

**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c.I.8,
AND ONTARIO REGULATION 283/95 (AS AMENDED);**

AND IN THE MATTER OF THE *ARBITRATION ACT*, c.17, (AS AMENDED);

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ECONOMICAL INSURANCE GROUP

Applicant

- and -

**SECURITY NATIONAL INSURANCE COMPNAY
and ROYAL AND SUN ALLIANCE INSURANCE COMPNAY**

Respondents

AWARD

COUNSEL:

David J. Van Staalduinen and Varshni Skantharajah for the Respondent, Security National

Derek Greenside for the Respondent, Royal and Sun Alliance Insurance Company

ISSUES:

Was Mr. Vincente Gonzalez an “insured person” within the meaning of Section 3(1) of the Statutory Accident Benefits Schedule and therefore entitled to accident benefit payments by Royal and Sun Alliance Insurance Company?

ORDER:

Mr. Gonzalez was an “insured person” within the meaning of Section 3(1) of the Statutory Accident Benefits Schedule and Royal and Sun Alliance is responsible for payment of accident benefits in this matter.

HEARING:

The hearing in this matter was held in the city of Toronto in the province of Ontario on June 8, 2018. No witnesses were called and the hearing proceeded on the basis of documents filed.

THE FACTS & ANALYSIS:

This arbitration arises out of a motor vehicle accident that occurred on March 12, 2015. At that time Mr. Vincente Gonzalez (“claimant”) was riding his bicycle when he was struck by a motor vehicle insured by Security National Insurance Company (“Security National”). At the time of the accident Mr. Gonzalez was employed as an automobile technician at a Canadian Tire store. His employer had a valid automobile insurance policy with Royal and Sun Alliance Insurance Company (“RSA”) for a 2004 Ford Super Cab pick up truck.

Following the accident Mr. Gonzalez submitted an application for accident benefits to the Economical Mutual Insurance Company (“Economical”) which insured a motor vehicle owned by the claimant’s father. Mr. Gonzalez was not, however, a listed driver under his father’s policy and therefore pursuant to Ontario Regulation 283/95, as amended, Economical commenced a priority dispute against RSA and Security National.

Priority between insurers for the purposes of accident benefits are governed by Section 268(2) of the Insurance Act which states:

268(2) The following rules apply for determining who is liable to pay statutory accident benefits...

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...

The issue before me is whether Mr. Gonzalez was an “insured person” under his employer’s automobile policy with RSA at the time of the accident. If so, then pursuant to Section 268(2)(i) of the Insurance Act, RSA is responsible for payment of accident benefits to Mr. Gonzalez. If not, then Security National is responsible for paying those benefits.

Before delving into the law in this matter, it is worthwhile to set out the relevant facts. The original RSA policy was dated July 9, 2014 and covered from that date until July 9, 2015. The named insured was Andrea N. Pilon Enterprises Limited. On the certificate of insurance there was a section entitled:

“Rating information”
“Driver information, Driver No. and name”

Below that were the names of four individuals who were assigned to the auto as principal or secondary drivers. Mr. Gonzalez’s name was not on this document.

The original policy was amended on September 22, 2014 and was in effect at the time of the accident. The reason for the amendment, as stated in the certificate of insurance was:

“Driver added
Driver restriction/exclusion added”

As with the original certificate, there was a section entitled:

“Rating information”

and below that the words:

“Driver information,
Driver No. and name”¹

As can be seen on the certificate, an additional person was added and assigned to the policy as a secondary driver. Mr. Gonzalez was also named and assigned to the auto policy as “excluded”. In addition Mr. Gonzalez also signed what is known as an OPCF-28A, Excluded Driver Endorsement, which explicitly states that it is part of the policy.

THE LAW:

As stated above, the issue before me was whether Mr. Gonzalez was an “insured person” under the RSA policy. The term “insured person” is defined in Section 3 of the Statutory Accident Benefits Schedule and states as follows:

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...

Counsel for Security National submitted that Mr. Gonzalez was “specified” in the policy as a driver noting he was listed under the heading of “driver information” and “driver name”. I will come back to the issue of whether the entries on the certificate and the OPCF-28A constitute being “specified on the policy”. I will deal first, however, with the issue of if someone listed as an excluded driver can be an insured person. This issue has been examined by Arbitrator Densen in State Farm Insurance Company vs. The Wawanesa Mutual Insurance Company, (March 10, 2016), Arbitrator Bialkowski in Dominion of Canada General Insurance Company vs. State Farm Mutual Insurance Company, 2015 Carswell ONT10269, and Arbitrator Cooper in Belairdirect Insurance vs. Dominion of

¹ See Schedule “A” of this award for the full Certificate of Insurance and OPCF-28A.

Canada General Insurance Company, 2017 ONSC367. The latter two cases were subsequently considered by the Ontario Court of Appeal.

Using the “modern approach” to statutory interpretation, I have no difficulty with the concept that an “excluded driver” falls within the meaning of “specified driver” for the purposes of Section 3(1) of the Statutory Accident Benefits Schedule and therefore can be an “insured person” for the purposes of Section 268(2) of the Insurance Act.

While it may initially seem odd to include a person who is an “excluded driver” in the definition of driver, it is clear from reading the Statutory Accident Benefits Schedule and indeed the Insurance Act, that that is what the legislation intended. “Excluded driver” is simply one of a number of subcategories of “specified” drivers.

The legislature did not intend to eliminate all benefits to excluded drivers. Rather it was designed to limit exposure of insurers to third parties when the insured vehicles were driven by high risk drivers. Sections 225 and 240 of the Insurance Act make it clear that the excluded driver retains certain benefits as provided for in the Statutory Accident Benefits Schedule. Section 31(1)(i) of the Schedule clearly intended for excluded drivers to be entitled to certain accident benefits, provided they were not driving the car in the question at the time of the accident. Section 31(1) states:

31. (1) The insurer is not required to pay an income replacement benefit, a non-earner benefit or a benefit under section 21, 22 or 23,

(a) in respect of a person who was the driver of an automobile at the time of the accident...

(iii) if the driver is an excluded driver under the contract of automobile insurance, or...

Furthermore, Section 31(2) of the Schedule states:

(2) Clause (1) (c) does not prevent an excluded driver or any other occupant of an automobile driven by the excluded driver from recovering accident benefits under a motor vehicle liability policy in respect of which the excluded driver or other occupant is a named insured.

In addition, a reading of OPCF-28A reveals that the payment of accident benefits is intended for excluded drivers, in limited situations, where they were not driving the vehicle which is covered by the policy.

Having decided that an excluded driver can be a specified driver and therefore an “insured person” within the meaning of Section 3(1) of the Schedule, we must now determine if Mr. Gonzalez was a “listed” or “specified” driver under the RSA policy.

Counsel for RSA submits that Mr. Gonzalez was simply a person excluded under the RSA policy and nothing more. In support of this position, counsel for RSA points out that nowhere in the Certificate of Insurance is Mr. Gonzalez named as a listed or specified driver. Counsel suggests that Mr. Gonzalez’s name is only on the certificate for rating information purposes, and not for coverage. In support of this position he filed a “Revised Certificate of Automobile Insurance Form and Data Elements”. This bulletin was published by Superintendent of Financial Services and sets out what must be contained in Certificates of Insurance after September 1, 2010 in Ontario. Insurers who want to use a form other than the one set out in the bulletin must submit proposed certificates for approval of the Financial Services Commission of Ontario.

A review of the bulletin reveals that rating information must be on the certificate along with “driver number”, “driver name”, and “assignment to automobile - - principal, secondary, occasional, excluded”

Counsel for RSA submits that the listing of Mr. Gonzalez is for the rating purposes only as referred to by the bulletin and does not therefore give him the status of an insured person. It is RSA’s position, as I understand, that the “rating information list” sets out not only the rating information required by the bulletin but also sets out that the five persons listed are either principal or secondary drivers under the policy, and Mr. Gonzalez is an excluded person and nothing more.

Counsel for RSA also takes the position that one is to look only at the Certificate of Insurance rather than the OPCF-28A in determining entitlement to coverage.

Counsel for Security National points out that there is only one list in the certificate, which covers driver information, driver name and their assignments to auto, being principal, secondary or in Mr. Gonzalez's case "excluded". He further points out that in the "Reason(s) for the amendment" section of the Certificate, it states:

"Driver added
Driver restriction/exclusion added"

A brief review of the case law in the area may be useful at this time. Arbitrator Densen, in State Farm Insurance Company vs. The Wawanesa Mutual Insurance Company, (unreported decision, March 10, 2016) dealt with the issue of whether an excluded driver was "a person specified in a policy as a driver of the insured automobile." In that case there was a list setting out the other drivers and listing the injured party, Mr. Dang, as an excluded driver. Arbitrator Densen found that by putting Mr. Dang's name in the "driver's name" column of the certificate of insurance it had in affect made him a "person specified in the policy as a driver of the insured automobile."

Interestingly, Arbitrator Densen found that a person acquires the statutory "excluded driver" status by being named in the OPCF-28A Excluded Driver Endorsement, not because he is named as a driver in the Certificate. He further states on page 21 of his decision that:

It is not necessary to name a driver in the driver list contained in the certificate to designate the driver as an excluded driver within the meaning of the Insurance Act.

In Belairdirect Insurance vs. Dominion of Canada General Insurance Company, 2017 ONSC367, Arbitrator Cooper dealt with a situation where the claimant, Matthew, was named "listed driver" on the Certificate of Insurance but elsewhere in the Certificate under "rating information" was assigned "excluded" status. Matthew had executed an OPCF-28A excluded driver endorsement. While Arbitrator Cooper was of the view that Matthew, by virtue of being a specified driver, was an insured person within the meaning of the Statutory Accident Benefits Schedule he felt bound by the decision to the contrary by Justice KP Wright, in Dominion of Canada vs. State Farm.

The status of an “excluded driver” was also considered by Arbitrator Bialkowski in Dominion of Canada General Insurance Company vs. State Farm Mutual Insurance Company, 2015 Carswell 10269. In that case the claimant, Umberto Rupolo, was a passenger in his girlfriend’s car. Umberto was a listed driver in his parent’s auto policy with Dominion of Canada. Subsequent to the issuing of Certificate of Insurance, Dominion’s underwriting department determined that Umberto’s driving history was too risky to insure and had him sign an OPCF-28A. While a Certificate of Insurance had him as a listed driver it also stated that “data information” that he was an excluded driver. While finding that Umberto was entitled to accident benefits as he as a listed driver on the certificate, Arbitrator Bialkowski then went on to suggest two possible ways that Dominion could have avoided the entitled to accident benefits; 1. Not show him as a listed driver on the face of the policy and 2. Change the Certificate to show a list of “listed drivers” and a separate list for excluded non-specified drivers.

The decision of Arbitrators Cooper and Bialkowski were eventually considered by the Ontario Court of Appeal. This court decided that the decisions of both arbitrators were reasonable.

Having examined the facts of our case and the law in the area, I am drawn to the following conclusions.

For the reason given above, I accept that an excluded driver comes within the meaning of “a person specified in the policy as a driver of the insured automobile”.

I further find that when attempting to determine if the person is “specified in the policy”, it is appropriate not only to look at the Certificate itself but also the OPCF-28A Excluded Driver Endorsement. The endorsement itself states: “Purpose of change. This change is part of the policy. Except for certain Accident Benefits, excludes all overages when the person (“Excluded Driver”) named in paragraph 3 below drives the automobile(s) described in paragraph 2 below.”

Section 3(1) of the Statutory Accident Benefits Schedule clearly states that an “insured person” can include any person specified in the policy as a driver of the insured automobile. Since the endorsement is part of the policy, it must be considered.

I am somewhat confused by the form used by the insurer, in that it has only one list under “rating information” and not a separate list for listed drivers. While the rating information is required on the certificate, including Mr. Gonzalez as excluded does give rise to some confusion. When you add to that, having Mr. Gonzalez sign the excluded driver endorsement, simply, at very least, adds to the confusion. In that form, which Mr. Gonzalez signed at the request of the insurer, it clearly states:

Exclusion from coverage – Except for certain Accident Benefits under Section 4 of the policy, we will not provide coverage while the excluded driver is driving the automobile listed below...

It also goes on to state:

3. Acknowledgment of Excluded Driver. I promise that I will not drive automobile(s) described in paragraph 2 above. I understand that if I do there is no coverage for... most accident benefits.

I think that is fair to say that any reasonable person reading the policy and particular, signing the OPCF-28A would conclude that they would be entitled to certain accident benefit coverage, provided they weren't driving the described automobile at the time of the accident.

As pointed by Justice Gonthier in Smith v. Co-operators General Insurance Co., [2002] 2 S.C.R. 129:

...one of the main objectives of insurance law is consumer protection, particularly in the field of automobile and home insurance.

Further more, to the extent that there is any ambiguity in this matter, it must be resolved in favor of the individual, in this case, Mr. Gonzalez. As Laskin G.A. stated in Schneider vs. Maahs Estate [2001] O.J. No. 4308

An insurance policy is a contract and the ordinary rules of contract interpretation apply to determine the meaning of an insured person. The court must give effect to the intention of the parties by looking at the words they used....Admittedly, searching for the intention of the parties to an Ontario car insurance policy is somewhat fictional. The mandatory provisions of the policy and the optional endorsements incorporate standard terms and forms. These terms and forms are written by the insurance industry. The driving public can either accept or reject the coverage that is available but they cannot modify the words of the policy... Any ambiguity in the terms of a contract must be interpreted against the drafter of those terms on the principle that the drafter could have avoided the ambiguous language.

In summary, I accept that an excluded driver can be an “insured person” within the meaning of Section 3(1) of the Statutory Accident Benefits Schedule. Furthermore, I accept, on the facts of this case, based on a reading of the certificate of insurance and the OPCF-28A that Mr. Gonzalez is entitled to accident benefits under the RSA policy.

In the event that the parties are unable to agree with regard to the issue of costs I may be spoke to.

DATED at TORONTO, ONTARIO this __16th __ DAY OF JULY, 2018.

M. Guy Jones
Arbitrator