IN THE MATTER OF AN ARBITRATION

B E T W E E N:

ALLSTATE INSURANCE COMPANY

- and -

LIBERTY INTERNATIONAL INSURANCE COMPANY

AWARD

The parties to this arbitration have submitted an issue to me to be decided in accordance with the Arbitration Act, 1991. This arbitration deals with certain rights and obligations with respect to payment of "no fault" benefits payable as a result of an automobile accident which occurred on or about March 5, 1995. The parties have submitted this issue to me to resolve issues which arise with respect to the "no fault" benefits and which require interpretation of the Insurance Act and the *Statutory Accident Benefits Schedule* which is promulgated pursuant to that Act.

BACKGROUND CIRCUMSTANCES

This dispute arises out of a motor vehicle accident which occurred on March 5, 1995 when one Robert Kerr was involved in a single motor vehicle accident. The parties have submitted an Agreed Statement of Fact which is an appendix to this award. This agreed statement discloses that the accident occurred when Mr. Kerr was driving a vehicle owned by "Sealand Quality Foods" in the course of his employment. Sealand Quality Foods is identified as a corporation. Sealand has insured the vehicle involved in the accident with Liberty International. Robert Kerr has his own policy of insurance (with respect to some other vehicle) with Allstate Insurance Company. Robert Kerr is the named insured on the Allstate policy.

The relationship between Kerr and Sealand is important. Kerr is an independent contractor with a relationship with Sealand. While the parties have loosely referred to Robert Kerr as an "employee" it is clear that the agreement between Sealand and Kerr denies the existence of an employee/employer relationship and creates a relationship of independent contracting parties.

A review of this contract indicates that Kerr is to obtain the vehicle and merchandise from Sealand. Kerr is accountable to Sealand for the settlement accounts and is obliged to pay $18.00 per day for each day that he uses a Sealand vehicle. It is contemplated that the Sealand vehicles will be used five days a week but it is not necessarily the case. If a vehicle is not going to be used on a particular day, Kerr had the option of returning the truck to Sealand and avoiding the cost for that day. In that eventuality it was conceivable that the truck might be used by another independent contractor on that occasion.

The independent contractor agreement including the provisions indicating that a truck will be leased to Kerr on a daily basis is dated February 17, 1995. The specific provisions of the lease include the following:

> "13. Sealand trucks will be leased to you on a daily basis and are due into the Sealand plant every morning. A failure to report with the truck to the Sealand plant in the morning will be reported to the police."
>
> 14. Sealand trucks are to be used only by a Sealand-approved operator in the fulfilment of his business of selling Sealand merchandise and may not be driven for any other purpose.
>
> 15. Sealand will not assume responsibility for any persons driving Sealand trucks under the influence of alcohol or drugs (prescription or other). All responsibility for the safe operation of the vehicle rests with the operator of the truck.
>
> 16. Sealand trucks are to be returned in the same condition as received, i.e. clean inside and out. If not returned in that condition, cleaning charges will be levied against you."

In the Agreed Statement of Facts the parties have indicated that the operator (Kerr) is allowed to keep the truck over weekends. It is also indicated that Kerr may be asked to leave his own private vehicle on Sealand premises as security for the truck when he leaves.

In these circumstances it is necessary for me to decide which of the insurers, Allstate or Liberty, is obliged to pay no fault benefits pursuant to the *Statutory Accident Benefits Schedule* under the Insurance Act.

The parties have put the issues in the following form:

1. Does Mr. Kerr qualify as a named insured under the Sealand Quality Foods policy by virtue of the fact that he has a vehicle which is made available for his regular use, or does the fact that he has not rented nor leased it for more than thirty days preclude him from qualifying as a named insured?

2. If Mr. Kerr qualifies as a named insured under the Sealand Quality Foods policy, should that policy respond to the accident benefits claim on the basis of priority of rules concerning payment of accident benefits?

3. Despite Mr. Kerr being a named insured under the *Allstate policy, does the exclusion* in Part E - General Provisions, Definitions and Exclusions, 5.2.2 subsection 4 (f), exclude him from receiving accident benefits coverage for the accident of March 5, 1995? Mr. Kerr is asking for coverage while driving another automobile and the exclusion indicates the other automobile is not used for carrying passengers for compensation or hire or for commercial delivery at the time of the loss.

I agree that the questions submitted are appropriate for consideration in the order presented.

Question No. 1

It is admitted that Kerr is a named insured under the Allstate policy. It is clear that he is not actually a named insured under the Liberty policy. However, question 1 raises the issue of whether or not Kerr's relationship with Sealand puts him in a position where he is considered to be a "named insured" for the purpose of the Insurance Act.[1] Section 91 of the *Statutory Accident Benefits Schedule* is a provision of the no fault benefit regime which deals with certain relationships and creates certain status for victims. The relevant provisions with respect to accidents in 1995 are the following provisions:

> "(4) Subject to subsection (7), if an insured automobile is made available for the regular use of an individual who is living and ordinarily present in Ontario by a corporation, unincorporated association, partnership, sole proprietorship or other entity, or if an insured automobile is rented for a period of more than 30 days to an individual who is living and ordinarily present in Ontario, the individual shall be deemed to be the named insured under the policy insuring the automobile for the purpose of payment of the statutory accident benefits set out in this Regulation.
>
> (5) Subject to subsection (7), if an insured automobile is rented for a period of 30 days or less to an individual who is living and ordinarily present in Ontario, the individual shall be deemed not to be the named insured under the policy insuring the automobile for the purpose of payment of the statutory accident benefits set out in this Regulation."

The provisions attempt to address two distinct circumstances which are not mutually exclusive. 91 (4) addresses circumstances where an insured automobile is made available to an individual for regular use by a business. 91(4) and 91 (5) attempt to address rental situations. Some rental arrangements will be associated with provision of vehicles for regular use and some will not.

Section 91 (4) on its own deals with two separate situations. If an automobile is made available for the regular use of an individual then the person may be deemed to be the named insured under the policy insuring the automobile. Alternatively, if an automobile is rented to a person for more than thirty days, then the individual is similarly deemed to be the named insured under the policy insuring the automobile.

To the contrary, however, section 91 (5) deems a person not to be the insured if an automobile is rented to them for a period of thirty days or less.

These provisions seem to create a situation where there may be a direct conflict and that conflict arises in the case at hand. I have no difficulty in concluding that this vehicle was not

---

[1] For the purpose of ensuring that no fault benefits are available to most victims of automobile accidents, the Insurance Act and its Regulations create an environment where an individual is likely to be considered an "insured person" with respect to several policies of insurance. The Insurance Act, in section 268, sets out certain priorities of payments to delineate the responsibilities of the various insurers who might have applicable policies. The scheme contemplates that a person who is named insured under the policy on the vehicle in which they are an occupant at the time of the accident must claim their no fault benefits from that insurer. Hence if Mr. Kerr is a "named insured" under the Liberty policy then it is clear that Liberty must pay the statutory accident benefits.

rented to Mr. Kerr for more than thirty days. The contractual provisions expressly state that it is a daily rental and in any event the contract had not yet been in force for thirty days. Thus, I find that the automobile was not rented to Mr. Kerr for a period of more than thirty days. Therefore, the second branch of section 91 (4) does not deem Mr. Kerr to be an insured.

A more difficult questions arises about whether or not the Sealand automobile is "made available for the regular use of" Kerr. This kind of phraseology has been the subject of consideration by some courts. I question whether this relationship can be characterized as one where the automobile is made available for Kerr's regular use. If Kerr were an employee of Sealand and if he were restricted to using the vehicle solely for company purposes, there might be doubt that the vehicle should be considered as provided to Kerr for his regular use.[2] The vehicle would be provided to Kerr for Sealand's purposes and use. However, the parties have carefully constructed their relationship as one of independent contractor. Kerr's hours and remuneration are determined by his own actions including use of the truck. Thus, it is my conclusion that the provision of the vehicle to Kerr in these circumstances can be construed as being for Kerr's use and it appears that the use was intended to be regular and was regular. Since Sealand is a corporation it appears that all of the conditions of the first branch of section 91 (4) are applicable.

I find that the 1993 Mazda 1/2 ton pick-up truck was made available for the regular use of Kerr by a corporation, Sealand. Therefore, section 91 (4) says that Kerr "shall be deemed to be the named insured under the policy insuring the automobile for the purpose of payment of the statutory accident benefits set out in this Regulation".

I now turn to the consideration of section 91 (5). This section applies "if an insured automobile is rented for a period of 30 days or less to an individual...". It is clear that an insured automobile was rented to Kerr and the question is whether or not it was rented for a period of 30 days or less". It does seem to be possible that this clause could be interpreted in two ways. One could look at the period of time for which the vehicle has been rented or one may look at the period of time for which the vehicle was intended to be rented. It seems likely to me that one is to look at the rental contract and determine the intended duration of the rental regardless of the passage of time from the inception of the arrangement. Thus, I conclude that nothing turns on the duration of the rental arrangement from the date of the inception of the contract until the date of the accident, which happens to be a period less than thirty days. However, one must look at the terms and conditions of the contract closely to determine whether this was intended to be a rental for thirty days or less. The parties have specifically agreed that the leasing arrangement is "on a daily basis". Kerr is obliged to report with the truck to the Sealand plant every morning. It is my conclusion that this is a vehicle which is "rented for a period of thirty days or less" and, therefore, section 91 (5) also applies.

---

[2] Grenada v. Canadian General, [1982] I.L.R. 1-1477 (Ont. Ct. Appeal) and Reisner v. Liao, [1994] O.J. No. 1033, (Ont. Div. Ct.)

There is a direct conflict between the deemed outcomes mandated by section 91 (4) and section 91 (5). This obviously leaves the parties in a quandary as to the correct status of Mr. Kerr.

Two possible approaches to resolving this conundrum are:

1. Consider the deeming provisions as cancelling each other out and look at the status of Kerr in the absence of these provisions; or

2. Look at the factual circumstances of the case and determine which of the deeming provisions more closely bears upon the actual relationship between Sealand and Kerr.

I consider the latter approach to be most appropriate. Therefore I must resolve the question of whether or not the relationship between Sealand and Kerr should be characterized as a relationship where an automobile is made available for Kerr's regular use or is it more aptly characterized as a situation where an automobile is rented for a period of thirty days or less. To determine this issue I have considered the following factors:

1. The vehicle is not made available to Kerr for personal use;

2. The vehicle is only made available for Kerr's use in conjunction with the distribution of Sealand's product which is an extension of Sealand's use;

3. With respect to the vehicle, the relationship between the parties is specifically described as a lease;

4. A daily amount is charged to Kerr as the rate for leasing the vehicle; and

5. The agreement between Sealand and Kerr includes restrictions on who may use the vehicle, excluded driver conduct, and liability for damage which are characteristics of a rental arrangement.

Based on these features and the totality of the arrangement and the contractual documents, I conclude that the relationship between Sealand and Kerr is more appropriately characterized as a rental arrangement as described in section 91 (5), as opposed to an arrangement described in section 91 (4). Therefore I conclude that the effect of the Regulation, as applied to these circumstances, is to deem Kerr to not be a "named insured".

In view of the mandatory nature of the wording, no further inquiry is necessary with respect to issue number 1.

<u>Question No. 2</u>

This question is not applicable in view of my conclusion that Kerr is deemed not to be a named insured under the Sealand policy.

Question No. 3

The meaning of section 5.2.2 of O.P.F. No. 1 has been cause for concern for many in the claims environment since June of 1990. Unfortunately the policy conditions are rather convoluted and the logic becomes difficult to follow. The most important feature of section 5.2.2 is to understand that this is a definition of "the automobile" and is not a definition of "automobile" or a definition of "other automobile". The concept of "the automobile" is for the purpose of determining the definition of the automobile to which the standard automobile policy applies. However, for the purpose of no fault benefits, it is unnecessary that an insured person have any particular involvement with "the automobile" in order to receive no fault benefits. It is of no consequence that the Sealand vehicle might not be within the definition of "the automobile" in order for Allstate to have an obligation to pay no fault benefits. Allstate has an obligation to pay no fault benefits to its named insureds whether they are occupants of "the automobile" or whether they are occupants of some other vehicle, or whether they are not occupants of vehicles at all. Hence, any language which is found in section 5.2.2 is irrelevant for the purpose of determining no fault benefits payable to the named insured.

On the other hand, if the vehicle were within the definition of "the automobile" Allstate would have additional obligations for payment of no fault benefits to occupants and persons struck by the vehicle. To this extent the provisions of 5.2.2 would be relevant to determining Allstate's possible obligation to these other individuals.

Any different analysis of this problem would lead to the unacceptable conclusion that Allstate would have no obligation to any of its policyholders while in other vehicle unless the vehicle was "personally driven by the insured..." and that is patently absurd.

I find that the definition contained in section 5.2.2 (iv) has no relevance to evaluating the obligation of Allstate to pay no fault benefits to its named insured. Whether or not the Mazda 1/2 ton truck qualifies as "the automobile" under the Allstate policy is irrelevant for the purpose of payment of no fault benefits.

In addressing the foregoing issue, I have noted that the parties had made reference to the provisions in O.P.F. No. 1. Given the date of the accident it would appear more appropriate that reference should be made to O.A.P. 1 which is a standard owner's policy for use after March 31, 1994. The corresponding provisions are found in section 2 of O.A.P. 1. The words are substantially different and it is quite plain that the drafters intend the extension of definition of "other automobiles" found in 2.2.3 to refer to coverage vis-a-vis the automobiles and not vis-a-vis no fault benefits. The same conclusion results.

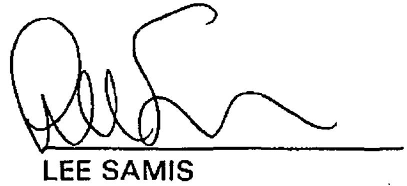
Additionally, I observe that it has not been clearly established that the use of the vehicle by Kerr is for the purpose of carrying passengers for compensation or for the purpose of commercial delivery. In fact, the vehicle seems to be used as a mobile sales facility.

CONCLUSIONS

For the foregoing reasons I have concluded that Kerr is deemed not to be a named insured under the Liberty policy but is a named insured under the Allstate policy. I have further concluded that section 5.2.2 of O.P.F. No. 1 and section 2.1 of O.A.P. 1 do not limit Allstate's obligation to pay no fault benefits to their named insured.

In accordance with the wishes of the parties, I will make no order as to the costs of this proceeding.

DATED at Toronto this 29th day of August, 1995.



LEE SAMIS

Attachment:
Agreed Statement of Facts