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

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

YORK FIRE & CASUALTY INSURANCE COMPANY

Applicant

- and -

KINGSWAY GENERAL INSURANCE COMPANY

Respondent

AWARD

Counsel Appearing

Derek Greenside for the Applicant

Mark Wilson for the Respondent

Introduction

In this matter the essential dispute between the parties is a question of priority as between a personal automobile insurer of the SABS claimant and the insurer of certain commercial vehicles owned by, or somehow associated with, the claimant's employer.

The accident which gives rise to this claim took place in Florida on March 5, 2007.

On the day of the accident, and perhaps for a day or two before, the claimant was involved in moving a load of commercial value from Canada to Florida. The evidence indicates that the vehicle he was using for this trip was a 1998 Volvo, blue in colour. The vehicle is one which is insured under a policy of insurance issued by the Respondent, Kingsway.

The claimant, Jacek M.[1], at the time of the accident was a named insured under a policy of insurance issued by the Applicant.

---

[1] In consideration of the privacy interests of witnesses who were required to testify about their personal affairs, I have deleted reference to surnames.

The circumstances of the accident are somewhat uncertain. We have a local police report which is part of one of the exhibits to this proceeding. Jacek M. denies any recollection of the circumstances immediately preceding the accident but has indicated that he stopped his vehicle at or near the side of the road in order to obtain some directions to complete his journey to a warehouse where he was offloading his cargo.

The dispute between these parties is a priority dispute based on the statutory scheme in place with respect to Ontario automobile insurance benefits.

Statutory and Regulation Background

As a result of the shift of automobile insurance injury compensation from a tort basis to a no fault system, the legislature reconfigured the applicability of no fault benefits. Effective in 1990, the legislature redefined how such benefits would be made available to accident victims. In order to ensure that all accident victims would have access to these benefits, the legislature chose to define very broadly the range of individuals who might make a claim against any policy of insurance with respect to an injury. Thus, when an insurer has issued a contract of automobile insurance with respect to somebody involved in an automobile accident, that insurer may have obligations to a broad array of individuals. Conversely, an injured individual may have access to a number of different insurers, as a result of being in the status of an "insured person" under a number of those insurance arrangements.

To accommodate the likely multiplicity of insurance coverage, and to allow insurers to know and understand their obligations with respect to providing benefits, the legislature enacted Section 268 of the *Insurance Act* to set out priority between insurers. That provision provides as follows:

> **Statutory accident benefits**
>
> **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*. 1993, c. 10, s. 26 (1).**
>
> **(1.1)-(1.3) REPEALED: 1996, c. 21, s. 30 (1).**
>
> **Indexation**
>
> **(1.4) Subject to subsection (1.5) and to the terms, conditions, provisions, exclusions and limits established by the *Statutory Accident Benefits Schedule, the Schedule* shall provide that, in respect of incidents involving the use or operation, after December 31, 1993 and before section 29 of the *Automobile Insurance Rate Stability Act, 1996* comes into force, of an automobile,**
>
> **(a) every continuing periodic amount payable by an insurer as an income replacement benefit, education disability benefit, caregiver benefit or loss of earning capacity benefit in accordance with the *Schedule* shall be revised, effective the 1st day of January in every year after 1994, using the indexation percentage published under subsection 268.1 (1); and**
>
> **(b) every monetary amount set out in the *Schedule* shall be revised, effective the 1st day of January in every year after 1994, by adjusting the amount by the indexation percentage published under subsection 268.1 (1). 1993, c. 10, s. 26 (1); 1996, c. 21, s. 30 (2).**
>
> **No decrease in payments**

(1.5) A continuing periodic amount payable by an insurer in accordance with the *Statutory Accident Benefits Schedule* shall not be reduced by the operation of the indexation percentage referred to in subsection (1.4). 1993, c. 10, s. 26 (1).

Liability to pay

(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.
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 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. R.S.O. 1990, c. I.8, s. 268 (2); 1993, c. 10, s. 1; 1996, c. 21, s. 30 (3, 4).

Liability

(3) An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits. R.S.O. 1990, c. I.8, s. 268 (3); 1993, c. 10, s. 1.

Choice of insurer

(4) 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. R.S.O. 1990, c. I.8, s. 268 (4); 1993, c. 10, s. 1.

Same

(5) 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. 1993, c. 10, s. 26 (2); 1999, c. 6, s. 31 (9); 2005, c. 5, s. 35 (13).

Same

(5.1) 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 discretion, may decide the insurer from which he or she will claim the benefits. 1993, c. 10, s. 26 (2).

Same

(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. 1993, c. 10, s. 26 (2); 1999, c. 6, s. 31 (10); 2005, c. 5, s. 35 (14).

Excess insurance

(6) The insurance mentioned in subsection (1) is excess insurance to any other insurance not being automobile insurance of the same type indemnifying the injured person or in respect of a deceased person for the expenses. R.S.O. 1990, c. I.8, s. 268 (6).

Idem

(7) The insurance mentioned in subsection (1) is excess insurance to any other insurance indemnifying the injured person or in respect of a deceased person for the expenses. R.S.O. 1990, c. I.8, s. 268 (7).

Payments pending dispute resolution

(8) Where the *Statutory Accident Benefits Schedule* provides that the insurer will pay a particular statutory accident benefit pending resolution of any dispute between the insurer and an insured, the insurer shall pay the benefit until the dispute is resolved. R.S.O. 1990, c. I.8, s. 268 (8); 1993, c. 10, s. 1.

As a result of the enactment of Section 268, insurers and insureds can see that an injured individual is required to claim benefits first from a policy where that person is the named insured, or the spouse of a named insured, among other things.

In this case we are concerned with the possible status of an individual as a person to whom a vehicle has been provided for regular use. That status is significant because of the following provision in the Statutory Accident Benefits regulation:

Company Automobiles and Rental Automobiles

66. (1) An individual who is living and ordinarily present in Ontario shall be deemed for the purpose of this Regulation to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,

(a) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity; or

(b) the insured automobile is being rented by the individual for a period of more than 30 days. O. Reg. 403/96, s. 66 (1); O. Reg. 462/96, s. 12 (1).

(2) An individual who is not living and ordinarily present in Ontario shall be deemed for the purpose of this Regulation to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,

(a) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity; and

(b) the individual, his or her spouse or any dependant of the individual or spouse is an occupant of the insured automobile. O. Reg. 403/96, s. 66 (2); O. Reg. 462/96, s. 12 (2); O. Reg. 114/00, s. 7; O. Reg. 314/05, s. 7.

There is a complicated history of corporate organizations, registrations, permits, and various intercompany business arrangements that could easily confuse someone trying to fully understand the various entities and their role in the business transactions.

Analysis

It is unquestioned that the applicant, York Fire, insured Jacek M. under a personal automobile insurance policy at the time of the accident, March 5, 2007. Jacek M.'s personal automobile was not involved in the subject accident.

We need to determine:

1. Was Jacek M. a person to whom a vehicle insured by Kingsway was being made available for regular use within the meaning of section 66?

2. If so, was Jacek M. an "occupant" of the vehicle at the time of the accident within the meaning of section 268 (5.2)?

At the time of the accident Jacek M. had secured some work in connection with transportation services with a numbered corporation, 2093614 Ontario Inc. Jacek M. was not clear about who he was actually working for at the time of the accident. The truck was marked with a Rig Master name, but owned by others. This certainly has confused Jacek M.'s evidence along the way, and has no doubt contributed to the uncertainty with respect to priority. But at the end of the day, much of this is a distraction from the issues before me.

The statement from Bassam C. makes it clear that Jacek M. was engaged to be a driver for 2093614 Ontario Inc. According to the materials before me, Jacek M. was only briefly engaged with respect to this company's related vehicles. There is some dispute on the evidence as to whether or not the accident occurred on his first trip in this arrangement, but at the most, it was his second or third trip. In either case, the relationship was of short duration at the time of this accident, and was not documented.

There is also confusion as to which vehicle was involved in the accident. But according to the material before me, either of the vehicles suspected as the one involved in the accident would have been insured by the respondent Kingsway. The evidence suggests to me that the involved vehicle was likely one that was insured under the policy of insurance of 2093614 Ontario Inc.

The evidence of Lisa A. indicates that she was involved and placed the insurance for that vehicle. Lisa A. stated that on February 15, 2007, she was requested to add Jacek M. as a driver for that vehicle. Subsequently there was some communication breakdown and the evidence suggests Kingsway did not receive that request on first submission but received it subsequently on March 8, 2007.

According to the statement of Lisa A. (which is at Tab 6 of Exhibit 2), *"In December 2006, Kingsway General Insurance Companies Underwriting agreed to add drivers for a period of 30 days pending receipt of their CVOR, MVR and letters of experience. However if this documentation was not supplied within 30 days, the driver would be deleted from the policy."*

This characterization of the arrangement implies that the insurer had agreed to accept listed drivers, without documentation, for a period of 30 days. The accident in question happened within that 30 day window.

The fact that a request was made on February 15 suggests that the relationship as a driver had commenced about three weeks prior to the motor vehicle accident.

The evidence before me is conflicting as to the exact nature of the relationship prior to the accident. In particular there is confusion about how many trips Jacek M. had done for 2093614 Ontario Inc.

Much of the evidence suggests that Jacek M. was on his first run when the accident occurred. He has given conflicting testimony suggesting that there were one or two previous runs. As pointed out by counsel for Kingsway, Jacek M. gave a statement under oath that was inconsistent about his driving experience for the company. The statement was made by an

insurance representative, and it is alleged that there were translation issues. There may be good reason to doubt the accuracy of this evidence.

Jacek M. was unable to provide documentation with respect to his prior alleged runs. He said that he never got paid for those runs. The statement of Bassam C. (found at Tab 6 of the supplemental document brief, Exhibit 3), gives the vehicle owners perspective on the relationship with Jacek M. He indicates that Jacek M. was only going to be used for a short-term basis. He said, *"I was only going to use him until I found someone else."* The person who had put him in touch with Jacek M. did not recommend him. But Bassam C. needed him for one trip as he had a full load of meat going to Florida and needed a driver.

In my view, this evidence is somewhat at odds with the evidence of Lisa A. indicating that the company operated by Bassam C. had sent a request on February 15, 2007 to add Jacek M. as a driver. This also seems inconsistent with the position that Jacek M. was only needed for "one trip" on March 3, 2007. Why then would he have been added to the policy in mid February?

In my view, the true perspective on the relationship is indicated by Bassam C.'s comment, *"I was only going to use him until I found someone else."* In my view, this indicates that there was a continuity of a relationship over a period of time, although clearly not an indefinite relationship. But this evidence is all consistent with the assertion by Jacek M. that there were other trips.

In addition to this evidence, I note that the paperwork to add Jacek M. as a listed driver was resubmitted after the accident and processed after the accident.

I have reviewed the statements of Mark P. which is found at Tab 7 of Exhibit 3. I don't find this evidence particularly helpful as it seems to be quite vague as to material details. It seems clear that Mark P. was the person who put Jacek M. into contact with Bassam C. Mark P. characterizes the accident trip as Jacek M.'s first trip but there is no indication about how this came to be his belief and seems to be entirely hearsay at best.

On the whole I find the evidence unsatisfactory as to the possibility of there being prior runs by Jacek M. for Bassam C., 2093614 Ontario Inc., or Rig Master. The evidence given by Jacek M. pointing in this direction is inconsistent and unsubstantiated by any of the documentation to be normally expected. The evidence of Bassam C. suggests that there was only one trip. The absence of any payment for prior runs is the most convincing evidence that there were no prior runs. These trips are business transactions with associated documentation, expenses to be tracked, remuneration to be paid and so forth. The absence of any evidence of prior trips is significant in this context.

On the basis of the record before me, I cannot conclude that there were any prior trips made by Jacek M.

However, there clearly was a relationship of some nature between 2093614 Ontario Inc. and Jacek M. for a period of weeks prior to the accident. Based on the evidence of Bassam C. and Jacek M., the vehicle present at the accident scene was made available to him in the sense that he was given dominion control over the vehicle to deliver a load of commercial value from Ontario to Florida. The span of the assignment only covered a few days. It seems that the trip was initially set to start on March 3 but in fact set out on March 4, 2007. The accident occurred on March 5, 2007 according to the police report.

Based on this evidentiary record, I must address whether or not the vehicle in question was made available for Jacek M.'s regular use. If the vehicle was made available for his regular use in accordance with the SABS, then Jacek M. is deemed to be a named insured under the policy on that vehicle. I note that the provisions of the accident benefit schedule do not require that the vehicle be made available for use by the insured under the policy or by any other particular specified entity. It suffices if the vehicle is made available for regular use by the owner, or the person or entity having dominion control over the vehicle on behalf of the owner.

The Court of Appeal has made it clear that it is not necessary that the person making available the vehicle be a corporation, but could also be a non-incorporated sole proprietor.

Based on the record before me, it appears that this vehicle was made available for Jacek M.'s use by 2093614 Ontario Inc. as represented by Bassam C. Therefore, the only question is whether or not the use can be construed as "regular use".

The question of what constitutes regular use has been troubling in many of these priority cases.

At the outset I point out that it is not necessary that the vehicle actually be used by the person in order for it to have been "made available". Actual use is certainly evidence that the vehicle was made available, but it is conceivable that a vehicle could be made available for someone's use without that person actually ever engaging in its operation.

In *Zurich Insurance Company v. Personal Insurance Company*, 2009 CanLII 26362 (ON SC), Justice Brown made the following comments:

> **[32] The SABS does not define the term "regular use". The jurisprudence considering s. 66, and its predecessor sections under the SABS, discloses that "regular use" is not restricted to personal use, nor is it restricted to exclusive use; the use of a vehicle only for business use may constitute "regular use".[1]**
>
> **[33] The case law has described "regular use" as use that is "habitual, normal and recurred uniformly according to a predictable time and manner,"[2] a definition that has been followed in a number of arbitration decisions involving priority disputes.[3] One arbitrator has described "regular use" as use in a normal and recurring fashion, in a predictable manner and over a predictable period of time.[4]**
>
> **[34] At the same time, the case law also indicates that constancy of use is not required to make the use "regular".[5] The frequency of use supporting a finding of "regular use" for the purposes of the SABS has varied from the daily operation of a school bus[6] or the use of a police cruiser on every shift[7], to the use by a part-time limousine driver of a vehicle several days each month over a period of a year and a half, a pattern of use which the arbitrator described as "erratic" and "not predictable"[8].**
>
> **[35] In his Award the Arbitrator identified the applicable legal test set out in the jurisprudence as follows:**
>
> > **Over the years, a body of caselaw has developed as to the type of fact situations which amount to "regular use". A broad spectrum of decisions has emerged. At the high end of the spectrum are cases where, in my view, the finding of "regular use" ought to have been apparent...**
> >
> > **At the lower end of the spectrum involving "regular use" cases, are cases such as Reisner v. Liao, [1993] O.J. No. 805 ...**
> >
> > **The cases where the individuals have been found not to be "regular users" of the subject vehicles were only those cases where the characterization of the use was "irregular at best and out of the ordinary"...**
> >
> > **The Arbitrator concluded:**

> **I am satisfied that there was a sufficient frequency of use and a sufficient regularity of use for [Mr. Ahmed] to be found a "regular user" of the McKevitt Trucking vehicles...Mr. Ahmed's use of the vehicle cannot be characterized as "irregular at best and out of the ordinary.**
>
> **[36] I conclude that the Arbitrator informed himself properly about the applicable legal test for determining "regular use".**

Justice Brown did consider whether one should examine usage over a period of time to inform the "regular use" determination.

> **[43] "Regular use" is a concept which invites an examination of the person's pattern of use of a vehicle over the period of time leading up to the accident in order to understand and to characterize the nature of the use as "at the time of the accident". Regularity of use generally connotes use on more than one occasion. The jurisprudence considered by the Arbitrator shows that the courts and arbitrators have looked at the pattern of use, amongst other evidence, to ascertain whether, at the time of the accident, the company had made the vehicle available to the claimant for "regular use". Quite frankly I see no other way that an adjudicator could attempt to determine whether use at the time of the accident was regular without looking back from the date of the accident to examine the nature of prior use. To limit the inquiry into the nature of use solely to the day of the accident, or the days immediately before the accident, as Zurich seems to suggest, would result in an artificial exercise and ignore material evidence regarding the pattern of use leading up to the day of the accident.**

But Justice Brown was well aware that there could be regular use with little or no history of use:

> **[44] I imagine a case could arise where the claimant's first use of a vehicle occurred on the very day of the accident. In that scenario the adjudicator would have no record of prior use to consider and would have to resort to other evidence to decide the question. However, none of the reported decisions have dealt with that unusual scenario.**

The fact that the accident occurs on the first trip is not determinative of the regular use question. The basis on which the vehicle was made available to Jacek M. was that he would use it exclusively and completely at least for the duration of the trip. But, in my view, the critical evidence here is the evidence of Bassam C. where he has stated that he was going to engage Jacek M. until he could find someone else. There is no evidentiary basis to conclude that the relationship was to be limited to this single trip. Truly Bassam C. did not intend for the relationship to be indefinite in nature, but he certainly contemplated that it would be a relationship that continued over a period of time, at least until he could find someone else. Paperwork had been in place for three weeks and there is absolutely no evidence to suggest that this first trip to Florida was going to be Jacek M.'s only trip.

To the extent that prior decisions may have used the term "regular" and posited that it means "recurring uniformly according to a predictable time and manner", I do not think that this is an appropriate interpretation to be applied to a provision captioned to capture the use of "company cars" and similar arrangements. Nor is it in accord with insurance underwriting principles that risk arising from regular use would be limited to circumstances where the use was "recurring uniformly according to a predictable time and manner". In my view such a test is entirely too rigid to reflect the reality of automobile usage. Indeed it would exceptional that a vehicle would be used in this fashion. I cannot accept this as a limiting interpretation of the concept of "regular use".

Indeed, tracing back in the case law, it appears that this definition goes back to the trial level decision in *Schneider et al. v. John Doe, Administrator of the Estate of William Maahs* 51 O.R. (3d) 90. In that case the court was indeed looking at cases with very

regular predictable use, although probably not uniformly so. Justice Heeney referred to the definition from *Carswell's Words and Phrases, 1993* in his consideration of the relationship between a police officer and the provider police vehicle:

> **[15] The first question is whether the plaintiff's use of the vehicle is "regular". The definition of that word in Webster's College Dictionary, 1991, includes the following:**
>
> > **1. usual; normal; customary. 2. evenly or uniformly arranged; symmetrical. . . . 7. habitual or long-standing: a regular user.**
>
> **[16] In Carswell's Words and Phrases, 1993, the following entry appears:**
>
> > **"Regular" has a meaning which in some circumstances means normal, and "regular" has a meaning which in some circumstances means recurring uniformly according to a predictable time and manner, and "regularly" in some circumstances means constant.**
>
> **[17] In the case at bar, the plaintiff uses a cruiser every working shift. Her use, therefore, is habitual, normal, and recurs uniformly according to a predictable time and manner. While her use is not constant, I am of the view that constancy is not required to satisfy the ordinary meaning of the word "regular". A person can regularly attend a local pub. That does not mean that he is constantly there, only that he is frequently there according to a predictable pattern. A person works at his regular occupation. That does not mean that the person is constantly working, only that he normally works there during his working shifts, which are predictable and uniform.**

Clearly, Justice Heeney did not conclude that uniformly predictable usage was necessary, but only that it was sufficient to establish "regular use".

As cited, usual, normal, and customary are also sufficient to establish regular use.

On the record before me I conclude that the relationship between 2093614 Ontario Inc. and Jacek M. was not indefinite in nature but was broader than encompassing only the single trip. The relationship contemplated further trips, perhaps many. We can never know this. But we do know that at the time the vehicle was made available, on March 3 or 4, 2007, Bassam C., the individual and directing mind of 2093614 Ontario Inc. contemplated and accepted the fact that there could be other uses of the vehicle other than this one trip, and of course we have the evidence of the insurance documentation continuing to be put forward, even after the accident occurred, to list Jacek M. as a driver.

I find that this tips the balance and accordingly the use of the vehicle was "regular". Jacek M. had exclusive use of the vehicle for the trip in question, and it was contemplated he would be doing further trips. At least until Bassam C. could find someone else. In the circumstances the use would be "normal" and "usual". And the concept of what constitutes "regular" use needs to be distinguished from personal use, or frequent use. There is no basis to read the regulation as importing any requirements for personal use or frequent use in order to acquire the status of regular use.

In my view, the conclusion that this vehicle was made available for Jacek M.'s regular use at the time of the accident is consistent with the evidence, the findings I have made, the true nature of the commercial relationship between the company and Jacek M., and the ancillary transactions wherein a request was made on February 15 to add Jacek M. to the policy as a listed driver. All of this evidence points to the true nature of the relationship as one consistent with regular use of a vehicle on behalf of 2093614 Ontario Inc.

Therefore I conclude that Jacek M. is a deemed named insured.

There was some discussion in the submissions with respect to the question of whether or not being a deemed named insured somehow was different than being a "named insured" for the purpose of priority. This issue has been foreclosed by case law of the highest level for many years. The Court of Appeal in *Warwick and Gore* dealt with this issue, and other cases have dealt with it as well. The regulation deems the regular user to be a named insured for the purposes of priority. In *Co-operators Insurance Company v. Axa Boreal Assurances*, the Court of Appeal extended the Warwick discussion to a "regular user" fact situation. The Court fully canvassed the arguments:

> **[12] Boreal's main submission on this appeal is that s. 91(4) of the SABS cannot make Hounsell a named insured under the Boreal policy for the purpose of determining which insurer is liable to pay accident benefits. Put differently, Boreal contends that "named insured" has a well-understood meaning in the industry and that the SABS cannot alter this meaning when applying the legislative priority rules.**
>
> **[13] Section 268(1) of the Act provides:**
>
> > **8(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.**
>
> **[14] In Warwick v. Gore Mutual Insurance Co. 1997 CanLII 1732 (ON CA), (1997), 32 O.R. (3d) 76 at p. 83, 143 D.L.R. (4th) 110 (C.A.), this court held that, "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 entitlement to these benefits would be determined by regulation." In other words, "Contractual entitlement to no-fault benefits is determined by s. 268(1) of the Act and s. 2 of the Schedule. Section 268(1) adds the Schedule to every contract of automobile insurance but then delegates to the Schedule-maker authority to define the classes of persons insured under any particular contract. Therefore the definition of 'insured person' in s. 2 of the Schedule governs Ms. Warwick's entitlement to no-fault benefits" (at pp. 82-83).**
>
> **[15] Boreal submits, however, that Warwick does not apply because it dealt with entitlement, not priority. I reject this submission. Distinguishing between entitlement and priority is artificial. Entitlement to benefits is meaningful only if an insurer is liable to pay these benefits. And, in cases like the present one, liability to pay depends on determining priority. The underlying rationale of Warwick is that the Schedule and the statute must be read together to determine who receives accident benefits and who is responsible for paying them. That rationale applies to this case. In my view, because of s. 91(4) of the SABS, Hounsell is a named insured under the Boreal policy for the purpose of determining which insurer must pay accident benefits under s. 268 of the Act. Boreal must therefore pay.**
>
> **[16] This conclusion is reinforced by comparing the wording of s. 91(4) with its predecessor, s. 3(1) of the pre-1994 Schedule, R.R.O. 1990, Reg. 672. Section 3(1) provided:**
>
> > **3(1) If the insured automobile is made available for the regular use of an individual, whether or not a resident of Ontario, by a corporation, unincorporated association, partnership, sole proprietorship or other entity or is rented to an individual who is a resident of Ontario, this Schedule applies to the individual and his or her spouse and their dependants as if the individual were a named insured.**
>
> **For convenience I reproduce s. 91(4) of the SABS:**
>
> > **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.**

> **The changes in wording are significant. Section 3(1) states that ". . . this Schedule applies to the individual"; s. 91(4) states that ". . . the individual shall be deemed to be the named insured under the policy". One could argue that under s. 3(1) a person was a named insured only under the Schedule, not the Act. In contrast, under s. 91(4) a person is deemed a named insured under the policy and thus is a named insured for the purpose of claiming benefits under the Act.**
>
> **[17] If this was not clear, s. 91(4) adds that a person is deemed to be a named insured under the policy "for the purpose of payment of statutory accident benefits set out in this Regulation". These additional words are not in s. 3(1). I accept Ms. Samworth's submission that these changes in wording were intended to correct an anomaly under the previous Schedule. If the named insured under the pre-1994 Schedule was a corporation, then no accident benefits would ever be paid even though coverage was mandatory and the corporation paid a premium for it. Under s. 91(4) of the SABS, regular company drivers can obtain accident benefits under the company's automobile policy.**
>
> **[18] Most of the case law to date is against Boreal's position. However, Boreal relies on and draws comfort from the decision of our respected former colleague, The Honourable Patrick Galligan, sitting as an arbitrator in *Axa Insurance (Canada) v. Old Republic Insurance Co.* (May 1997). Mr. Galligan held that s. 91(4) cannot define an expression -- "named insured" -- used in a statute. He wrote:**
>
> > **The terms "named insured" and "insured" have long had 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 in 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.**
>
> **[19] I cannot accept this reasoning because it fails to give effect to s. 268(1) of the Act or to the wording of s. 91(4) of the SABS. This case was reversed on appeal by Lax J. at 1998 CanLII 14670 (ON SC), (1998), 38 O.R. (3d) 630, 37 M.V.R. (3d) 144 (Gen. Div.), who pointed out at p. 637 that the statute does not define "named insured" and s. 268(5) does not "fix the class of named insureds". Instead, she observed at p. 639, referring to Warwick: ". . . If the statute could authorize a narrower definition of 'insured person' to apply to Ms. Warwick, there was no reason that it could not equally authorize a broader definition of 'named insured'. . . . Section 91(4) is not inconsistent with s. 268(5) of the Insurance Act . . .". I agree with Lax J.**
>
> **[20] For all these reasons Hounsell is a named insured under the Boreal policy for the purpose of determining liability to pay accident benefits under s. 268 of the Act.**

Having found that Jacek M. is a deemed named insured and therefore to be treated as a named insured under the Kingsway policy, we now must analyze the situation where there are two competing policies. There is the Kingsway policy where Jacek M. is a deemed named insured, and there is the York Fire policy where Jacek M. is the actual named insured. Between these two policies we must decide which is the higher-ranking coverage.

This situation is governed by section 268 of the *Insurance Act*, quoted above. In particular subsection 5.2 is germane. The legislation directs us to look at the question of occupancy. If, at the time of the accident, Jacek M. was the occupant of the vehicle insured by Kingsway, then that is the higher-ranking coverage. If the contrary is the case, and Jacek M. was not an occupant of the vehicle at the time of the accident, then the two policies are equally ranking in priority and it becomes a question of where Jacek M. chose to have coverage by his application.

It is understood that the application was made to York Fire. Therefore the outcome would be opposite if Jacek M. was not an occupant of the vehicle at the time of the accident.

The evidence with respect to the accident circumstances suggests that Jacek M. was not physically within the vehicle at the time of the accident that caused his injury. It is understood that he was en route to make a delivery. He needed to get directions.

He stopped the tractor-trailer at the side of the road. He thought he would take a moment to speak with drivers of trucks on the other side of the road. Those truckers were stopped, standing at the curb and close to the sidewalk. He left his vehicle with the intention to go across the road and ask for directions to the particular warehouse that was his destination. He expected it would take a few minutes. It was his intention once he got the directions to go back into the tractor-trailer and go to the destination. He did not remember whether he left the engine running or not in the truck that was in his custody.

In my view, this fact pattern is directly governed by the decisions of the Court of Appeal in *Axa v. Markel* and in *McIntyre v. Scott*.

The test to be applied is to ask the question whether an objective observer of this incident would have considered Jacek M. to be the driver of the tractor-trailer.

The facts are very close here to the facts in the *Axa v. Markel* case. In that case Ferguson was the SABS claimant. The Court reports the following circumstances:

> **On January 30, 1996, Mr. Ferguson drove the tractor trailer to the Stelco South Billet Yard, Rod Mill #2 in order to make a delivery of steel. Once there, he stopped his vehicle outside the loading bay, exited his vehicle and entered the loading bay to wait his turn to unload his truck. He was outside his truck standing about 30 feet away when he was struck by a piece of wood which had been propelled off the back of another tractor trailer exiting the loading bay.**

The court noted that the statute contemplates that "occupant" includes "the driver". It was necessary then to consider whether Ferguson was the driver at the time of the accident.

> **[13] To answer this question it is helpful to begin with the ordinary meaning of the word "driver". The concise Oxford Dictionary defines it as "one who drives". Using this definition the issue is whether at the time of the incident Mr. Ferguson was the one who was driving the tractor trailer.**
>
> **[14] By using this criterion the Act focuses on the description of the person claiming the benefits. It does not turn on the activity being engaged in nor the person's precise location. There is nothing in the statutory definition that requires the person at the time of the incident to be engaged in the act of driving or to be in the vehicle. The requirement is merely that he or she be the driver of the vehicle.**
>
> **[15] This statutory approach is to be contrasted with that addressed in Kyriazis v. Royal Insurance Company of Canada et al. reflex, (1991), 82 D.L.R. (4th) 691, affirmed reflex, (1993), 107 D.L.R. (4th) 288 (Ont. C.A.). In that case the court was considering the standard automobile insurance policy which defined "occupant" to be "a person driving, being carried in or upon or entering or getting on to or alighting from an automobile." The court pointed out that the word "occupant" was defined by reference to various physical activities or processes and since the person in that case had stopped his vehicle and exited it to clean snow from the windows of the vehicle, he was not engaged in driving and therefore was not an occupant.**

> **[16] Because the relevant definition in Kyriazis was by reference to various physical activities including driving, that case is clearly distinguishable from this one. In the instant case the relevant definition contains no requirement that the person be engaged in driving at the time of the incident.**
>
> **[17] However, the legislative context here suggests several other considerations relevant to determining whether Mr. Ferguson can be said to have been the driver of the tractor trailer on January 30, 1996.**
>
> **[18] First, while s.224(1) does not require that a person be in the vehicle to be "the driver", by placing s.224(1)(a) together with the definitions in ss. 224(1)(b) and (c), it suggests that there must be some degree of physical connection with the vehicle for the person to be the driver.**
>
> **[19] Second, the requirement in s.268(5.2) that the person be the driver at the time of the incident suggests that this is not a status that attaches permanently to a person but, rather, something that depends on the circumstances at the time.**
>
> **[20] Third, s.268(5.2) uses this criterion to determine which of two insurers may be required to pay the benefits. This suggests that although a person may be a named insured in respect of two vehicles in two separate policies, at the time of the incident the person can be the driver of only one but not both of those vehicles, at least for the purposes of s.268(5.2). Otherwise this criterion of being "the driver" would be ineffective in determining which insurer pays.**
>
> **[21] Keeping in mind these considerations, the question is whether in all the circumstances at the time of the incident Mr. Ferguson was the driver of the tractor trailer. Would an objective observer of this incident on January 30, 1996 who had in mind these considerations answer affirmatively if asked whether Mr. Ferguson was the driver of the tractor trailer?**
>
> **[22] In my view, the answer is clear. When he was injured Mr. Ferguson was in close physical proximity to the vehicle. He had driven it there and was waiting to unload it after which he undoubtedly would have driven it away. It is also safe to infer that at the time he was hit he maintained some element of control over the vehicle. Certainly there is no evidence that anyone else had taken over control of it nor had assumed the role of driver. In my view therefore, at the time he was injured he was the driver of the tractor trailer for the purposes of s.268(5.2) of the Act.**

It seems to me that this case is very close in facts to the case that the Court of Appeal decided. There was close physical proximity to the vehicle. Jacek M. had driven it there and was going to continue on with his journey. He maintained some element of control over the vehicle by his presence. There is no evidence that anyone else had taken over control of the vehicle or assumed the role of the driver.

I therefore conclude that the objective observer would consider Jacek M. to be the driver of the tractor-trailer at the time of the accident and therefore the "occupant" of the vehicle in accordance with the *Insurance Act*.

As Jacek M. is deemed to be a named insured in accordance with the regulations and was an occupant of the vehicle in accordance with the *Insurance Act* at the time of the accident, the highest priority of coverage rests with Kingsway General Insurance Company in this case.

Conclusion

For the foregoing reasons I conclude that Jacek M. was a deemed named insured with respect to the Kingsway policy and was an occupant of the vehicle as defined by the legislation and case law.

Therefore I conclude that Kingsway is the highest ranking insurer with respect to the payment of Statutory Accident Benefits.

If counsel wish to address costs or any other matters, please feel free to contact me in the next 30 days.

Dated at Toronto this 15th day of January, 2014.

Lee Samis

LEE SAMIS
Arbitrator