IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, as amended, Section 268 AND Regulation 283/95 made under the *Insurance Act;*

AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c.17, as amended;

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

ALGOMA MUTUAL INSURANCE COMPANY

Applicant

- and -

CO-OPERATORS GENERAL INSURANCE COMPANY

Respondent

DECISION

COUNSEL

Kadey Schultz – Schultz Frost LLP
Counsel for the Applicant, Algoma Mutual Insurance Company
(hereinafter referred to as "Algoma")

Mark Donaldson – Dutton Brock LLP
Counsel for the Respondent, Co-operators General Insurance Company
(hereinafter referred to as "Co-op")

ISSUES - OPCF-47 OPTIONAL BENEFITS, DEFLECTION, S. 32 SABS DISCLOSURE OBLIGATIONS AND EQUITABLE RELIEF

[1] In the context of a priority dispute pursuant to s.268 of the *Insurance Act*, R.S.O. 1990, c. I.8 and Ontario Regulation 283/95, the issue before me is to determine which insurer stands in priority to pay statutory accident benefits to or on behalf of the claimant, Travis White, with respect to personal injuries sustained in a motor vehicle accident which occurred on September 1, 2017. This determination involves the interpretation of the OPCF-47 Optional Benefits Endorsement and the requirements of s. 32 of the *Statutory Accident Benefits Schedule* to provide a written explanation of the benefits available, deflection and equitable relief.

PROCEEDINGS

[2] The matter proceeded on the basis of written submissions, Document Briefs, Examination Under Oath transcripts and Books of Authority.

FACTS

[3] The claimant, Travis White ("Travis"), was struck as a pedestrian by a vehicle insured by Dominion of Canada in Parry Sound on September 1, 2017. He was nine years old at the time He sustained serious orthopaedic injuries requiring multiple surgeries, giving rise to an extensive hospitalization.

[4] The Applicant Algoma insured the claimant's father, Brad White, with the policy providing standard mandatory accident benefits coverage.

[5] The Respondent Co-op insured the claimant's mother, Kim White, with the policy providing optional enhanced accident benefits coverage.

[6] The claimant's mother and father had been separated for several years but never divorced. Kim was the primary caregiver to Travis and Brad paid $484 per month in child support.

[7] According to Co-op log notes, Travis' accident was initially reported by his mother, Kimberly White ("Kim"), on September 14, 2017. A new claims file was opened and it was internally documented that the Co-op policy provided $1,000,000 in optional accident benefits coverage.

[8] The claim was initially assigned to an intermediate accident benefits adjuster SM. SM handled the file until December 12, 2017 when assumed by adjuster CC.

[9] SM attempted to reach Kim by telephone on September 18, 2017 and left a voicemail message. She claims to have also e-mailed Kim an accident benefits application package, but it is unclear from the log notes if that was the case. What is clear is that a package was mailed to Kim. A full copy of the AB package sent to Kim has not been produced. A description of its contents was later provided on the Examination Under Oath of the Co-op adjuster. The adjuster testified that the reference to optional benefits in the accident benefits package provided read:

> "Optional benefits increase the amount of basic benefits. They must be purchased before the accident. The optional benefits are increased income replacement benefit, caregiver, housekeeping and rehabilitation, attendant care, death and funeral and

> optional indexation benefit. If you aren't sure if you have optional benefits available, please contact your insurer."

[10] There is no indication that the package included a statement that Kim's policy included such optional benefits or specific detail as to the extent of the optional benefits purchased, or how they differed from the standard mandatory benefits.

[11] Kim returned the Co-op adjuster's call later that day September 18, 2017. The Co-op log notes contain the following notation:

> "her ex – sps has submitted an a\b claim to his own insurance co"

[12] This suggests that the adjuster was told that an accident benefits claim had already been submitted. However, a claim was not made until October 27, 2017, long after the September 18, 2017 telephone discussion.

[13] The Co-op log notes also included a notation:

> "explained POP and opt benefits"

[14] In an Examination Under Oath on October 29, 2018, Kim stated that she had never been advised by Co-op of the optional benefits available under her policy and, if advised, would have submitted an OCF-1 to Co-op. During MS's discussion with Kim, the Co-op adjuster claims to have explained the priority of payment issue and optional benefits and advised Kim that Co-op would likely be receiving a Notice of Dispute from the other insurance company, given her understanding that a claim had already been submitted to Algoma who insured the father of the claimant. Co-op adjuster SM, according to her Examination Under Oath evidence, advised Kim that there were optional benefits under her policy, but admits she did not explain the OPCF-47.

[15] According to the Examination Under Oath evidence of SM, Kim did not reply to the e-mail of September 18, 2017 which included what has been referred to as the AB package.

[16] The evidence indicates that the Co-op accident benefits application package was sent out to Kim, whether by e-mail, regular mail or both, prior to Kim's telephone discussion with adjuster MS. The cover letter that accompanied the application package was a standard form letter. Co-op sends the same letter and application package to every claimant so that they know each claimant has the same application documents available to them. As part of adjuster MS's standard practice, during her telephone discussion with Kim she would have offered to meet with her in the event that Kim needed any assistance in completing the application documents.

[17] Co-op never received an OCF-1 with respect to Travis in the immediate aftermath of the accident.

[18] The only Application for Accident Benefits completed with respect to Travis' claim in the immediate aftermath of the accident is on a form provided by Algoma's independent adjuster, Canadian Shield Adjusters. That Application was signed October 27, 2017 by Kim and was date stamped received by Algoma's adjuster the same day.

[19] The OCF-1 indicates, at Part 2, that Travis is represented by his father, Bradley White ("Brad"). At Part 4 of the Application, it is indicated that Travis was dependent upon Brad, and details were provided with respect to Brad's vehicle as insured by Algoma.

[20] On October 27, 2017, Algoma secured statements from both Brad and Kim. Kim indicated that she had an auto insurance policy with Co-op. She was separated from Travis' father, Brad. Brad paid her support and in Kim's view, Travis was more dependent upon her than Brad. Brad indicated that he is Travis' biological father and that he is separated from Travis' mother, Kim. Brad indicated that his vehicle was insured by Algoma. Brad and his family had Travis more than 50% of the time to accommodate Kim's work schedule. In Brad's opinion, Kim and Travis were financially dependent upon him.

[21] A Co-op log note dated October 31, 2017, makes reference to the fact that as mother and father were still spouses, the claimant could pick which policy to make a claim for accident benefits.

[22] Algoma generated a Notice to Applicant of Dispute Between Insurers form and forwarded same to Co-operators under cover of letter dated November 14, 2017. Algoma confirmed that a completed Application for Accident Benefits had been received October 27, 2017 and that Algoma insured Travis' biological father's vehicle. Algoma alleged that priority may rest with Co-op as their information was that Travis was principally dependent upon Kim.

[23] Co-op requested a statement from Kim and that was conducted by adjuster CC by telephone on December 13, 2017. The recording of that statement was subsequently transcribed. Kim confirmed that Brad reported the accident to his insurance company and that his insurer had been funding the claim and Kim's recollection was that Brad reported the claim to his insurer "in September sometime, the end of .... maybe the middle of September or the end. Probably near the end of September, I think".

[24] Under cover of letter dated October 22, 2018, Algoma's counsel served Co-op with a Notice Demanding Arbitration.

[25] On October 29, 2018, Algoma conducted an Examination Under Oath of Kim. Kim advised that she secured more coverage for her auto in 2013. Although Kim did not recall the exact conversation with the Co-op agent, she did describe periodically going to the agent's office and the agent advising of additional coverage. When asked specifically about the additional accident benefits coverage, Kim was sure that the agent had explained that to her as "she is very thorough". Kim confirmed that Co-op sent her a package of forms which

needed to be completed, but she "didn't pursue my insurance company anymore because we were already dealing with Brad's insurance". Kim identified her handwriting and also Brad's on the completed Application for Accident Benefits. Kim confirmed that she signed that form. Kim first retained counsel in November 2017. Kim confirmed that at the time of the accident, she and her husband were separated but not divorced.

[26] Kim has been insured with Co-op since 1998. She had policies for auto, home and life. Kim reviewed her Co-op coverages with the Co-op agent on September 9, 2016. At that time, Kim opted to purchase optional benefits with respect to medical, rehabilitation and attendant care benefits.

[27] Co-op transferred file handling to a different adjuster, CC, effective December 12, 2017. CC attended at an Examination Under Oath on November 11, 2020. Her understanding was that Kim had been advised by her predecessor as to availability of optional accident benefits. In addition, a standard, general description with respect to optional benefits was sent out to Kim. That description is sent out to every accident benefits claimant. The Co-operators received a copy of the completed OCF-1 that had been submitted to Algoma on December 18, 2017 from Algoma's independent adjuster. CC was aware of the endorsement pertaining to optional benefits, the OPCF-47 and also that there were competing decisions as to the potential effect of that endorsement upon an inter-company priority dispute. Most importantly, CC admitted that Co-op had failed to provide written notice of the specific benefits available under Kim's policy as required by s. 32(2)(b) of the *Statutory Accident Benefits Schedule*.

[28] In response to Co-op's refusal to accept responsibility for this claim, Algoma's independent adjuster advised by letter, *inter alia*, that "Kimberly and Brad White were legally divorced at the time of the motor vehicle accident" and "according to Kimberly White, she does not have any optional benefits under her above-noted policy with the Co-op".

[29] It was not until Algoma's mandatory benefits were exhausted that Co-op advised claimant's counsel that they would be assuming carriage of Travis' claim for accident benefits beyond the standard benefits available under the Algoma policy. On March 15, 2020, Kim completed an OCF-1 on behalf of Travis and submitted it to Co-op. Co-op has been adjusting the accident benefits claim since.

ANALYSIS AND FINDINGS

[30] A priority dispute arises when there are multiple motor vehicle liability policies that may be available to a person injured in a motor vehicle accident to pay statutory accident benefits. Section 268(2) of the *Insurance Act*, R.S.O. 1990, c.I.8, sets out the priority rules to be applied in order to determine which insurer is liable to pay statutory accident benefits.

[31] As the claimant Travis White was a pedestrian at the time of this motor vehicle accident, the priority rules with respect to "non-occupants" are applicable. They are set out in Section 268(2) of the *Insurance Act,* which is set out as follows:

In respect of non-occupants,

> **i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured;**
>
> **ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant;**
>
> iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any 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 non-occupant has recourse against the Motor Vehicle Accident Claims Fund.
>
> [emphasis mine]

[32] Section 3(1) of the *SABS* defines an "insured" to mean:

> (i) The named insured;
> (ii) A listed driver;
> (iii) A spouse of the named insured; or
> (iv) A dependent of the named insured or spouse of the named insured.

[33] The claimant Travis White was therefore an "insured" under both Algoma and Co-op policies and by reason of s. 268(4) of the *Insurance Act*, could in his absolute discretion decide the insurer from which he would claim benefits. Either Algoma or Co-op at the first rung of the priority ladder would stand in priority to Dominion, the insurer of the automobile that struck the non-occupant, which would stand at the second rung of the priority ladder set out above.

[34] The Algoma policy only provided basic mandatory accident benefits, whereas the Co-op policy provided enhanced optional benefits. The Co-op policy provided an additional $935,000 of available coverage when compared to the mandatory benefits available under the Algoma policy. Nonetheless, the accident benefits claim was presented to Algoma. Algoma claims that Co-op is the priority insurer. Algoma claims that the conduct of Co-op was a breach of s. 32(2) of the *SABS* and amounted to a deflection of the claim as per s. 2.1(5) of *O. Reg. 283/95.*

[35] Firstly, with respect to disclosure obligations, the Statutory Accident Benefits Schedule provides:.

> 32(2) The insurer shall promptly provide the person with,
>
> (a) the appropriate application forms;
>
> (b) **a written explanation of the benefits available**;
>
> (c) **information to assist the person in applying for benefits;** and
>
> (d) information on the election relating to income replacement, non-earner and caregiver benefits, if applicable
>
> [emphasis mine]

[36] "Deflection" arises out of section 2.1(5) of O. Reg. 283/95 which states:

> (5) An insurer that provides an application under subsection (2) to an applicant shall not take any action intended to prevent or stop the applicant from submitting a completed application to the insurer and shall not refuse to accept the completed application or redirect the applicant to another insurer.
>
> [emphasis mine]

[37] In response, the Respondent Co-op submitted that they complied with their obligation imposed by s. 2.1 of Ontario Regulation 283/95, as they provided to their insured an application package including the "appropriate forms in accordance with the *Schedule*". However, in this case, the Applicant opted to complete the form provided by Algoma and a completed OCF-1 was never returned to Co-op in the immediate aftermath of the accident.

[38] Further, having provided their insured with the Application for Accident Benefits package, it was submitted that Co-op did not "take any action intended to prevent or stop the applicant from submitting the completed application" nor, did Co-op "refuse to accept the completed application or re-direct the applicant to another insurer". They claim there was no "deflection". Co-op has claimed that the claimant's mother was advised of the optional benefits in her telephone discussion with adjuster SM on September 18, 2017 and that the accident benefits package made reference to optional benefits that might be available.

[39] Co-op has also submitted that although the OPCF-47 Endorsement with respect to optional benefits indicates that an application for accident benefits may be submitted to the policy that includes coverage for optional benefits even though another insurer may stand in priority, but provided they have not made a claim under another policy. Here, it was thought by the Co-op adjuster that a claim had been submitted to Algoma.

[40] The OPCF-47 states as follows:

> **1. Purpose of This Endorsement**
>
> This endorsement is part of your policy. It has been made because persons who are entitled to receive optional statutory accident

> benefits under this policy may, by the priority of payment rules in Section 268 of the Insurance Act, be required to claim under another policy that does not provide them with the optional statutory accident benefits that have been purchased under this policy. This endorsement allows these persons to claim Statutory Accident Benefits (SABS) under this policy including the optional statutory accident benefits provided by this policy, provided they do not make a claim for SABS under another policy.
>
> **2. What We Agree To**
>
> If optional statutory accident benefits are purchased and are applicable to a person under this policy, and the person claims SABS under this policy as a result of an accident and agrees not to make a claim for SABS under another policy, we agree that we will not deny the claim, for both mandatory and optional statutory accident benefits coverage purchased, on the basis that the priority of payment rules in Section 268 of the Insurance Act may require that the person claim SABS under another insurance policy.
>
> [emphasis mine]

[41] I will commence the analysis with findings of fact that impact on the analysis. I am satisfied that in the initial telephone conversation with Co-op adjuster SM on September 18, 2017, the mother of Travis advised that her husband had already submitted an AB claim to his own insurance company, as evidenced by the log note to that effect and also supported in the later notation in the log note that Kim would likely be receiving a notice from the other insurance company. Section 2.1(4) of *O. Reg.283/95* makes it clear that an application for accident benefits can only be sent to one insurer. In the mind of adjuster SM, that application had already been made. It is therefore difficult to reach a conclusion that adjuster SM took "any action intended to prevent or stop the applicant from submitting a completed application". In her mind, the one and only accident benefits claim that could be made had been made. I am not satisfied that given the specific facts of this case, there was a "deflection" or breach of s. 2.1(5) of *O. Reg. 283/95*.

[42] However, although Co-op may not have deflected the claim given the specific wording of s.2.1(5) of *O. Reg. 283/95*, I find that there was nevertheless a clear breach of the requirements of s.32(2) of the *Statutory Accident Benefits Schedule:*

> 32(2) The insurer shall promptly provide the person with,
>
> (a) the appropriate application forms;
>
> (b) **a written explanation of the benefits available**;
>
> (c) **information to assist the person in applying for benefits;** and
>
> (d) information on the election relating to income replacement, non-earner and caregiver benefits, if applicable.
>
> [emphasis mine]

[43] In my view it is clear on the evidence that Co-op both failed to provide a written explanation of the benefits actually available and failed to provide information to assist the person in applying for benefits as required by s. 32(2) of the SABS. The AB package forwarded to Kim did not describe the enhanced optional benefits under her policy that may not have been available under her husband's policy. It simply provided a generic reference to optional benefits without specific detail. In the interests of consumer protection, I am satisfied that an insurer providing optional benefits should and must provide specific details of the enhanced benefits available under its policy and advise that such benefits may not be available under any other policy. In the present situation, Co-op ought to have advised Kim, as part of its obligation to assist the person applying for benefits, to check with her husband as to whether his policy contained optional benefits. Further, I would have thought that Co-op ought to have asked Kim to obtain and provide a copy of the application said to have been submitted by her husband or at least obtain the husband's policy details so they could confirm whether a claim had been formally submitted.

[44] In the case of "optional benefits", consumer protection in my view is ever so important and the obligations under s. 32 of the Statutory Accident Benefits Schedule ought be interpreted accordingly in a strict fashion.

[45] The Supreme Court of Canada in *Smith v. Co-operators General Insurance Co. [2002] 2 SCR 129,* deals with the impact of consumer protection in the interpretation of insurance legislation. The Court stated:

> There is no dispute that one of the main objectives of insurance law is consumer protection, particularly in the field of automobile and home insurance. The Court of Appeal was unanimous on this point and the respondent does not contest it. In Insurance Law in Canada (loose-leaf ed.) vol 1, Professor Craig Brown observed, "In one way or another, much of insurance law has an objective the protection of consumers".

[46] One must consider what would have occurred if appropriate disclosure and assistance had been provided. Co-op would have determined that an application for accident benefits had not yet been made and that the husband's policy did not provide for optional enhanced benefits of an additional $935,000 over and above the mandatory benefits provided by the Algoma policy. Kim was simply not provided with information by Co-op that would have enabled her to make an informed election as to which insurer was to be approached with respect to the accident benefits of Travis. There is no doubt in my mind that if Kim had been provided with specific details of the enhanced benefits under her policy and properly assisted by the Co-op adjuster, the accident benefits claim would have been presented to Co-op. These omissions on the part of Co-op were therefore tantamount to a deflection and the ramifications similar to those set out in s. 2.1(7) of *O. Reg. 283/95* should in my view result.

[47] In the absence of a breach of s.32(2) of the *Statutory Accident Benefits Schedule,* the claim would have been presented to Co-op. Co-op would have adjusted the claim and paid mandatory benefits, and once exhausted, optional benefits in accordance with the Schedule.

I find that Co-op is the priority insurer and obligated to adjust the ongoing claim of Travis White. I find that Co-op must reimburse Algoma for the mandatory benefits reasonably paid to the claimant. I find that Algoma, given its success in this arbitration, is entitled to the legal costs of this arbitration on a full indemnity basis, as well as reimbursement for any independent adjusting costs and the cost of medical examinations reasonably incurred in the handling of the underlying accident benefits claim.

[48] Another way of approaching the consequence of the breach of s. 32(2) of the *Statutory Benefits Schedule* is to consider the breach as putting Kim in a situation whereby she could not make an informed decision as to which insurer ought be presented with the claim, thereby entitling her to a re-election.

[49] In *Prosser v. Progressive Casualty Insurance Company* (Arbitrator Sampliner – May 28, 1997), the arbitrator allowed an insured to re-elect for a benefit where he was satisfied that the insurer had failed in its information obligations pursuant to s. 59(2) of the SABS, which obligations are similar to the current s. 32(2) of the SABS.

[50] Arbitrator Sampliner found that the insurer's misinformation and incorrect advice directly led the insured to apply for the incorrect benefit and she relied to her detriment on the insurer's representations. He found that the insurer had a responsibility to correct the misrepresentations. The insurer's negligent misrepresentations, failure to correct them and failure to meet its statutory obligation to provide accurate written information, were the basis for his allowing the claimant to re-elect an income replacement benefit rather than a caregiver benefit. It was found that the adjuster failed to provide a written explanation of benefits, failed to explain available benefits and advised the claimant that the income from a job she recently left was not relevant to the calculation of income replacement benefits. In fact, the income she earned from a job she recently left was relevant and would make the income replacement benefits to which she was entitled greater than the caregiver benefit she chose. Arbitrator Sampliner wrote at page 5 of his decision:

> *"Without basic information about potential accident benefits, the insured person is unable to make the reasonably informed decision contemplated by the legislators. Insurers who fail to comply with the statutory standard do so at their peril."*

[51] Also, in the FSCO Appeal decision *Antony v. RBC General* (Appeal P03-00023, July 22, 2004, Director's Delegate Makepeace), concurred with the rationale in *Prosser* and ruled that the claimant's election of Caregiver Benefits in that case was not a valid election because RBC General Insurance Company ("RBC") did not comply with its information obligations under s. 32(2). The claimant was allowed to re-elect.

[52] Looking at the facts before me, a re-election would result in Co-op, with the available enhanced benefits, being the insurer chosen by the claimant to pay accident benefits. At the present time, the law is unsettled as to whether an insurer providing optional benefits can recover the mandatory benefits paid from an insurer standing higher in priority. See *Echelon*

v. Co-operators (Arbitrator Samis – January 20, 2015), Jevco v. Cheiftain (Arbitrator Samworth – March 11, 2016) and Continental Casualty v. Chubb (Stinson J. – June 19, 2019 – unreported). Such issue does not apply in the case before me because both Algoma and Co-op stand equal in priority. With proper disclosure by Co-op, the claim would have been submitted to Co-op with that being the exercise of the claimant's absolute discretion to choose as set out in s. 268(4) of the *Insurance Act*, where a person has recourse to more than one insurer at the same priority level.

[53] Further, I am satisfied that the clear failure by Co-op to satisfy the obligations under s. 32(2) of the *Statutory Accident Benefit Schedule,* which once again would have resulted in the claim being made to Co-op, cries out for the application of equitable relief pursuant to s. 31 of the *Arbitration Act 1991*. The application of equitable relief would give rise to the same result as the findings I have made.

ORDER

[54] On the basis of the findings aforesaid, I hereby order:

1. That Co-op is the priority insurer;

2. That Co-op reimburse Algoma for the mandatory benefits reasonably paid to the claimant, together with interest calculated pursuant to the *Courts of Justice Act*;

3. That Co-op reimburse Algoma for the costs of any independent adjusting fees and insurer examination fees reasonably incurred in adjusting the underlying accident benefits claim of the claimant;

4. That Co-op pay to Algoma the legal costs of this Arbitration on a full indemnity basis;

5. That Co-op pay the Arbitrator's account.

DATED at TORONTO this 23rd)
day of March, 2021.)

KENNETH J. BIALKOWSKI
Arbitrator