

IN THE MATTER OF AN ARBITRATION under the Arbitration Act, 1991, S.O. 1991, c. 17
and in the matter of the Insurance Act, R.S.O. 1990, c. I.8 and s. 268 thereof and Regulation
283/95 made pursuant to the Insurance Act

BETWEEN:

YORK FIRE & CASUALTY INSURANCE COMPANY

Applicant

and

ECONOMICAL MUTUAL INSURANCE COMPANY

Respondent

AWARD

COUNSEL:

Elizabeth Iwata for the Applicant

Pamela M. Stevens for the Respondent

ISSUE:

1. Is York Fire & Casualty Insurance Company or Economical Mutual Insurance Company responsible for paying accident benefits to or on behalf of Mr. Seung Beom Sohn?

RESULT:

1. Economical Mutual Insurance Company is responsible for payment of accident benefits to or on behalf of Mr. Sohn.

HEARING:

1. The arbitration was held in the city of Toronto, in the province of Ontario, on August 22, 2003 before me, M. Guy Jones, pursuant to the provisions of Regulation 283/95 and the Arbitration Act, S.O. 1991.

THE FACTS:

The facts of this matter are relatively straight forward and the case proceeded by way of an agreed statement of facts.

Mr. Seung Beom Sohn was involved in a serious motor vehicle accident on January 6, 1998 when the Mazda Miata that he was driving collided with a Ford Van insured by York Fire & Casualty Insurance Company. At the time of the accident the Mazda Miata was owned by Mazda Canada Inc. and leased to Mr. Sohn. Economical had issued a motor vehicle liability insurance for the Miata in April of 1997. In or about October 1997 the broker, Bernhardt, advised Economical that Sohn had deleted all coverages on the Miata with the exception of comprehensive insurance.

A number of tort lawsuits ensued as Mr. Sohn's passenger was killed and a number of the occupants of the van were injured. Mazda Canada Inc. was a defendant in the lawsuit and it brought a motion for summary judgment for determination as to whether or not the Economical policy was in force as of the date of the loss. Mr. Justice Lederman, on December 21, 2001 found that there was no evidence that Mazda Canada Inc., as owner of the vehicle, had been given proper notice of the change of coverage as required under the provisions of the Insurance Act, and stated that:

The legal effect is that coverages on the policy remains in effect and have not been validly deleted with respect to Mazda's interest.

Mr. Sohn had originally made an application to Economical Insurance Company for payment of accident benefits on December 28, 1998. Economical, however, took the position that Mr. Sohn had changed his policy to comprehensive coverage only and was therefore not entitled to accident benefits from Economical. Mr. Sohn subsequently, on February 3, 1999, applied to York Fire for payment of the accident benefits. York Fire subsequently paid the accident benefits to and on behalf of Mr. Sohn. On June 21, 2002, York Fire gave formal notice to Economical that it would be seeking repayment of accident benefits paid to date regarding Mr. Sohn.

Economical takes the position that Mr. Sohn, by changing his policy to comprehensive coverage only, is not entitled to accident benefit coverage and therefore must look to the insurer of the other motor vehicle, York Fire, for payment of accident benefits for Mr. Sohn. Economical argues that Mr. Sohn changed the policy to comprehensive coverage only and the fact that Economical did not give proper notice to the owner, Mazda Canada Inc. should not allow Mr.

Sohn to recover accident benefits from it, as Mr. Sohn had clearly cancelled the motor vehicle liability policy as far as he was concerned.

I have no difficulty with the proposition that a motor vehicle liability policy can be changed to a comprehensive policy only, and that such a policy does not provide accident benefit coverage. The cases of Coseco Insurance Company and Pilot Insurance Company, decision of Arbitrator Torrie, May 11, 2000 and Zurich Canada and Pilot Insurance Company and Royal & SunAlliance, decision of Arbitrator Malach, October 20, 2000 have decided this issue and I am in agreement with them.

The case that we are dealing with here is somewhat different. While Mr. Sohn advised Economical that he was cancelling the motor vehicle liability provisions, Economical failed to properly advise the owner, Mazda Canada Inc., that the motor vehicle liability policy was being cancelled as required by the Insurance Act. As such York Fire argues that the motor vehicle liability insurance and the accident benefit provisions remain in effect as it relates to Mazda Canada Inc., and point to Mr. Justice Lederman's decision in this regard, and they also rely upon the decision of Mr. Justice Lax in Jackson vs. Dennis [1998] O.J. No. 228 (ONT.C. J.) subsequently upheld by the Ontario Court of Appeal, [1999] O.J. No. 3466 (ONT. C.J.). In that case Mr Dennis leased a motor vehicle from the owner, Mr. Leggatt and insured the motor vehicle with Libery Mutual Insurance Company. Mr Dennis subsequently put the vehicle into storage and advised Liberty that the motor vehicle liability coverage should be changed to simply comprehensive coverage. Mr. Leggatt was not properly advised of the change. The court held that since no proper notice of the change was given to the owner, the motor vehicle liability

policy remained in effect. I am in agreement with the Court's decision in that matter and find that it is applicable in this case. Mr. Justice Lederman found that the policy remained in effect for the owner, Mazda Canada Inc. This, in my view, concludes the matter. Economical has suggested that while the motor vehicle liability policy might still exist for the owner, it does not apply for Sohn who would then only have had comprehensive coverage. I believe that the Jackson decision has decided this issue, however, even if Economical were correct I do not think that it would change the result. While Mr. Sohn may not have remained a "named insured" under the policy, he would still be an "insured" as defined in section 224 (5) of the Insurance Act, which states that an "insured" means:

A person insured by a contract of insurance whether named or not and includes any person who is entitled to statutory accident benefits under the contract whether or not described therein as an insured person.

If one looks to the priority section of the Insurance Act, s. 268 (2) it states:

The following rules apply for determining who is liable to pay statutory accident benefits:

1. In respect to 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 sub paragraph (i), the occupant has recourse against the insurer of the automobile in which he or she was an occupant.

Thus even if Economical were correct that s. 268 (2)(1)(i) does not apply, one would then move to s. 268 (2)(1)(ii). Clearly Mr. Sohn was an occupant of the Mazda Canada Inc. motor vehicle which had a valid motor vehicle liability policy in effect at the time of the accident, as found by Mr. Justice Lederman.

While I have some sympathy for Economical's position that Mr. Sohn will be recovering accident benefits from Economical when he purported to cancel those provisions of the policy, one must remember that Mr. Sohn would not be entitled to receive income replacement benefits. In addition, the result has occurred in part, due to Economical's failure to give the owner, Mazda Canada Inc., proper notice of the termination and Mazda ought not to suffer as a result thereof.

NOTICE:

Economical also takes a position that York Fire cannot proceed with the arbitration as it has not complied with a 90-day notice provision as set out in s. 3 (1) of Regulation 283/95. Economical points out that York Fire first received the completed application for accident benefits on December 28, 1998 and did not serve a Notice of Intention to Dispute upon York Fire until June 21, 2002. In the interim, as noted above, a number of tort lawsuits ensued and Mr. Justice Lederman, on December 21, 2001 decided that the Economical policy was still in effect. Economical originally advised that it was appealing that decision but on March 28, 2002 advised York Fire that it was foregoing any appeal. On June 21, 2002 York Fire served the Notice of Intention to Dispute. The difficulty that I have with Economical's position is that they themselves did not comply with Regulation 283/95. It was agreed by the parties that Economical received the first completed application for accident benefits on or about December 28, 1998 or more than a month prior to York Fire receiving it, after Economical had denied Mr. Sohn's application. In Liberty Mutual Insurance Company vs. Commerce Insurance Company, a decision written by myself dated July 6, 2001, I indicated that insurers who receive the first completed application for accident benefits but who wrongly refused to pay cannot be allowed to rely on non-compliance with section 3 of Regulation 283/95 when they themselves have not

complied with section 2 of that Regulation. This decision was upheld by Mr. Justice Lissiman in Liberty Mutual Insurance Company vs. Commerce Insurance Company [2001] O.J. No. 5479 (ONT. C.J.). While there may be instance where an insurer receives the first completed application and does not pay but may still rely upon the notice provisions, I am of the view that the principal I set out in Liberty vs. Commerce applies in this case. Insurers must understand that when they receive the completed application for accident benefits they must pay in accordance with section 2 of Regulation 283/95 and then dispute the matter later with whatever insurer they may believe is ultimately responsible for paying the accident benefits. If the insurer does not comply with section 2, then it should not be able to rely upon the notice provision of section 3 (1) except in exceptional circumstances.

In light of the above, I find that Economical Mutual Insurance Company is responsible for payment of accident benefits to or on behalf of Mr. Sohn. Economical is to compensate York Fire for payments made to or on behalf of Mr. Sohn to date, subject to any issues as to the reasonableness of such payments.

In the event that the parties cannot agree on the issue of costs, I may be spoken to.

Dated this _____ day of August, 2003

**M. Guy Jones
Arbitrator**