

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c. I.8, as amended

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

AND IN THE MATTER OF Arbitration pursuant to O. Reg. 283/95
made under the Insurance Act

BETWEEN

CHARTIS INSURANCE COMPANY OF CANADA

Applicant

- and -

THE MOTOR VEHICLE ACCIDENT CLAIMS FUND

Respondent

AWARD

Counsel:

Chartis Insurance Company of Canada: J. Claude Blouin

The Motor Vehicle Accident Claims Fund: Janis P. Criger

Issue:

Was Terrance Green a named insured or a person specified in Chartis policy number RMBA 1245047 as a driver of the insured automobile within the meaning of Section 2 of the SABS on April 23, 2009?

Result:

Terrance Green was not a named insured or a person specified under the Chartis policy on April 23, 2009. As a result the Motor Vehicle Accident Claims Fund is required to pay Statutory Accident Benefits to and on behalf of Mr. Green.

Hearing:

The hearing in this matter was held in the City of Toronto in the Province of Ontario on June 25, 2014.

Exhibits:

Exhibit 1: Arbitration Agreement dated June 25, 2014

Exhibit 2: Motor Vehicle Accident Report with respect to accident April 23, 2009

Exhibit 3: AIG Commercial Insurance Company of Canada policy RMBA 1245047 (including Annex A): pages 1 to 62

Exhibit 4: Transcript of the examination under oath of John Sterns: on behalf of Chartis Insurance Company of Canada

Exhibit 5: Letter Blouin Dunn to Janis P. Criger dated July 29, 2013

Background:

Terrance Green suffered a significant injury on April 23, 2009 when he fell off his personal ATV.

Mr. Green applied to Aviva for accident benefits believing his personal vehicles were insured by Aviva on the date of loss. It was ultimately determined that the policy had been properly cancelled for non payment and Aviva was released from this arbitration.

Chartis insures Transforce (Mr. Green's employer) under a fleet policy that was in force on April 23, 2009. However it is agreed between the Applicant and the Respondent that Mr. Green did not have regular use of any of the Transforce vehicles at the time of the accident.

Chartis takes the position that Mr. Green was not a named insured or a listed driver under their policy and as there is no other insurance available that priority for his accident benefits rests with the Fund. The Fund takes the position that Mr. Green was either a "named person/named insured" or a listed driver under the Chartis policy on the date of loss.

Mr. Green's Statutory Accident Benefits claim is settled.

Agreed Facts and Evidence:

There does not appear to be any dispute with respect to the relevant facts. The parties filed an agreed Book of Documents. Rather the parties disagree about the legal implications that flow from the facts and the documents: particularly the policy of insurance. There was also an examination under oath conducted of Mr. John Sterns who is the vice president of commercial casualty at AIG (AIG was formerly Chartis Insurance Company).

The evidence is that Chartis issued a fleet policy to Transforce Inc. and all its subsidiaries and divisions. There are in excess of 150 companies and divisions and the policy covered all vehicles owned by and licensed in the name of the insured, leased or rented for a period in excess of 30 days (see page 12 in Annex A of exhibit 3). There is no doubt that Mr. Green was an employee of Transforce on the date of loss.

The policy of insurance (exhibit 3) and the transcript of the examination for discovery of Mr. Stern confirms that this was a new policy effective December 1, 2008. The policy period relevant to this claim was from December 1, 2008 to December 1, 2009. Mr. Stern's evidence was that when the policy was entered into that no list of drivers was requested. As it was a blanket fleet policy the number and types of vehicles would be listed and not each individual vehicle nor each individual driver. Mr. Sterns acknowledged that a list of drivers was provided by Transforce for the contract period December 1, 2009 to December 1, 2010 and that list did include Terrance Green's name (also see exhibit 5).

Mr. Stern gave evidence that in blanket fleet policies that it is not necessary to provide a list of individual vehicles or a list of drivers as the premium is adjusted based on the size of the fleet: the number of units. It is a lost rated program. The premium is not based on the number of drivers or their driving record but on the size of the fleet.

Mr. Stern also gave evidence that Annex A (of exhibit 3) lists all the named insureds under the policy. Page 3 of exhibit 3 and endorsement OPCF 2 (page 42) each have the words "as known to insurer". At page 3 of the policy the registered owner is noted: **as known to insurer** as is the actual owner. Under the OPCF 2 the named persons are noted: **as known to insurer** as is the relationship to the insured. Mr. Stern gave evidence that the reason for this is because there are so many names involved that is not feasible to type out all the named insureds and/or all the registered owners. They are rather those individuals shown on Annex A. Not only did this policy cover numerous named insureds but it also covered in excess of 5000 vehicles. Page 13 of the policy of insurance notes that it covers the following:

Number of Units	Type of Use or Description of Automobile
83	Private passenger vehicles
168	Light Commercial
969	Heavy Commercial
3438	Trailers
409	Medium vehicles

Also of relevance is Section 3.3 of the policy found at page 13 which requires the insured to deliver a written statement at the end of the policy with the effective dates of all automobiles added to or deleted from the original schedule of automobiles during the policy period. There is no similar requirement to provide a list of drivers and/or of employees who may be driving any of the vehicles in the fleet with consent. Section 3.3 also provides that the premium charged will be on a 50/50 basis charging or refunding 50% of the rate specified for the net increase or decrease for each type of use or description of automobile. There does not appear to be anything in the policy that would require the premium to be calculated based on the number, qualification or driving record of any of the drivers.

Mr. Stern also admitted on his examination under oath that the drivers of the company automobiles would be covered under the Chartis policy because they are licensed to drive the vehicles with the permission of the company.

In reviewing exhibit 3 (the policy) it clearly provides that the named insureds are Transforce Inc. and their subsidiaries set out at Annex A. The policy provides with respect to the described automobile that it would include all automobiles owned by, leased to/or registered in the name of the insured. The latter would include not only Transforce Inc. but all the subsidiaries set out on Annex A. It is also of some importance that this policy provides an OPCF 21b: Blanket Fleet Coverage for Ontario Licensed Automobiles. The OPCF 21b offers coverage for all automobiles licensed or required to be licensed in Ontario that are owned by and licensed in the name of the insured or leased for a period in excess of 30 days. It is on the OPCF 21b that we find the list of the description of the automobiles covered under the fleet which include private passenger vehicles, light commercial, heavy commercial, trailers and medium vehicles as per the list noted above.

The other relevant document that the parties noted from this policy is the OPCF 2 (page 42 of exhibit 3) which provides coverage when named persons drive other automobiles. This document is where we find the "named persons" as being indicated as "as known to insurer". This endorsement provides coverage including accident benefits when the "named person" is driving an "other automobile". Other automobile does not include an automobile that is owned by or frequently used by the named person or anyone living in the same dwelling as the named person.

Parties Arguments:**Respondent's Argument**

MVAC argues that Mr. Green is named insured or a person specified as a driver of the insured automobile because he is a "named person" under the OPCF 2. They also argue that Mr. Green is a person specified as a driver under the policy because once the list for drivers for 2009/2010 was submitted Mr. Green's name was on it. They argued that the inevitable inference is that if a list of drivers had been submitted for 2008 to 2009 that Mr. Green's name would have been on it as he was working for Transforce then.

The Respondent argues that the definition of "insured person" is a broad one and that once the claimant falls within the definition of "insured person" in the SABS that they are then entitled to the payment of accident benefits and that the last payor would be MVAC. MVAC argues that Chartis insured Mr. Green on the date of loss based on the above-noted argument and therefore Chartis should be responsible for paying his accident benefits.

Applicant's Argument

The Applicant's position is that Mr. Green is neither a named insured nor a listed driver under the Transforce Inc. policy. Chartis argues that the list of drivers submitted in 2009 in the second year of the policy is not relevant to the inquiry being made here. Even if it were to be relevant Chartis argues that having a list of drivers under a blanket fleet policy does not raise the level of those drivers to become a "listed driver" as defined as an insured person under the SABS. Chartis submits that the OPCF 2 and its reference to named persons/as known to the insurer make reference to Annex A: the list of named insureds such as Transforce Inc. and its subsidiaries and does not make reference to any listed drivers. Further Chartis submits that even if Mr. Green were somehow to be elevated to a named person: as known to the insurer that this endorsement would not apply to him because the ATV does not fall within the definition of other automobile. Chartis submits that the ATV would be a vehicle that is owned and frequently used by Mr. Green and therefore would be excluded under the OPCF 2.

Relevant Provisions:

Subsection 268 (2) of the *Insurance Act* states:

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.

Section 2 of *Regulation 403/96* provides:

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

- (a) the named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured and any dependant of the named insured or spouse, if the named insured, specified driver, spouse or dependant,
 - (i) was involved in an accident in or outside Ontario that involves the insured automobile or another automobile, ...

Analysis and Finding:

There are really 2 issues for determination here. The first is whether Mr. Green by virtue of the OPCF 2 becomes a listed driver/named insured under the Chartis policy. The second issue is that if I find that to be the case whether he would still be covered under the endorsement by virtue of the fact that he is driving an ATV which is owned and frequently used by him. Turning to the first issue there were 2 cases that I found helpful in this determination.

The first case is *Allianz Insurance Company of Canada and Lombard Insurance Company of Canada, Her Majesty the Queen as Represented by the Minister of Finance*: decision Arbitrator Guy Jones June, 2009 and endorsement on appeal Justice L.A. Pattillo April 13, 2010.

In that case Mr. Timothy Klue was operating a Jeep Cherokee owned by him and his spouse when he struck a pedestrian, Ms. Merino. Ms. Merino was not covered under a motor vehicle policy of her own. By the time the case came to arbitration it had narrowed down to the question as to whether Lombard Insurance Company who insureds the employer of Mr. Klue (Phasecom/Mastec Systems) was responsible for pay accident benefits to Ms. Merino on the grounds that Mr. Klue was a deemed named insured under the Lombard policy by virtue of his regular use of a company vehicle or whether the Fund was liable. While there were many

issues in that case not relevant to the case at hand there was a helpful analysis made of the fleet policy that Phasecom Systems were insured under. In that case there was a list of drivers which included Mr. Klue and a vehicle with an identification number. The list suggested that this list of drivers was covered under the group fleet policy. Lombard argued that the lists were used for internal purposes to establish premium and that being put on the list did not elevate the individual to a listed driver. Both the Arbitrator and Justice Pattillo on appeal confirmed that to be the case. As in the case before me the Lombard policy determined premium based on the number of vehicles in the fleet. At the end of the term there would be a determination of the number of vehicles in the fleet and a premium correction would be made. There was no requirement that the parties update any list of drivers or submit any list of drivers. It was therefore concluded that Mr. Klue was not a listed driver under the policy based simply on his name being on a list.

The decision of *Certas Direct Insurance Company and Lombard General Insurance Company of Canada: Arbitrator Shari L. Novick (May, 2012)** was also of assistance. In that case Lombard insured vehicles owned and operated by a company called Classic Towing. At the relevant time Mr. Rajathurai worked as a driver for Classic Towing. His name appeared on a document entitled "description of drivers" that had been completed by Lombard or its broker and sent to Classic Towing when the policy was renewed. Mr. Rajathurai was involved in a motor vehicle accident in April of 2009 and the issue was whether his accident benefits should be payable by Certas Direct, the insurer of the vehicle in which he was an occupant, or by Lombard on the grounds that he was a listed driver on the Lombard policy.

As in this case the Lombard policy included OPCF 21b: the blanket fleet coverage endorsement. It was argued and accepted before Arbitrator Novick that when the OPCF 21b endorsement is provided by an insurer that the coverage attaches to the vehicles listed on the policy and that consequentially there are no "listed drivers" on the policy. It was argued that a list of drivers being provided is for purposes of determining premium and not for the purposes of providing a list of "listed drivers".

Arbitrator Novick concluded that the list of drivers was supplied solely for the purposes of enabling underwriters to assess the risk and set the premium for the policy. She found there was no requirement to provide this list based on the OPCF 21b endorsement. She found that a "fleet policy" by definition does not include a cast of listed drivers.

She held that the OPCF 21b endorsement changes the parties practices and obligations to each other in a fundamental way.

"In an individual policy, a premium is established based on the actual drivers covered by the policy, and the addition or deletion of a driver will often trigger a change in the premium charged. That is not the case with respect to "fleet policies"."

Certas Direct Insurance Company and Lombard General Insurance Company of Canada: Arbitrator Shari L. Novick (May, 2012) page 10

*Arbitrator Novick's decision was upheld by Spence J. in reasons dated March 22, 2013. Leave to Appeal to the Court of Appeal was denied in reasons dated September 11, 2013.

I agree with Arbitrator Novick in her analysis of the blanket fleet endorsement above. I also agree with her comments that the OPCF 21b does not require a list of drivers to be filed and the reason for this is that it makes the policy simpler to administer. There is no need to notify the insurer every time there is a change in drivers or staff. It focuses the risk on the types and number of vehicles as opposed to the drivers themselves.

I therefore find that in this case Chartis issued a blanket fleet coverage policy for Transforce Inc. and its various subsidiaries listed under exhibit 3. In the relevant year of the policy coverage (December, 2008 to December, 2009) there was no list of drivers. I do not find the fact that Mr. Terrance Green was on a list of drivers for the next year of the policy to have any relevance. However if I am wrong with respect to that I conclude that even if that list of drivers with Mr. Green's name on it for the second year of the policy is relevant that it does not result in Mr. Green being elevated to the position of a listed driver. It is simply a list for premium purposes and not to determine who is a "named or listed" insured under the policy.

While I agree with the Respondent's submissions that Mr. Green would be covered under the policy when operating an employer's vehicle with consent (as indicted by Mr. Stern) the fact is that at the date of loss he was not operating the employer's vehicle but his own ATV. Again this does not elevate Mr. Green to the status of a named insured or listed driver. He is simply operating the company vehicle consent and entitled to coverage as any other individual would be if operating the vehicle with consent. The fact that the premium under this policy is based on the net increase or decrease for each type of automobiles is also important in my determination. It clearly indicates that the drivers are of little relevance in a blanket fleet policy and all the documents and evidence support the proposition that it is the type and number of vehicles that is key to the blanket fleet coverage.

Turning to the OPCF 2 I do not accept the argument that Mr. Green somehow or other becomes a "named person: as known to the insurer". Clearly the named person as known to the insurer makes reference to the named insureds as listed under the policy in Annex A. It includes Transforce and all the subsidiaries and as Mr. Stern indicated in his examination under oath the purpose of that terminology is for administrative reasons to avoid making a list of 100 or more subsidiaries. To suggest that Mr. Green because his name is on a list of drivers submitted to this insurer in the second year of the policy somehow elevates him to a "named person" is not born out by any of the policy wording or any of the evidence in this case. Mr. Green is simply a driver and an employee of Transforce. He is not a named insured. He is not a named person. He is not a listed driver.

However if I am wrong and Mr. Green is a "named person: as known to the insurer" under the OPCF 2 I find that that does not extend coverage to the circumstances of this loss. At the time of the loss Mr. Green was not operating a company vehicle. The parties have agreed in fact that he did not have regular use of a company vehicle on the date of the accident. He was operating an ATV that was owned by him. Accordingly coverage is excluded under the OPCF 2 as the owned ATV does not fall within the definition of "other automobile".

Conclusion:


Accordingly I find that Mr. Terrance Green was not a named insured or a listed driver under the Chartis policy issued to Transforce Inc. As there is no "insurer" to provide accident benefit coverage to Mr. Green I conclude that the Motor Vehicle Accident Claims Fund is required to pay Statutory Accident Benefits to and on behalf of Mr. Green.

Costs:

In accordance with the parties Arbitration Agreement (exhibit 1 paragraph 4) the expenses of the arbitration are to be apportioned by the Arbitrator taking into account the success of the parties, any offer to settle, the conduct of the proceedings and the principles generally applied in litigation before the courts of Ontario. I am not aware of any offers to settle but taking into consideration that Chartis was entirely successful in this matter I therefore find the Motor Vehicle Accident Claims Fund to be responsible to pay for the costs of the arbitration incurred by Chartis as well as the arbitration fees and any related disbursements.

If counsel cannot agree on the quantum payable please contact me and I will arrange for brief oral or written submissions on the point.

DATED THIS 5th day of August, 2014 at Toronto.


Arbitrator Philippa G. Samworth
DUTTON BROCK LLP