

BETWEEN:

LINDA D. CLEMENT

Applicant

and

ING INSURANCE COMPANY OF CANADA

Insurer

REASONS FOR DECISION

Before: Jeffrey Rogers

Heard: September 21, 2004, in Belleville, Ontario.

Appearances: Mr. Kristian Bonn, solicitor for Mrs. Clement
Mr. Douglas A. Wallace, solicitor for ING Insurance Company of Canada

Issues:

On October 26, 2001, Jim Clement, Mrs. Clement's husband, was electrocuted when the mobile crane he had been operating became electrified by overhead power lines. Mrs. Clement applied for statutory accident benefits from ING Insurance Company of Canada ("ING"), payable under the *Schedule*.¹ ING refused to pay the claimed benefits on the grounds that the crane is not an "automobile" as defined. The parties were unable to resolve their disputes through mediation, and Mrs. Clement applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

¹The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended by Ontario Regulations 462/96, 505/96, 551/96, 303/98, 114/00 and 482/01.

ING does not dispute that, if the crane is an “automobile”, Mrs. Clement is entitled to a death benefit of \$25,000 under subsection 25(2.1) of the *Schedule* and a funeral benefit of \$6,000 under section 26 of the *Schedule*. However, ING takes the position that Mrs. Clement was not a “dependant” of the deceased, as defined in subsection 2(6) of the *Schedule*. She is therefore not entitled to an additional death benefit of \$10,000 under subsection 25(2.2) of the *Schedule*, in any event.

The issues in this hearing are:

1. Is the mobile crane an “automobile” for the purpose of section 2 of the *Schedule*?
2. Was Mrs. Clement a “dependant” of her deceased husband at the time of the incident, as defined in subsection 2(6) of the *Schedule*?
3. Is Mrs. Clement entitled to interest on overdue payment of benefits pursuant to subsection 46(2) of the *Schedule*?
4. Is ING liable to pay Mrs. Clement’s expenses in respect of the arbitration under subsection 282(11) of the *Insurance Act*?
5. Is Mrs. Clement liable to pay ING’s expenses in respect of the arbitration under subsection 282(11) of the *Insurance Act*?

Result:

1. The mobile crane is not an “automobile” for the purpose of section 2 of the *Schedule*.
2. If the parties are unable to resolve the issue of expenses, either party may make an appointment for me to determine the matter in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

THE FACTS

The parties filed an Agreed Statement of Facts², supplemented by further agreed facts in the Joint Document Brief.³ The relevant facts are as follows: At approximately 1:00 a.m. on October 26, 2001, Jim Clement was operating a 1973 Grove 30-Ton Hydraulic Crane owned by 58205 Ontario Inc. c.o.b. as Trenton Crane Service. The Applicant, her husband and her son Ryan Clement, were officers of Trenton Crane.

Trenton Crane had been subcontracted by Underground Services (1983) Ltd. to assist in a contract with the Ministry of Transportation to conduct bridge repairs on Highway 401 at Belleville. Portable concrete median barriers, each weighing about 5,200 lbs., had been placed to separate the eastbound, inside lane of Highway 401 and that lane was closed to traffic. The crane was being operated in that lane, lifting median barriers onto flatbed trucks so that the lane could be re-opened. The crane was positioned in the eastbound lane, inside shoulder, between the concrete centerline median and the portable barriers. It was removing barriers and working its way west.

When the incident occurred, Jim Clement was backing up the crane with the boom partially extended and raised. Ryan Clement was the signalman for the crane. He had been walking on the median and had directed his father to a spot almost directly below the power lines which were approximately 37' 11" above the highway. The crane had stopped. Ryan Clement had jumped off the median and was talking to another worker at the site when he noticed the crane backing up again and approaching the power lines. He ran towards the crane to warn his father. He was electrocuted as he did so. Jim Clement exited the cab to aid his son and he too was electrocuted.

²Exhibit 1

³Exhibit 3

The crane was designed to be driven on highways, with a maximum speed of about 100 km/h, and it was driven on the highway to the construction site. It has a single seat-cab from which it is driven and a separate single-seat cab from which the boom is operated. When the crane became electrified, Jim Clement was in the driver's cab. There was no load on the boom.

The crane was insured by ING under a valid commercial general liability policy. In the policy, the crane is described as "equipment" and the coverage includes road travel. Injury arising from the operation of an automobile is specifically excluded from coverage under the policy and the crane is not an "automobile" as the term is defined in the policy.

Mrs. Clement was a listed driver under a motor vehicle liability policy that ING issued to Trenton Crane with respect to a Chevrolet Blazer. It is under that policy that she makes this claim. The crane is not specifically covered by that policy.

ANALYSIS

Statutory Provisions

Mrs. Clement may be entitled to benefits under the *Schedule* if her husband died as a result of an "accident" as defined in section 2 of the *Schedule*. "Accident" is defined as "an incident in which the use or operation of an **automobile** directly causes an impairment...." ING does not dispute that the incident with the power lines directly caused Mr. Clement's death. However, as stated above, ING takes the position that the crane is not an "automobile." "Automobile" is not defined in the *Schedule*. The definition is found in section 224 of the *Insurance Act*:

"automobile" includes a **motor vehicle** required under any Act to be insured under a motor vehicle liability policy;

To find out which motor vehicles are required to be insured under a motor vehicle liability policy, one must turn to two other statutes. Firstly, the *Compulsory Automobile Insurance Act*, R.S.O. 1990 c. C.25, imposes in section 2 a requirement for a “contract of automobile insurance” where a “motor vehicle” is operated on a highway, but does not contain a definition of “motor vehicle.” For that, section 1 of the *Compulsory Automobile Insurance Act* refers us to the definition of “motor vehicle” in the *Highway Traffic Act*, R.S.O. 1990, c. H.8:

“motor vehicle” includes an automobile, motorcycle, motor assisted bicycle unless otherwise indicated in this Act, and **any other vehicle propelled or driven otherwise than by muscular power, but does not include** a street car, or other motor vehicles running only upon rails, or a motorized snow vehicle, traction engine, farm tractor, self-propelled implement of husbandry or **road-building machine** within the meaning of this Act. [emphasis added]

ING takes the position that the crane is excluded from the definition of “motor vehicle” because it is a “road-building machine.” That term is also defined in section 1 of the *Highway Traffic Act*:

“Road-building machine” means a self-propelled vehicle of a design commonly used in the construction or maintenance of highways, including but not limited to,

- (a) asphalt spreaders, concrete paving or finishing machines, motor graders, rollers, tractor-dozers and motor scrapers,
- (b) tracked and wheeled tractors of all kinds while equipped with mowers, post-hole diggers, compactors, weed spraying equipment, snow blowers and snow plows, front-end loaders, back-hoes or rock drills, and
- (c) power shovels on tracks and drag lines on tracks

“Automobile” in ordinary parlance

The Court of Appeal has considered the meaning of “automobile” in section 224 of the *Insurance Act*, in three recent decisions: *Regele v. Slusarczyk*,⁴ *Morton v. Rabito*,⁵ and *Copley v. Kerr Farms*

⁴ [1997] O.J. No. 1849 (C.A.)

⁵ [1997] O.J. No. 1849 (C.A.)

*Ltd.*⁶ These cases establish that the analysis is to proceed in two steps. First, does the term “automobile” in ordinary parlance, include the vehicle being considered? If so, the vehicle is an “automobile” as defined. If not, a second question is posed: Does the vehicle qualify as an “automobile” under the expanded definition in section 224 of the *Insurance Act*, or an expanded definition in the policy?⁷

As noted in the FSCO decision in *Turner v. CAA Insurance Co.*⁸, “the courts have not demanded specific evidence about the general use or understanding of the term ‘automobile.’ Instead, judges have exercised their own judgment.” They have simply stated their conclusion on whether or not the vehicle at issue in the case is an “automobile” in ordinary parlance. In the above decisions of the Court of Appeal, the conclusion was that the back-hoe, farm tractor and tomato wagon at issue in those cases were not automobiles. Since the Court simply stated the conclusion, the cases offer no insight into the process for arriving at the conclusion. There is no case in which a mobile crane or similar vehicle is found to be an “automobile” in ordinary parlance.

The decision in *Turner* does offer some assistance in the process to be applied in determining whether a vehicle is an “automobile” in ordinary parlance. There, reference was made to dictionary definitions of the term before concluding that a “turf-truckster” falls well outside the common understanding of “automobile.”⁹ The decision does not specifically explain why this approach is taken, but it appears to me to flow naturally from the two-step process established by the Court of Appeal.

⁶ [2002] O.J. No. 1644 (C.A.)

⁷ Neither party relied on the definition in the policy.

⁸ (FSCO P99-00036, February 9, 2000), at para 10.

⁹ At para 28

The first question to be answered was rephrased in *Copley v. Kerr Farms Ltd.* as follows:

“First, it must be determined whether the vehicle in issue is an automobile within the ordinary sense of the word.”¹⁰ Phrased in this way, it becomes clear that the Court did not establish a new approach to statutory interpretation when it used the term “ordinary parlance.” It simply applied the established principle that the words of a statute are to be given their ordinary meaning. Dictionary definitions are a standard tool in determining ordinary meaning.

The definitions of “automobile” referred to in *Turner* are “a passenger car, usually four-wheeled, propelled by an engine or motor, esp. an internal-combustion engine, that is part of it, meant for travelling on streets or roads; motorcar”¹¹ and “a passenger vehicle that carries its own engine and is driven on roads and streets; car.”¹² The mobile crane is clearly well outside these definitions. I therefore conclude that the crane is not an “automobile” within the ordinary meaning of the term.

In arriving at that conclusion, it is not necessary or fruitful to engage in a process of listing the characteristics of the crane that are similar to an automobile. That process would also require listing the characteristics that are not similar to an automobile and would be useful only where the decision is a close call.

“Automobile” extended definition

The question now becomes whether the crane is a “motor vehicle” as defined in the *Highway Traffic Act*. It is undoubtedly a “vehicle propelled or driven otherwise than by muscular power” and therefore within the general definition of “motor vehicle.” But is it excluded as a “road- building machine” as the Insurer claims?

¹⁰ At para. 13

¹¹ Webster’s New World Dictionary of American English (3rd College Edition, 1988)

¹² The Gage Canadian Dictionary (1987, Stoddart)

Counsel for the Applicant submitted that cranes are used for many things other than highway construction or maintenance and that the crane was not working as a crane at the time of the incident. It was moving, without a load. Clearly, cranes are used for many other purposes. But counsel conceded that they are also “of a design commonly used in the construction or maintenance of highways.”

The question of determining the character of a multi-use vehicle has been addressed in several cases. Most notably, in *F.W. Argue, Ltd. v. Howe*,¹³ the Supreme Court of Canada found that the damage caused as a result of overfilling a fuel tank was not caused by the use or operation of a motor vehicle, but by the use or operation of the pump mounted on the motor vehicle, when the motor vehicle itself was stationary. The Court noted that it had made a distinction in its earlier decision in *Dufferin Paving v. Anger*¹⁴ between damage caused when a cement truck was being operated as a motor vehicle and when it was being operated as a cement mixer. In the decision in *Copley v. Kerr Farms Ltd.* that I referred to earlier, the Court of Appeal drew a distinction between the “tomato wagon” when it was under the power and control of a motor vehicle and when it was not.

The principle to be applied, adopted in *Argue* from the decision in *Harvey v. Shade Brothers Distributors Ltd.*¹⁵, is as follows: “Shortly put, the test to be applied when considering the character of a multi-purpose article at any given time is the purpose for which, at that time, it was being used.”¹⁶ The changing character of a vehicle is also recognized in the definition of “road-building machine” which specifically includes tractors, but only while equipped with certain accessories.

¹³ [1969] S.C.R. 354

¹⁴[1940] S.C. R. 707

¹⁵ (1967), 61 W.W.R. 187

¹⁶ At Page 363

Applying the principle established by the Supreme Court, I find that, at the time of this incident, the mobile crane was being used in the construction or maintenance of a highway and was therefore a “road-building machine” as defined. Trenton Crane had been contracted on a highway repair project and that was the only reason that the crane was on Highway 401. The crane was on the construction site. The crane was actively engaged in the project at the relevant time. That was why the boom was extended and, although there was no load on the boom, the only reason that the crane was moved was so that it could continue working on the construction site.

I do not accept the submission that, the fact that the crane was not carrying a load at the time of the incident and did not have its outriggers extended, should lead to the conclusion that it was not being operated as a crane. Taking that approach would lead to the absurd result that the crane changes character from minute to minute, as it moves from one place to another within the construction site. Consequently, its requirement to be included in the scheme of compulsory automobile insurance would also change from minute to minute. It is more reasonable to look at the overall purpose for which the crane was being used at the relevant time.

Conclusion

For the above reasons, I find that the crane is excluded from the definition of “motor vehicle” and as such not required to be insured under a motor vehicle liability policy.

Having applied the two-step approach, I conclude that the crane is not an “automobile” within the ordinary meaning of the term or its extended definition. Therefore, Mr. Clement’s death was not caused by an “accident” as defined.

Having made that conclusion, it is not necessary to consider whether Mrs. Clement was a “dependant” as defined.

EXPENSES:

If the parties are unable to resolve the issue of expenses, either party may make an appointment for me to determine the matter in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Jeffrey Rogers
Arbitrator

November 18, 2004

Date

BETWEEN:

LINDA D. CLEMENT

Applicant

and

ING INSURANCE COMPANY OF CANADA

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. The mobile crane is not an “automobile” for the purpose of section 2 of the *Schedule*.
2. If the parties are unable to resolve the issue of expenses, either party may make an appointment for me to determine the matter in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Jeffrey Rogers
Arbitrator

November 18, 2004

Date