Does the Claimant have recourse against Allstate for accident benefits as the “insurer of an automobile in respect of which he is an insured” under section 268(2)1(i) of the *Insurance Act*?

The real question raised by Allstate is whether the insurer of a “listed driver” occupies the top rung or tier of the ‘priority ladder’ in section 268(2) of the *Act*. The parties agree that in view of the Court of Appeal’s decision in *Belair v Dominion, supra*, the fact that Mr. Prasad was an excluded driver on the policy provides him with the status of a “listed driver”.

RESULT:

1. Yes, as a “listed driver” on the Allstate policy, the Claimant has recourse against Allstate for accident benefits under section 268(2)1(i) of the *Act*.

EVIDENCE:

5. None of the facts are in dispute. Counsel filed the few documents relevant to the issue, as well as written submissions, including case law, setting out their respective positions.

6. As set out above, Mr. Prasad was an occupant of a vehicle insured by Aviva at the time of the accident. He was not a named insured or listed driver on the Aviva policy. He was a listed driver on his parents’ Allstate policy at the relevant time, and had the status of an “excluded driver” with respect to the vehicles described in that policy.

RELEVANT PROVISIONS:

The following provisions are relevant to my determination of this matter:

Insurance Act

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.

(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,

Statutory Accident Benefits Schedule

3. (1) In this Regulation,

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

*(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,

Ontario Automobile Policy (OAP 1)

1.3 Definitions

We and You

Throughout this policy the words you and your refer to the person or organization shown on the Certificate of Automobile Insurance as the named insured.

Other people may also be covered under certain conditions. We call both them and you insured persons.

2.2 Extending Your Insurance to Other Automobiles

If a premium is shown on the Certificate of Automobile Insurance for a specific coverage for a described automobile, then this coverage may be available in the event of a loss for other types of automobiles under this policy.

2.2.3 Other Automobiles

Automobiles, other than a described automobile, are also covered when driven by you, or driven by your spouse who lives with you.

The following coverages apply to other automobiles if a premium is shown for the coverage on the Certificate of Automobile Insurance for a described automobile:

- Liability,*
- Accident Benefits,*
- Uninsured Automobile, and*
- Direct Compensation -Property Damage*

PARTIES' ARGUMENTS:

Allstate's submissions

7. Counsel for Allstate concedes that as a "person specified in the policy", Mr. Prasad was a "listed driver" on his parents' policy with Allstate. He contends, however, that that status alone does not lead to the conclusion that Allstate is the priority insurer in these circumstances. He relies on Arbitrator Jones' finding in *Unifund v Zurich, supra*, that the

“Other Automobile” provisions in section 2.2.3 of the OAP 1 must be considered, and that a listed driver on a policy who is injured while an occupant of a vehicle that is not described in the policy cannot access accident benefits through that policy.

8. Counsel notes that the facts in this case are virtually identical to those in the *Unifund* case, other than the fact that the Zurich policy was issued to a company rather than an individual, which is not material to the analysis. He notes that Arbitrator Jones determined that as the claimant was an occupant of a vehicle not described in the Zurich policy at the time of the accident, the only way that he could access benefits through the Zurich policy would be through the application of section 2.2.3 of the OAP 1.

9. Mr. Kirshenblatt noted that Arbitrator Jones found that a “listed driver” does not fit within the definition of “you” in section 1.3 of the OAP 1, and submitted that a claimant who is a listed driver on the policy “cannot climb the priority ladder without going through 2.2.3”. He contended that Mr. Prasad would not be covered under the Allstate policy pursuant to section 2.2.3, because he was a listed driver rather than a named insured, or spouse or dependent of the named insured on the policy.

Aviva’s submissions

10. Counsel for Aviva contends that section 268(2) of the *Act* provides that Mr. Prasad has first “recourse against the insurer of an automobile in respect of which..(he) is an insured” for accident benefits. She notes that Allstate has conceded that Mr. Prasad was a “person specified in the policy as a driver”, otherwise known as a “listed driver”, and that he is therefore an “insured person” as defined in section 3 of the *SABS*. She submitted that the priority ladder in section 268(2)1 clearly provides that an insurer of an individual who is an insured under a policy is on a higher “rung” than the insurer of a vehicle in which the person is merely an occupant, and that Allstate is therefore in higher priority than Aviva to pay Mr. Prasad’s claim.

11. Ms. Rogers contends that section 268(2), as well as much of the arbitral case law, confirms that the policy under which a claimant is specified or listed as a driver is in higher

priority to pay a claim than the policy that covers the vehicle in which the claimant was merely an occupant. She noted that in *AXA Insurance v. State Farm Mutual Automobile Insurance and CGU Insurance* (July 14, 2005), Arbitrator Jones found that there was “no doubt” that the claimant, as a listed driver on the State Farm policy, would fit within the definition of “insured person” under that policy. She also noted that Arbitrator Bialkowski endorsed that view in *The Personal Insurance Company v Kingsway General Insurance* (June 16, 2009), and explicitly stated that section 2 (now 3.1) of the *SABS* includes a “listed driver” as an “insured person” so as to satisfy the requirements of section 268(2)1(i) of the *Act*.

12. Counsel also cited my decision in *Aviva General Insurance v Security National Insurance Company* (released December 6, 2018) as further support for her contention that this approach is well-established in the case law.

13. Counsel for Aviva contends that Arbitrator Jones’ decision in *Unifund v Zurich, supra*, is incorrect, and that his finding that the only way that a “listed driver” on a policy who is not an occupant of the vehicle described in the policy at the time of the accident can access benefits through that policy is through section 2.2.3 of the OAP 1 is an error. She submits the question of coverage under section 2.2.3 of the OAP 1 is separate and distinct from the determination of whether an individual is an “insured person” under a policy for the purposes of priority, and argues that while the “Other Automobile” provisions may be relevant in determining whether coverage extends to another automobile not described in a policy, it is not relevant to the analysis of priority between two insurers under section 268(2) of the *Act*.

Reply submissions – Allstate

14. Mr. Kirshenblatt noted that the question of whether section 2.2.3 of the OAP 1 is relevant to a determination of whether a listed driver fits on the top rung of the priority ladder was not raised in the earlier cases cited by Aviva, and it is therefore incorrect to rely on these cases to dismiss the argument.

15. Counsel also submitted that the definition of “insured person” in the *SABS* should not be used in the analysis of whether a listed driver is an “insured” for the purposes of determining priority under section 268(2)1(i) of the *Act*. He suggested that this definition is germane to the question of whether someone is entitled to claim benefits under the *SABS*, but should not dictate which insurer is in priority to pay those benefits. He contended that this should be determined by the wording of section 268(2) of the *Act*, which specifies that it is the “insurer of the automobile in respect of which the occupant is insured” that is in highest priority to pay benefits.

16. Counsel explained that the effect of the decision in *Unifund v Zurich, supra*, does not alter the priority ladder, but simply clarifies that listed drivers no longer fit within the ‘top rung’, as has been found when the *SABS* definition of “insured person” has been applied and the OAP 1 provisions ignored. He submitted that a listed driver on a policy may fall under paragraphs (ii), (iii) or (iv) of section 268(2)1, but that he or she will not be an “insured” in respect of the automobile covered by the policy if the policy itself does not extend coverage to them under the provisions in 2.2.3 of OAP 1.

17. Finally, Mr. Kirshenblatt contends that the distinction he suggests between a listed driver and a named insured for the purposes of priority is supported by the fact that the ‘tiebreaker provisions’ in section 268 of the *Act* refer only to the status of named insureds (or their spouses or dependents), while there is no mention of listed drivers. He suggested that if the legislators intended that a listed driver enjoy the same status of “insured” for the purposes of section 268(2), the *Act* would have specifically provided for that.

ANALYSIS & REASONS :

18. Aviva submits that as a listed driver on the Allstate policy, Mr. Prasad is an “insured” under that policy and that Allstate is therefore in priority to pay the claim by virtue of section 268(2)1(i) of the *Act*. Allstate disputes this for the reasons set out above. Its argument essentially rests on two claims – Arbitrator Jones’ finding in *Unifund v. Zurich* that the provisions in 2.2.3 of the OAP1 must be considered when a person claims accident benefits under the policy on which they are a listed driver, but that does not cover

the vehicle in which they were an occupant, and also that the definition of “insured person” in section 3 of the *SABS* should not be used when determining priority under section 268(2) of the *Act*. Counsel contends that rather than using the *SABS* definition, reference should be made to whether the claimant is covered under the terms of the OAP 1 or standard auto policy.

19. I do not agree with either of these arguments. Addressing the second one first, the Court of Appeal made it clear in *Warwick v Gore Mutual Insurance Company* (1997) 32 O.R. (3d) 76 (C.A.) that the definition of “insured person” in the *SABS* is to be used in a priority analysis under section 268(2). I will not set out the court’s lengthy reasoning, but note that after going through the analysis, Laskin, J.A. stated succinctly in a postscript at the end of the decision that the definition of “insured person” in the *Schedule* was expanded with the January 1994 amendments, and that

If anything, this expanded definition confirms that "insured persons" under a particular automobile insurance policy are determined by the Schedule, not by the Act.

20. Since then, the use of the *SABS* definition of “insured person” has been accepted by counsel and arbitrators when determining whether a claimant is an “insured” under the first rung on the priority ladder. I note that in *Pafco Insurance Company v. Cumis General Insurance* (March 31, 2014), Arbitrator Bialkowski explicitly found that applying the definition of “insured person” contained in the *SABS*, the claimant was a person specified in the policy as a driver and was therefore an “insured person” under the Pafco policy. I further note that in her appeal ruling in *Belair Direct Insurance v. Dominion of Canada General Insurance, supra*, Justice Akbarali referenced the parties’ agreement that the relevant definition for determining whether the claimant was “an insured” under the Dominion policy was contained in section 3(1) of the *SABS*, and cited *Warwick v. Gore Mutual*.

21. I stated in *Aviva General v. Security National, supra*, that it was settled law that the definition of “insured person” in section 3(1) of the *SABS* is what dictates whether an

occupant of an automobile is an “insured” for the purpose of section 268(2)1(i) of the Act (at para.42), in light of the Court of Appeal’s decision in *Warwick v. Gore Mutual, supra*.

I also set out my view on the overall approach to be taken when considering priority determinations under section 268(2) of the Act in that decision -

The priority ladder set out in section 268(2) of the Act is structured in such a way that insurers who have a relationship with any of the people defined in section 3(1)a of the SABS stand at the front of the line, followed by insurers of vehicles in which a claimant was an occupant, then followed by insurers who insure any vehicle involved in the incident and lastly, the Fund.

(at para.40)

22. While the focus of my decision in that case was on whether the fact that the claimant’s name appeared in a particular place on the Certificate of Insurance qualified him as someone identified on the policy, it was implicit in my analysis that the insurer of a “person specified in the policy” (a.k.a a “listed driver”) was on the first rung of the priority ladder under section 268(2)1(i) of the Act, and in fact, the parties explicitly agreed that it was so.

23. Counsel for Allstate acknowledges these decisions, but emphasizes that the applicability of Section 2.2.3 of the OAP 1 was not raised in those cases. He contends that the issue must now be reconsidered, in light of Arbitrator Jones’ finding in *Unifund v Zurich* that a listed driver is not entitled to accident benefits under the policy if he or she was an occupant of a vehicle not covered by that policy at the time of the accident.

24. In my view, Section 2.2.3 of the OAP1 is not relevant to the determination of priority under section 268(2)1(i) of the Act. A close review of these provisions reveals why. Section 2 of the OAP 1 is titled “What Automobiles Are Covered?”. Section 2.1 discusses the types of coverage available for automobiles described or specifically indicated in a policy. Section 2.2 then provides that if a type of coverage, such as coverage for liability or property damage, is provided by the policy, that coverage may also apply when other vehicles that are not described in the policy such as a “newly acquired automobile” or

“temporary substitute automobile” are driven. In the same vein, Section 2.2.3 provides that automobiles other than the one(s) described on the policy “are also covered when driven by you or driven by your spouse who lives with you”. It goes on to list various “Special Conditions” that must be satisfied in order for this coverage to apply.

25. It is important to note that Section 1.3 of the OAP 1 defines the word “you” as the **named insured** under the policy. It is therefore clear that coverage under Section 2.2.3 – which provides coverage when vehicles are “driven by you or driven by your spouse who lives with you” - would only be extended in circumstances where a named insured (or their spouse living with them) is driving another vehicle. A listed driver does not enjoy this coverage. This point was raised in the case of *HMQ (MVACF) v. Intact Insurance* (July 18, 2012), and I determined that coverage under these provisions only applies to named insureds (or their spouses) and does not apply to listed drivers. The decision was upheld on appeal by Justice Abrams (March 12, 2013).

26. Given that Mr. Prasad was not a named insured under the Allstate policy, Section 2.2.3 of the OAP 1 is inapplicable in these circumstances. I find nothing in Arbitrator Jones’ decision in *Unifund v. Zurich, supra*, to persuade me otherwise. As I read the decision, he determined that the only way that a claimant who is a listed driver on a policy can access accident benefits under that policy (when involved in an accident in a vehicle not described in the policy) is through the application of section 2.2.3, but then goes on to find that 2.2.3 does not apply to listed drivers. With respect, I find that reasoning to be circular. A close review of the decision reveals that the main focus seems to be on whether the various parts of Special Condition 6 applied, which led to a detailed analysis of the claimant’s employment status and work history. This may have clouded the analysis.

27. I note that section 2.2.3 clearly only applies when the named insured is **driving** the “other automobile”. Mr. Prasad was a passenger, rather than a driver of the Aviva insured vehicle at the time of the accident. Accordingly, even if section 2.2.3 did apply to listed drivers, he would not meet the requirements. In my view, this supports the conclusion that the OAP 1 provisions have no place in the priority analysis required under section 268(2)

of the *Act*. If they did, a named insured who was an occupant of a vehicle not described in their policy at the time of an accident would similarly not be entitled to access benefits under their policy, as they would not meet the requirement to be a **driver** of the “other automobile”. It is unlikely that this result was intended by the legislators, and in any event would be inconsistent with Allstate’s argument that listed drivers and named insureds merit different treatment under section 268(2)1(i).

28. For the reasons set out above, I reject Allstate’s arguments that it is not the “insurer of an automobile in respect of which ...(the claimant) ...is an insured”. The Court of Appeal has made it clear in *Warwick v Gore Mutual* that a claimant’s right to claim accident benefits from an insurer in Allstate’s position derives from his or her status as an “insured person” under the *SABS*. This definition includes a “listed driver” on a policy, which we now know includes those who have signed Excluded Driver Endorsements but are not driving the vehicles they undertook not to drive at the time of the accident (*Belair Direct v. Dominion, supra*). The conclusion that inevitably flows from this is that the Claimant is also an “insured” for the purposes of section 268(2)1(i) of the *Act*.

29. I therefore find that pursuant to section 268(2)1(i) of the *Act*, Mr. Prasad must seek recourse from Allstate for accident benefits as the “insurer of an automobile in respect of which he is an insured”.

ORDER:

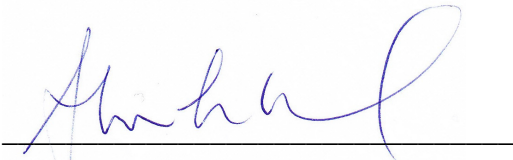
By virtue of section 268(2)1(i) of the *Insurance Act*, Allstate is in higher priority than Aviva to pay Mr. Prasad’s claims for accident benefits. Allstate must therefore reimburse Aviva for all benefits paid out to him or on his behalf to date, and take over the adjusting of the claim, if it remains open.

COSTS:

As the unsuccessful party, Allstate must pay Aviva’s legal costs as well as any Arbitration fees incurred. In accordance with paragraph 3 of the Arbitration Agreement executed by

the parties, I leave it to counsel to resolve the quantum of costs payable, and invite them to contact me if they are unable to do so.

DATED at TORONTO, ONTARIO this ___31st___DAY OF JANUARY, 2020



Shari L. Novick
Arbitrator