IN THE MATTER of Regulation 283/95 made under the *Insurance Act*, R.S.O., c. 18, as amended,

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

AND IN THE MATTER of an Arbitration,

BETWEEN:

UNIFUND ASSURANCE COMPANY

Applicant

– and –

ST. PAUL FIRE & MARINE INSURANCE COMPANY

Respondent

AWARD

This matter was put before me pursuant to the *Arbitrations Act*, 1991 to arbitrate a dispute as to which of the two insurers is obliged to pay Benefits pursuant to the *Insurance Act* and its Regulations to one Daniel Chang.

Factual Background and Finding:

In the early hours of the morning of April 27th, 1998, Daniel Chang, a part-time limousine driver with Avondale Limousine Services, was involved in an automobile accident on the Queen Elizabeth Highway in the eastbound collector lanes.

At the time of the accident, Daniel, 49 years of age, was the sole occupant of a white 1990 Lincoln Towncar stretch limousine which was leased by its owner to Avondale Limousine Services, an unincorporated company owned by one Angelo Sarris.

Mr. Sarris also owned at that time a smaller black limousine.

Mr. Chang was married at the time of this accident and was ordinarily resident in Etobicoke, Ontario. Mr. Chang himself did not own a motor vehicle. However, his wife owned a 4-door Mercury Sable. She was the named insured under the Mercury policy which was issued by the Applicant Unifund Assurance Company. Daniel Chang was a listed driver on that policy.

I was not provided with an Agreed Statement of Facts. However, the facts noted above appear to have been agreed upon by virtue of the Written Submissions of the Applicant and Respondent herein. I have carefully reviewed Exhibits 1 through 5 (see attached), as well as the Written Submissions of the parties and the following is a summary of the relevant facts as I find them.

Daniel Chang started working in the limousine driving business approximately three years prior to the motor vehicle accident of April 27th, 1998. .

According to Exhibit 5, Mr. Chang started driving a limousine for Avondale in January of 1997. He had a verbal agreement with Mr. Sarris that he would work for him exclusively. In other words, he would not drive a car for any other limousine services and when called upon to drive by Mr. Sarris he would make himself reasonably available. This was subject to Mr. Chang's condition that he did not wish to exceed in terms of income in any one year, his personal tax exemption of $6,500.00. There was some evidence to suggest that in or around the time the accident occurred, Mr. Chang now wished to move out from his father's house where he and his wife were living at the time of the accident, and he wanted to increase his hours of work so that he and his wife could buy a home. However, the facts as revealed through the Exhibits, clearly indicate that the increased hours had not been put into effect at the time of the accident in April of 1998. I therefore do not find that information relevant with respect to the

issues that I have been asked to determine. I must look at the situation "at the time of the accident" with some reasonable historical perspective.

According to Mr. Sarris' evidence at his Examination for Discovery, not only did he have the white limousine and the black limousine, but he also had an arrangement with one George Sinclair who was the owner of a smaller sedan. When one of Sinclair's customers required a larger vehicle, he would contact Mr. Sarris and arrange to subcontract from him one of his stretch limousines which George would then drive. Similarly, it appears on occasion when Mr. Sarris may have required a third vehicle that George would make both himself and his vehicle available for Mr. Sarris. According to the limousine logs for the years 1997 and 1998 (Exhibit 5), George only used the Avondale vehicles on approximately six occasions. The other drivers which were available to drive for Mr. Sarris, drove as infrequently as George. This includes drivers who are identified on the log as Wendy, Courtnay and Hassan. In fact, in 1998, in the four months prior to the motor vehicle accident, Wendy drove on only two occasions, Hassan on one occasion, and George on one occasion.

The log notes indicate well over 80% of the driving of the various Avondale limousine vehicles was conducted by Angelo Sarris himself.

I find that for the purposes of this Arbitration the relevant time period to look at as to when Mr. Chang was driving an Avondale Limousine vehicle is the six month period prior to the accident. (November 1997 to April 1998). The reason for this is that the limousine service is clearly a seasonal one. Over Christmas and New Year's, the limousine companies are busy. In the spring and summer months, during wedding season and prom season, the limousines are busy. However, February and March are clearly off months.

However, I also reviewed to get some sense of Mr. Chang's use of the Avondale vehicles, the number of days that he drove, from January of 1997. The following is a summary of the facts that I drew from the log notes:

Summary from Log Notes of Days that Daniel Chang Drove:

January 1997	8 days
February 1997	12 days
March 1997	0 days
April 1997	5 days
May 1997	8 days
June 1997	6 days
July 1997	6 days
August 1997	4 days
September 1997	6 days
October 1997	9 days
November 1997	3 days
December 1997	7 days
January 1998	5 days
February 1998	4 days
March 1998	3 days
April 1st to April 27th	5 days

Unfortunately, the log notes do not reflect which car Mr. Chang was driving. However, I accept his and Sarris' evidence that the majority of the time Daniel Chang drove the white limousine.

I also felt that it was relevant to look at the use that had been made of the Avondale Limousine vehicles by the other drivers. In comparing the number of days that the Avondale vehicles were driven and by whom in the months of January, February, March and April of 1998, I note the following:

1. In January, Daniel Chang drove five out of the twenty-four days it was driven, Angelo drove twenty-four days.

2. In February, Daniel Chang drove four out of the twenty-two days and Angelo drove for nineteen days.

3. In March, Daniel Chang drove three out of the nineteen days available while Angelo drove for sixteen days.

4. In April, up until the time of the accident, Daniel Chang drove for five out of the fourteen days while Angelo drove for twelve days.

The parties agree and indeed the evidence so indicates, that Daniel Chang never made use of any of the Avondale Limousine vehicles for his personal use. I find that his use of the white limousine was restricted to an exclusive business use.

I also find that from time to time, Daniel Chang would keep the white limousine, the black limousine and indeed it appears George's sedan, at his home parked in his driveway.

I also find that Daniel Chang had a second set of keys to the white limousine, but did not to any of the other vehicles.

I also find that Mr. Sarris was clearly responsible for all the following activities with respect to the white limousine: filling it with gas, maintenance, paying for insurance and ensuring that it was in good working condition. Mr. Chang, on the other hand, had minimal responsibility for the vehicle but did ensure that it was clean inside and out for the customers.

The log notes that were provided to me only indicated the days on which the vehicle was driven by Mr. Chang and start time with respect to each customer. It did not provide me with any way of being able to determine how many hours a vehicle was actually driven by Mr. Chang. The only evidence I have on that point is from his Examination for Discovery in which he indicates that on average on a weekly basis he would drive it approximately for ten to twelve hours in the relevant time period. Based on my review of the log notes in terms of the number of days he drove the vehicle and the start times, that would appear to be a reasonable estimate.

The log notes also do not indicate which vehicle Mr. Chang drove. However, both the evidence of Mr. Chang and Mr. Sarris on their Examinations for Discovery was that the majority of the time Mr. Chang drove the white vehicle. Mr. Sarris indicated that Mr. Chang may only have driven the black limousine on perhaps two occasions during the course of his association with Avondale.

The driving schedule of Mr. Chang was erratic to say the least. In the wedding season he would work mostly Saturdays. In the off season he could work weekends, week-days, week-nights, Monday, Tuesday, Wednesday or any other day of the week. In his Examination for Discovery he stated that with respect to his driving for Avondale it was "nothing predictable". (See Exhibit 1, page 78). Not only were his days of assignments not predictable, but his hours of work were not predictable. On some days he may do four or five short trips, and on other days he may have one long assignment.

All that I am able to draw from the evidence is that Mr. Chang drove the white limousine more often than any other driver including Mr. Sarris. He appears to drive the vehicle at least once a week in every month and in some months, twice a week. When Mr. Chang was not driving the white limousine, more often than not, it would not be driven at all. In regard to the latter comment, I note Mr. Sarris' Examination for Discovery in which he indicated that he (Mr. Sarris) drove the black limousine the majority of the time and that the white car was a new product for him and, therefore, he did not have much business for it. Up until the time of the accident, the white limousine was a losing money proposition which was mainly being run on wedding Saturdays subject to New Year's and prom season.

Mr. Chang's wife worked as a nurse and worked shift work. However, other than in inclement weather, she did not drive her vehicle to work and this vehicle remained available to Mr. Chang for his personal use during the course of the day and/or evening. Mr. Chang himself did not own a motor vehicle and was not dependent upon anybody. Therefore with respect to the accident of April 27th, 1998, Mr. Chang had potential access to two insurance policies; 1) the Unifund policy on his wife's personal vehicle as he was both the spouse of the named insured and the listed driver on the policy, and 2) the St. Paul's policy based on section 66 of the Statutory Accident Benefits Schedule (hereinafter called the "SABS"), which would deem Mr. Chang to be the named insured under that policy in the event that it is found that he "is an individual who was living and ordinarily resident in Ontario and at the time of the accident the insured automobile was being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity".

The Law re: Regular Use

I now turn to the legal issues I am to address.

With respect to section 66, the parties have agreed as follows:

1. That if Mr. Chang is found to have regular use of "the insured automobile" then the effect of section 66 is to deem him a named insured for the purposes of determining priority. (I point this out as initially this was raised as an issue at the Pre-Hearing. However, based on the parties' submissions, I do not have to decide that issue as they have agreed that section 66 does have the effect of deeming an individual as a named insured for the purposes of priority under section 268(2) of the *Insurance Act.*)

2. That Daniel Chang was an individual who was living and ordinarily resident in Ontario.

3. That Avondale Limousine Service was a sole proprietorship at the time of the accident.

What is left for me to decide based on the facts is whether the insured automobile was made available for Mr. Chang's regular use.

Although the parties did not deal with this in their Submissions, I find as a fact that there are two potential insured automobiles which would fall within the purview of section 66 in the circumstances of Mr. Chang. The first is the 1990 white stretch limousine insured by St. Paul and the second is the black limousine which is also insured by St. Paul and owned and/or leased by Avondale Limousine Services. It is my view that it does not matter which of these vehicles is provided for Mr. Chang's regular use and that I may consider that he used both vehicles to determine this issue. However, that may very well be a moot point as I have found that the black limousine was only used on two occasions by Mr. Chang.

What then constitutes regular use in the circumstances of this case? It is urged upon me by counsel for Unifund that regular use cannot be restricted to an exclusive business use. I do not accept that proposition and I am satisfied on the case law provided to me that regular use is not restricted to circumstances where there is both business and personal use. This is supported by the Court of Appeal in *Reisner v. Liao* (1995) O.J. No 2489 (Ont. C.A.) when in rejecting the

leave to appeal application from the decision of the Divisional Court, it tacitly accepted the conclusion of the Trial Judge that regular use "is not restricted to personal use nor is it restricted to exclusive use". In that regard, I also note the decision of Arbitrator Malach in the case of *The Dominion of Canada General Insurance Company and The Co-Operators General Insurance Company*, a decision of February 9th, 1999. In that case, Mr. Berlec was provided with a van owned by his employer Global Travel Apartments Inc. The evidence was that while Mr. Berlec had possession of the van twenty-four hours a day, seven days a week, he was restricted in his use of the van to work hours and work related activities. He had no right to use the vehicle on a personal basis. Arbitrator Malach, in my view, correctly concluded that regular use was not limited to a combination of personal and business use or exclusive use but that regular use could encompass a business use only. In any event, in my view I am bound by the decision in *Reisner v. Liao* and must follow the Court of Appeal supporting Justice Jenkins' conclusions that regular use included circumstances where there was not exclusive use nor personal use of a vehicle outside of business operations.

This brings me to the thornier question of whether, in the circumstances of this case, the Avondale Limousine vehicle was made <u>available</u> to Mr. Chang for "regular use". By that I mean I must address the following questions:

1. In terms of regular use, was Mr. Chang's business use of the vehicle regular in the amount of time it was used and in the uniformity of its use; and

2. The meaning and effect of the word "available".

I pause here to comment on the burden of proof. It is my view that the burden of proof in this case lies upon the Applicant, Unifund Assurance Company, to satisfy me on the balance of probabilities that Mr. Chang had "made available to him for his regular use" the Avondale Limousine vehicle.

Before addressing the question of the regularity of use, some comments should be made as to the meaning of the words "made available". These words appear in section 66 of the Statutory Accident Benefits Schedule where other words could have been used by the Legislature such as have been seen under other endorsements such as "provided to" or "furnished to". The latter two words appear in many of the other cases that have been referred to by counsel and, in particular, in some exclusionary provisions.

The use of the words "make available" to my mind suggest that whether an individual actually uses the vehicle may not be necessarily be a key part in determining regular use. In looking at the wording of section 66, it does not appear to require that the individual actually uses a vehicle regularly but rather that it is made available should he wish to use it regularly. However, I accept that actual use of the vehicle would be evidence as to the extent that it would be made available.

This reasoning is consistent with the decision of Arbitrator Samis in *State Farm Mutual Automobile Insurance Company and Kingsway General Insurance Company*, a Private Arbitration decision rendered on October 20th, 1999. In that case Arbitrator Samis comments at page 3: "It is to be noted that the Regulation [and he is referring to section 66] does not require that Robert Scheffler actually have used the vehicle regularly. The Regulation requires us to examine its availability. Actual use is evidence of the availability of the vehicle." I agree with Arbitrator Samis in his analysis of the Regulation.

In reference to the case involving Mr. Chang, the facts seem to indicate that the white limousine was clearly made available to Mr. Chang to use whenever there was a customer who requested the white limousine. I am satisfied on the evidence that the white limousine was made "available" to Mr. Chang more than any other driver.

Let us now turn to the actual use of the vehicle and whether it is regular in the sense of the amount of time it was used and the uniformity of its use.

Counsel for St. Paul referred me to the Webster's College Dictionary definition from 1991, of the word "regular". In particular, he refers to the following portion of the definition "1) usual, normal customary; 2) evenly or uniformly arranged, symmetrical or 7) habitual or long-standing; a regular use".

He also referred me to Carswell's Words and Phrases, 1993, which defines "regular" as: "regular has a meaning which in some circumstances means normal and 'regular' has a meaning which in some circumstances means recurring uniformly according to predictable time and manner."

In reviewing these definitions I conclude that I must in this case look not only to the frequency with which Mr. Chang used the Avondale vehicle but whether that frequency in and of itself was uniformly arranged in that there was predictable time and manner, or whether there was a habitual or normal use.

In this particular case, Mr. Chang on the facts provided, appears to have used the white limousine more than any other driver. He drove the vehicle at least five days every month. The uncontradicted evidence of Mr. Chang is that on average he would drive this vehicle at least 10 to 12 hours a week. He had been doing this since January of 1997 and the accident occurred in April of 1998. I am satisfied that this constitutes regular use under section 66 of the *Insurance Act*.

I am strengthened in my conclusions by reference to the following cases.

1. *Sittler v. Canadian General Insurance Company* [1993] O.I.C.D. 72, decision of Nancy Makepeace, Arbitrator – "Nothing in subsection 3(1) restricts the 'regular use' branch to the company car situation, and I do not accept that it is restricted in that way."

While Arbitrator Makepeace was looking at section 3(1) under the OMPP schedule, section 66 is extremely similar in that it also provides the subheading under Part XV "Company Automobiles and Rental Automobiles" as its title. While this is a heading only and is not part of the legislation *per se*, I agree that it can be used as an aid to interpreting the section contained under it.

In this case, while the title "company vehicle" certainly gives some direction as to the nature and purpose of section 66, in my view it does not limit it or restrict it. Indeed, in reviewing section 66 nowhere does one find the words "company". Rather, in examining the issue of regular use, one looks at the vehicle being provided for somebody's use by "a corporation, an unincorporated association, a partnership, a sole proprietorship or other entity". Under general parlance, one would think that only a corporation would fall under the heading "Company Vehicle". However, clearly the legislators intended this to have much broader coverage as it also included sole proprietorships or an "other entity". In this case we have a sole proprietorship, Avondale Limousine Services, providing the vehicle to Mr. Chang. I cannot see how that cannot fall within the purview of the title, which to my mind seems to go to the nature of the "entity" providing the vehicle to the individual as opposed to the type of use that the individual may put it to.

It was argued before me by St. Paul Fire & Marine that company car essentially means an employee's family car. As I have found that regular use does not require personal use as well as business use, I cannot, similarly, accept the argument that a company car under section 66 must be a "family car".

2. *The Co-Operators General Insurance Company and Cigna Insurance Company of Canada*, a private Arbitration decision of Arbitrator Samis dated August 14, 1997.

I accept Arbitrator Samis' comments at page 6 wherein he states: "It seems appropriate for the definition of a 'named insured' to be expanded in those circumstances where a vehicle is owned by a corporate entity or organization. In such cases, it is appropriate to identify regular users of such vehicles to be treated in a similar fashion to persons who are registered owners and become 'named insureds' as a result of that status."

3. I was referred by both counsel to the decision of the Court of Appeal in *Yamada v. The Canadian General Insurance Company*, [1982] I.L.R. 659.

I accept the submissions of counsel for the Applicant that *Yamada* are of relatively limited assistance in this case. It was interpreting an exemption clause with somewhat different wording than what we are dealing with here. In particular, while the words "regular use" was in issue in that case, it was preceded by the words "furnished by". In my view, the words "furnished by" are quite different from the words "made available for". Further, I agree with counsel for the Applicant that as I am here interpreting a coverage clause as opposed to an exemption clause, that I must construe it broadly and liberally as opposed to the narrow interpretation that would be appropriate in an exemption clause case.

However, in reviewing the *Yamada* case, there does appear to be an obiter comment from the Court of Appeal which does provide support to the Applicant's position herein. In that case, Miss Yamada had turned 16 years of age and had obtained her driver's licence. The evidence disclosed that for some time prior to the accident she drove the vehicle in question on one or two occasions a week. The vehicle was a company vehicle, her father being President of the company. At all times when she was driving the vehicle she was accompanied by her father and the vehicle was being driven on company business. The Trial Judge had found that "that use was

not regular, suggesting that it did not import a pattern or scheme of things as, for example, 2, 4, 8, 16, 32, is a regular series". He suggested that if Miss Yamada drove the Maverick to pick up the mail every Wednesday, then that would be regular use of the vehicle even though it was only once a week. As there was no evidence that it was a regular day or time that she drove it, he felt that its use therefore was irregular and at unequal intervals. The Court of Appeal stated: "we are of the opinion that if that were the only issue in this case, the result arrived at by the Learned Trial Judge might well have been in error. We think that on the facts as found by him there might have been a regular or frequent use of the vehicle by Miss Yamada, if one considered those terms in isolation from the other terms of the policy."

Therefore, if Miss Yamada's use of her father's vehicle being no more than once or twice a week, and on no specified day, could, in the eyes of the Court of Appeal, constitute regular use, then certainly the facts involving Mr. Chang's driving of the white limousine would support a conclusion of regular use.

4. Counsel for the Respondent referred me to the decision of *Laurie v. Federated (Mutual) Insurance Company*, a decision of Justice Herold (1991), 2 CCLI (2d) 283.

In this particular case the issue was whether the Plaintiff would be covered under the uninsured provisions of an automobile insurance policy issued to his employer covering a GMC pick up truck. The Plaintiff had the right in some fairly limited circumstances to use the GMC pick up truck owned by his employer. It appears that he primarily used the vehicle in its function as a service vehicle although from time to time he had some restricted personal use.

I distinguish this case on two points. First, the legislation that was in issue is different in wording from the one under section 66. In particular, the wording was: "if the insured is a corporation, unincorporated association or partnership, any director, officer, employee or partner of the insured **for whose regular use the insured automobile is furnished...**". Once again, we

see the use of the word "furnished" as in the *Yamada* decision. Justice Herold, while having his attention directed to the *Yamada* decision, did not look at it in terms of the direction given by the Court of Appeal as to the meaning of "regular use" but rather rejected it as being of any assistance as it dealt with an exemption clause as opposed to an inclusionary clause which he was required to look at. It appears that Justice Herold's decision that the vehicle was not furnished for regular use was based primarily on the following facts: (a) that the employee was not given his own set of keys; was not given a credit card, ownership permit or proof of insurance, and (b) he seemed to have had a limited right to use the vehicle primarily restricted to business use and that did not constitute regular use.

For reasons I have mentioned above, it is my view that *Reisner v. Liao* has established that the latter is not the law. Secondly, in this case Mr. Chang had a set of keys, and had the vehicle parked from time to time at his house.

5. The last decision referred to me in reply by the Applicant was the decision of the *Dominion of Canada General Insurance Company v. General Accident Assurance of Canada* [1998] I.L.R., Private Arbitrator Flanigan, November 1997.

Arbitrator Flanigan was reviewing section 91 of the Statutory Accident Benefits Schedule with respect to an accident occurring on March 25, 1996 (post the amendments of January 1, 1995). The issue before Arbitrator Flanigan was whether Purolator Courier made one of their insured automobiles available for the "regular" use of Kelly Marks, a courier who was injured in a motor vehicle accident. Kelly Marks only had the use of his vehicle while at work, although on a occasion he could take it home for lunch. He also had to turn in his keys at the end of each shift. Arbitrator Flanigan found that the insured automobile was made available to Kelly Marks for the purposes of a Purolator courier carrying out its business purpose and for Kelly Marks to earn his living as their instrument in doing so. Arbitrator Flanigan concluded that in making the vehicle available to Kelly Marks as required to enable him to carry out his employment was

sufficient to fall within section 91(4) of the Schedule and to make him a deemed named insured. Arbitrator Flanigan stated, and I agree with him: "In looking at the entire scheme of the legislation, it is clear that the intent of the Legislature is to give the widest possible coverage in the case of insured persons. The Legislators have had ample time and opportunity to define a restricted use for the term 'regular use' and have chosen not to."

Conclusion

I therefore answer the questions posed by their parties in their material filed as follows:

1. At the time of the accident of April 27th, 1998, did Avondale Limousine provide Mr. Chang with an automobile for his regular use provided for under section 66 of the Statutory Accident Benefits Schedule (post November 1, 1996)?

   My answer to this question is yes.

2. If the answer to question 1 is yes, then is the effect of section 66 to deem Mr. Chang a named insured under the St. Paul Fire policy so that under section 268 of the *Insurance Act*, St. Paul would have priority for accident benefit coverage over Unifund?

As noted earlier in reviewing the factums filed, both Applicant and Respondent concurred that if the answer to my first question was yes, the answer to the second question would also be yes, and I so find.

As a result of these answers I therefore find that Daniel Chang is a deemed named insured under the St. Paul Fire & Marine Insurance Company policy and that, therefore, St. Paul Fire & Marine is responsible to pay the statutory accident benefits to Daniel Chang arising out of the motor vehicle collision of April 27th, 1998.

DATED at Toronto, this _____ day of August, 2000.

PHILIPPA G. SAMWORTH

Attachment:
Exhibit List

IN THE MATTER of Regulation 283/95 made under the *Insurance Act*, R.S.O., c. 18, as amended,

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

AND IN THE MATTER of an Arbitration,

BETWEEN:

UNIFUND ASSURANCE COMPANY

Applicant

– and –

ST. PAUL FIRE & MARINE INSURANCE COMPANY

Respondent

LIST OF EXHIBITS

1. Transcript of Examination for Discovery of Daniel Chang dated October 1st, 1999.
2. Transcript of Examination for Discovery of Angelo Sarris taken October 1st, 1999.
3. Limousine Log: April, 1997 to April 25th/26th , 1998.
4. Typewritten statement of Daniel Chang dated June 25th, 1998.
5. Chang's Run Sheets provided by Avondale Limousine (identical to Exhibit 3 other than includes dates January, 1997 through the end of March, 1997).