

IN THE MATTER of the *Insurance Act*, R.S.O. 1990,
c.l.8, s. 268 (as amended) and Regulation 283/95 (as amended);

AND IN THE MATTER of the *Arbitration Act, 1991*,
S.O. 1991, c.17, (as amended);

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

CO-OPERATORS GENERAL INSURANCE COMPANY

Applicant

- and -

CERTAS HOME & AUTO INSURANCE COMPANY

Respondent

A W A R D

COUNSEL:

Mark K. Donaldson
Counsel for the Applicant, Co-Operators General Insurance Company ("Co-Op")

Ahmad Khan
Counsel for the Respondent, State Farm Insurance Companies, now known as Certas
Home and Auto Insurance Company ("Certas")

ISSUES:

This arbitration involves a priority dispute between insurers. The issues, as set out in the Arbitration Agreement, are as follows:

- (a) Which of the Applicant or the Respondent bears first priority for the accident benefits claim of Mr. Alexander F¹?
- (b) If the answer to (a) is the Respondent, what is the appropriate indemnity amount to be paid by the Respondent to the Applicant?
- (c) What is the amount of interest, if any, payable on such indemnity amount as may be found to be owing?
- (d) The determination of the costs of the arbitration and the burden of payment of same.

EVIDENCE:

The following documents were marked as exhibits at the hearing which proceeded before me on Monday, April 15, 2019.

Exhibit 1 – Arbitration Agreement (long form)

Exhibit 2 – Applicant’s Document Brief

Exhibit 3 – Respondent’s Document Brief

I did not receive any evidence apart from the documents filed.

The facts which give rise to the within arbitration are not in dispute at all. Rather, it is the interpretation of a variety of provisions applicable to optional benefits which requires me to make a determination in this matter.

The basic facts which serve as a backdrop to the dispute are as follows. The claimant, Alexander F, held a valid policy of motor vehicle liability insurance issued by Co-Op pertaining to a 2013 Dodge Dart. Effective April 21, 2017, the policy was amended to include coverage for certain optional accident benefits. As a result, an OPCF 47 was added to Alexander F’s policy. Alexander F also held a valid policy of motor vehicle liability insurance with Certas respecting a 1989 Suzuki motorcycle. This policy only provided for standard or mandatory accident benefits.

¹ By reason of privacy concerns, the claimant’s last name is not reflected in these Reasons.

On September 16, 2017, Alexander F was involved in a single vehicle accident while operating the Suzuki motorcycle insured by Certas.

On September 26, 2017, Alexander F submitted an application for accident benefits (OCF-1) to Co-Op. On September 28, 2017, Certas sent an accident benefits package to Alexander F after speaking with him on the same date. This letter appears to be a standard letter which explains statutory accident benefits and provides the claimant with a variety of standard forms for completion with a view toward applying for statutory accident benefits. None of these forms were completed and submitted to Certas. On October 5, 2017, Certas sent a follow up letter to Alexander F to the effect that Certas had attempted to contact Alexander F by telephone to discuss the accident but had been unsuccessful in reaching him. Alexander F was requested to contact a Certas representative.

On October 6, 2017, Co-Op sent Certas a Notice to Applicant of Dispute Between Insurers form. Correspondence was exchanged between the insurers; each insurer attempting to persuade the other of their position in relation to priority. On February 20, 2018, Co-Op issued and served a Demand to Participate in the Appointment of an Arbitrator and the parties agreed, on consent, to appoint the writer as arbitrator pursuant to the *Arbitration Act*, 1991, to arbitrate a dispute as between two insurers with respect to a priority issue pursuant to the *Insurance Act* and its regulations: specifically Regulation 283/95, as amended.

Section 268 of the Insurance Act 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.

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.

Liability

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

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.

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.

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.

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.

Section 28 (1) of the Statutory Accident Benefits Schedule for accidents after September 1, 2010 (“SABS”) provides that automobile insurance policies must offer various optional benefits including those purchased by Alexander F. Section 28 (4) of the SABS provides that where optional benefits are purchased by the insured person, the insurer shall issue to the person the endorsement set out in OPCF 47. Section 28 (2) of the SABS notes that the optional benefits only apply to the named insured, the spouse of the named insured, the dependants of the named insured and of the named insured’s spouse and the person specified in the policy as drivers of the insured automobile. This section is designed to ensure that only those individuals who have purchased and paid for the optional benefits will receive the benefit of the coverage. This lines up with the 2nd of the 4 conditions enumerated by Arbitrator Samis, below, namely, are the optional statutory accident benefits applicable claimant.

REVIEW OF CASE LAW:

There are not a great number of cases arising from the issue of the effect or import of optional benefits as it relates to the issue of priority. The cases put before me, which I review in chronological order, are set out as follows.

In *Economical Mutual Insurance Company v ACE INA Insurance Company* (a decision of mine released in December 2011), the issue for determination was whether Economical's failure or refusal to launch an application to the Workplace Safety and Insurance Act Tribunal (WSIAT) has any implications or effect on the amount to which Economical would otherwise be entitled to indemnification from ACE INA. In the course of reviewing the factual history in that matter, I noted that counsel for ACE INA made an inquiry regarding the existence of optional benefits under the Economical policy. There were no optional benefits applicable to the Economical policy. I observed, as nothing more than obiter, that if the Economical policy contained such optional benefits, then Economical could not have pursued the priority dispute pursuant to the SABS and the OPCF 47. There was no argument put to me by counsel for the parties in this matter and, as I have noted, the comment made in paragraph 33 of my Award is nothing more than obiter without any analysis on my part.

On January 20, 2015, Arbitrator Samis released his Award in *Echelon General Insurance Company v Co-Operators General Insurance Company*. The claimant was involved in a motor vehicle accident on February 5, 2013. She was operating a vehicle insured by Echelon which did not provide for optional benefits. The claimant applied to Echelon for statutory accident benefits. Subsequent inquiries determined that the claimant was listed as a driver under a policy issued by Co-Operators with optional benefits. Echelon attempted to argue that Co-Operators, by issuing a policy with optional benefits, was the higher priority insurer responsible for the claimant's claim for statutory accident benefits. Given that the claimant did not apply to Co-Operators, the reasons expressed by Arbitrator Samis are obiter.

The analysis of Arbitrator Samis starts, at page 7, with his consideration as to what would happen if the claimant had applied directly to Co-Operators. For reasons that will follow, I disagree with the reasons of Arbitrator Samis.

I do agree with Arbitrator Samis to the extent that there are four conditions enumerated or present in the OPCF 47 before a claimant can access optional benefits:

1. Are optional statutory accident benefits purchased?
2. Are the optional statutory accident benefits applicable to the claimant?

3. Has the claimant claimed or could he or she claim SABS under the policy with optional benefits? and,
4. Has the claimant or could the claimant agree not to make a claim for SABS under another policy?

As I have noted, in the case before Arbitrator Samis, the claimant did not claim statutory accident benefits under the policy that had the optional coverage, being Co-Operators. As a result, Echelon remained the higher priority insurer. In obiter, Arbitrator Samis reviewed what may have happened had the claimant applied to Co-Operators first. Arbitrator Samis constructed a scheme whereby Co-Operators would evaluate and administer benefits (both mandatory and optional) and have the right to reimbursement or indemnification from Echelon in relation to mandatory benefits only. This appears to be a hybrid of priority and loss transfer. There is no precedent of this process being actually employed in relation to a statutory accident benefits claim of which I am aware.

The next case put before me is an Award of Arbitrator Samworth in *Jevco Insurance Company v. Chieftain Insurance Company* released on March 11, 2016. The claim arose from a motor vehicle accident which occurred on July 15, 2013. The claimant was involved in an accident while riding his motorcycle which was insured by Jevco. The claimant was also insured under a policy of automobile insurance with Chieftain which policy covered the claimant's personal automobile and contained optional benefits. Once again, the claimant, by choice, mistake or accident, applied to Jevco for statutory accident benefits. The claimant failed to meet the third condition of the OPCF 47 (described, above, by Arbitrator Samis and with those four conditions approved of by Arbitrator Samworth). Arbitrator Samworth found that the purchase of optional benefits and the completion of the OPCF 47 does not change the ordinary rules of priority. The claimant, by applying to Jevco (the insurer of the motorcycle upon which he was riding at the time of the accident) was the higher priority insurer. The presence of optional benefits under the Chieftain policy did not allow for Jevco to assert a successful priority claim and, for want of a better term, transfer the administration and provision of benefits to Chieftain.

Arbitrator Samworth, in obiter, makes certain comments as to what would have happened had the claimant made a first and only application to Chieftain (the insurer with optional benefits coverage). I agree with her reasons, expressed in obiter.

The next case is another decision of Arbitrator Samis in *Echelon General Insurance Company v Co-Operators General Insurance Company* released on March 2, 2018. The claimant was operating a motorcycle on August 6, 2013. The motorcycle was insured by Echelon. The claimant was also covered for purposes of statutory accident benefits under an automobile policy issued by Co-Operators which included optional benefits. The claimant applied to Echelon. Once again, the third condition precedent to obtaining optional benefits was not satisfied. Arbitrator Samis found that there was no basis to find Co-Operators to be the higher ranking insurer. Given that Echelon insured the motorcycle upon which the claimant was riding at the time of the accident and given that the claimant applied to Echelon, there would be no basis to find Co-Operators to be the higher priority insurer. That said, Arbitrator Samis concluded his Award by finding that to the extent that the claimant could claim benefits from Co-Operators, he would require Co-Operators to handle the claim but be entitled to reimbursement from Echelon only with respect to the standard or mandatory statutory accident benefits. This is a comment in obiter.

The most recent Award put before me is that of Arbitrator Bialkowski in *Chubb Insurance Company of Canada v. Continental Casualty Company*, dated April 4, 2018. This is an extremely messy matter, for want of a better term, which gave rise to issues about regular use, dependency, deflection and optional benefits. There are allegations and findings of misrepresentation as to whether optional benefits were or were not applicable to a policy. I am advised that an appeal was taken on the issue of regular use and that the appeal was heard by Stinson, J. on January 30, 2019. No reasons have been released by Stinson, J. at the time of my hearing though, as I have indicated, I am advised that the issue before Stinson, J. related to regular use. It would appear that CNA issued a policy with optional benefits but did not disclose this to the claimant. The claimant applied to Chubb. Thus, the third condition present in the OPCF 47 was not satisfied by the claimant. The analysis offered by Arbitrator Bialkowski, while informative, was very fact specific as the claimant was misinformed and never in a position to make an informed election as to the insurer he wished to pay benefits.

SUBMISSIONS AND ANALYSIS:

Counsel for Co-Op makes submissions as follows. The provisions of the SABS require every insurer to offer various optional benefits (SABS – Ontario Regulation 34/10, Section 28). The OPCF 47 endorsement is issued by an automobile insurer to their

insured when optional benefits are purchased. As an endorsement, the OPCF 47 is a form that has been approved by the Superintendent.

Counsel for Co-Op submits that the terms of the endorsement are permissive rather than mandatory. The endorsement “allows” individuals entitled to receive optional statutory accident benefits to claim them under the corresponding policy. Permitting a claimant for statutory accident benefits to submit only one application is consistent with the amendment made to Ontario Regulation 283/95 – Disputes Between Insurers. Section 2.1(4) applies to accidents after September 1, 2010 and clearly stipulates that “the applicant shall use the application provided by the insurer and shall send the completed application to one insurer”.

Alexander F was within his rights to submit his application for benefits to Co-Op (being insured under both the Co-Op and Certas policies). Section 268(5.2) of the *Insurance Act* would direct the claimant to submit his application to the insurer of the vehicle he was occupying (Certas). However, this would defeat the purpose of obtaining optional benefits which are designed to be portable, ie. to move with the person insured for such coverage, regardless of whether they may be a pedestrian, driver or occupant of a vehicle with optional benefits coverage or the driver or occupant of another vehicle.

Counsel for Co-Op submits as follows:

“By virtue of the terms of the OPCF 47, an insurer agrees to not deny a claim for both mandatory and optional statutory accident benefits on the grounds that the priority of payment rule found in Section 268 of the *Insurance Act* may oblige a claimant to direct their claim elsewhere. However, that agreement is premised upon several pre-conditions, namely, that (a) the optional accident benefits have been purchased; (b) the optional accident benefits are applicable to a person under the policy; (c) the person claims the accident benefits under the policy where the optional benefits are provided; and (d) the claimant agrees not to make a claim for statutory accident benefits under another policy”.

The essence of the argument advanced by counsel for Co-Op is that the provisions of the OPCF 47 govern the relationship between the insured and the insurer but do not address or impact a priority dispute between two competing insurers. This is the reasoning espoused by Arbitrator Samis, discussed above.

I respectfully disagree with the reasoning of Arbitrator Samis. The OPCF 47 is entitled “AGREEMENT NOT TO RELY ON SABS PRIORITY OF PAYMENT RULES”. The

endorsement is specifically provided to be part of the policy. The purpose of the endorsement acknowledges that an applicant would typically be required to claim benefits pursuant to Section 268 of the *Insurance Act* and this may direct the claimant to a policy that does not provide them with optional statutory accident benefits. The endorsement, reproduced as an appendix to this Award, provides as follows:

“This endorsement allows these persons to claim statutory accident benefits (SABS) under this policy including the optional statutory accident benefits provided by this policy, provided they do not make a claim for SABS under another policy.”

The OPCF 47 provides, in paragraph 2, the terms agreed upon by the insurer pursuant to the endorsement:

“If optional statutory accident benefits are purchased and are applicable to a person under this policy, and the person claims SABS under this policy as a result of an accident and agrees not to make a claim for SABS under another policy, we agree that we will not deny the claim, for both mandatory and optional statutory accident benefits coverage purchased, on the basis that the priority of payment rules in Section 268 of the *Insurance Act* may require that the person claim SABS under another insurance policy.”

I do not need to repeat the analysis provided by Arbitrator Samworth in *Jevco v Chieftain*, above. I agree with her analysis and I will not advance the interest of the parties herein or the industry at large by reiterating her reasons.

That said, I will focus on the phrase “we will not deny the claim ...on the basis that the priority of payment rules in Section 268 of the *Insurance Act* may require that the person claim SABS under another insurance policy.”

It is trite that an insurer cannot deny statutory accident benefits to the claimant on the basis of a priority dispute. This situation was addressed in the very early years of enhanced accident benefits coverage starting with the Ontario Motorist Protection Plan (OMPP). It can only mean that the ordinary priority rules (absent optional benefit coverage) do not apply. On the facts before me and absent optional benefits coverage with Co-Op, the claimant would have been obliged to apply to Certas. If the claimant had

applied to Co-Operators, the higher priority insurer would be found to be Certas as the claimant, being a named insured under both policies, was the driver or operator of the Certas motorcycle.

The OPCF 47 endorsement changes everything and, provided that the claimant satisfies the four conditions present in the endorsement, the optional benefits insurer is required to administer both mandatory and optional benefits coverages without regard for the priority of payment rules in Section 268 of the *Insurance Act*.

For the reasons given, Co-Operators remains the higher priority insurer responsible to respond to claims for statutory accident benefits on the part of Alexander F arising from the motor vehicle accident of September 16, 2017.

I remain seized of this matter to address the issue of costs if counsel are unable to work this out. I order that Co-Operators pay the costs of the Arbitrator in accordance with the terms of the executed Arbitration Agreement.

I am most appreciative of the efforts of counsel for their courtesy and cooperation extended to me and to each other from the inception of the arbitration through to its conclusion and wish to thank counsel for their thoughtful, comprehensive and intelligent submissions.

Dated at Toronto, this day of April, 2019.

Vance H. Cooper, Arbitrator