

EMPLOYEE COVERAGE UNDER SECTION 66 OF THE STATUTORY ACCIDENT BENEFITS SCHEDULE

ACE INA Insurance v. the Co-operators General Insurance Company

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In a recent decision of the Ontario Superior Court of Justice, dated March 30, 2009, Justice Belobaba allowed ACE INA's appeal and set aside the decision of Arbitrator Bruce Robinson dated July 30, 2008, which declared that ACE INA was responsible for the payment of Statutory Accident Benefits to the claimant as a result of a motor vehicle accident that occurred on September 24, 2006. The relevant provision requiring interpretation was section 66 of the *Schedule* dealing with the regular use of company vehicles.

The claimant was injured in a motor vehicle accident while a passenger in a vehicle insured by Co-operators. At the time of the accident, the claimant was employed by Enterprise Rent-A-Car, which was insured by ACE INA Insurance. In the capacity of his position, the claimant had access to the rental vehicles while he was working and once his work day was over he could no longer drive the cars, nor take any of the rental vehicles home. Enterprise cars were made available to him, but only while he was at work.

The accident occurred on a Saturday night when the claimant was heading downtown with a friend and he was not working at the time of the accident. The claimant had not worked for nine days as of the accident date.

The claimant initially received benefits from the driver's insurer, Co-operators. Co-operators won at arbitration against ACE, by arguing that the claimant was deemed to be a named insured under the ACE policy of the "company car" provision and therefore that ACE was responsible for paying accident benefits for the claimant.

The relevant provision is section 66 of the *Schedule* regarding regular use of a company car:

Company Automobiles...

66. (1) An individual who is living and ordinarily present in Ontario shall be deemed for the purpose of this Regulation to be the named insured under the policy insuring an automobile at the time of an accident, if at the time of the accident,

(a) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity;...

In the appeal of the arbitration decision to the Ontario court, the judge indicated that the meaning of “being made available at the time of the accident” was the key issue in this case. The interpretation that the judge used was whether the company car was being made available to the claimant at the time of the accident, when he was off work and was on his way downtown in a friend’s car. The judge found that it cannot be said that at the time of the accident an Enterprise car was being made available to the claimant.

The judge found that the moment in time relevant to section 66(1)(a) pertains to the exact time of the accident and whether any vehicle was being made available to the claimant – which can be argued to extend the interpretation to any company vehicle. However, the “time of the accident” element of the section was the limiting factor in this case that resulted in Co-operators having priority to pay the claimant.

The judge found on the “regular use” issue, that the question is whether ACE’s insured was making it’s vehicles available for the claimant’s use at the time of the accident. The judge concluded that the plain language of the section must be examined and as a result, the arbitrator unreasonably ignored the plain language of the section.

It is important to note that the judge limited the extension of the company car provision in this case in order to provide that Co-operators should retain the responsibility to pay accident benefits. The judge found that it was not only a standard of correctness, but a standard of unreasonableness whereby the arbitrator extended the company car provision too far without a proper reading of section 66. The arbitrator brought ACE into the context without consideration of the days that went by where the claimant was not at work, and the fact that he did not have access to company vehicles out of work hours. It was plain and clear that the claimant’s accident occurred during a social venture, days after his work activities.