IN THE MATTER OF THE *INSURANCE ACT*
R.S.O. 1990 c. I.8, SECTION 268 AND
REGULATION 283/95 MADE UNDER THE
THE *INSURANCE ACT*

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

STATE FARM MUTUAL INSURANCE COMPANY

Applicant

-and-

ECONOMICAL MUTUAL INSURANCE COMPANY

Respondent

ARBITRATION DECISION

Counsel:

Tim Crljenica for State Farm Insurance
Thomas Gold Pettingill LLP

Jason Frost for Economical Insurance
Schultz Frost LLP

Before:

Arbitrator Fred Sampliner

This matter concerns whether State Farm Mutual Insurance Company (State Farm) or Economical Mutual Insurance Company (Economical) has a higher priority to pay Mr. Richard Newman's *Statutory*

Accident Benefits (SABS) under section 268(2) of the *Insurance Act*, arguably resulting from his driving a defective taxi cab during May 2014. The hearing was held on January 23, 2017 at Professional Court Reporters in Toronto. The parties presented an Agreed Statement of Facts, four (4) Joint Document Briefs, Factums and oral submissions. No witnesses testified.

The Issues:

1. Was Mr. Newman involved in an accident?
2. Was Mr. Newman an insured under the Economical auto policy?
3. Did Mr. Newman elect his SABS insurer, and how does his choice affect the insurers' priority?

Result:

1. Mr. Newman was involved in an accident.
2. Mr. Newman was deemed to be an insured under the Economical auto policy.
3. Mr. Newman elected State Farm, but his choice is overridden by law and Economical is the priority insurer.

Background:

Mr. Newman was 66 years old in May 2014 and had been a taxi driver for approximately 40 years. In May, he drove three to four (12 hour) taxi shifts per week using a 2003 Buick Century operated under the name Citywide Taxi. The car was owned by Mr. John Wright, insured by Economical and provided to Mr. Newman for his use during taxi shifts. Newman usually commuted to work in his personal vehicle, a 2005 Dodge SX he insured with State Farm.

Mr. Newman explained at his June 7, 2016 examination under oath that during the latter half of May 2014 he returned to work after a weekend break and noticed that the back and center of the driver's seat were collapsed. He usually drove with his left arm out the window or leaning on armrest, which he said put him in an awkward leaning position. Mr. Newman said he drove the vehicle for six shifts between May 20 and 29, 2014, and began to have excruciating back pain during his last three work days. In his examination, Mr. Newman said that on May 29, 2014 he told Ms. Deborah Rodriques, Citywide's office manager, he was taking 6 to 8 weeks off work, but he never returned to their employment afterwards.

Mr. Newman testified at his examination that his back pain worsened after driving in the collapsed seat. He had a neighbour give him back massage and later attended for various physical therapies. On June 12, 2014, Mr. Newman saw his family physician. Dr. Charlene Lockner's notes indicate his report of back pain triggered by driving in the abnormal car seat. Dr. Lockner ordered X-ray imaging, which showed disc space narrowing in two areas of Mr. Newman's low back plus grade 3 spondylolisthesis in the same area. A follow-up visit to his family doctor that June confirmed Mr. Newman's deteriorating back condition. Dr. Lockner referred him to Dr. Mason, a physical and rehabilitation specialist, whose report of October 1, 2014 states that Mr. Newman's spondylolithesis pre-existed his current back symptoms, but related to his symptoms of earlier that spring.

Ms. Rodriquez signed a written statement on February 18, 2015 that Mr. Newman initially reported the collapsed seat problem to her in May 2014. She indicates the seat had been previously repaired in 2013 and that maintaining the taxi driver seats was a common problem due to the heavier men usually operating their vehicles.

At his examination under oath, Mr. Newman said he spoke to Citywide's owner to obtain repair authorization. He explained that Mr. Wright refused to spend more money on the aging car and he planned to take it out of service. Mr. Newman stated his second call to the owner was also unsuccessful.

In a January 27, 2015 sworn statement, Mr. Wright denied speaking with Mr. Newman in May 2014 about the taxi's condition or his back pain from using the vehicle. He admitted taking the car out of service in 2014, but said he had no maintenance records.

Mr. Wright's written statement was not tested on cross-examination and bears less weight than Mr. Newman's examination under oath by the parties in this matter. I prefer Mr. Newman's examination evidence that he complained to Citywide about the defective seat because he is consistent with Ms. Rodriquez' admission he reported the defective seat to her. Based on Newman's testimony, I conclude that the Buick seat frame was broken, needed repair and that he lodged a complaint about the seat condition with Ms. Rodriquez/Citywide before he left the Company in late May 2014.

Was there an accident?

Economical argues State Farm's claim did not arise from an accident and the Tribunal lacks jurisdiction. The jurisdiction to decide accident issues in priority matters is addressed in section 1 of the *Disputes Between Insurers, Regulation* 283/95, made under the *Insurance Act,* R.S.O. 1990: "All disputes as to which insurer is required to pay benefits under section 268 of the *Act* shall be settled in accordance with this regulation." These words contain no limitation of arbitral authority respecting disputes between insurance companies about their SABS payment obligations. Similarly broad authority to decide legal issues is granted to arbitrators in this dispute resolution scheme under section 8(2) of the *Arbitration Act*, 1991, "The arbitral tribunal may determine any question of law that arises during the arbitration...."

In the case of *Primmum Insurance Company v. ING Insurance Company*, 2007 CanLII (ON SC) Justice D. Brown upheld Arbitrator Samworth's jurisdiction to deal with questions of law with the following analysis:

> When one combines the powers given to an arbitrator under the *Dispute Regulation* with those under the *Arbitration Act*, in my view an arbitrator appointed to deal with a SAB priority dispute possesses the jurisdiction to consider and decide any question regarding the dispute, including questions of law or mixed fact and law, such as those that arise in the course of interpreting a statute or contract.

Based on Justice Brown's reasoning and applying the "plain meaning" rule[1] to the relevant legislation, I agree that arbitrators have authority to decide "accident" issues in respect of insurer priority disputes.[2]

The term "accident" has a defined meaning under section 3(1) of the *Schedule* as: "an incident in which the use or operation of an automobile directly causes an impairment...." The term "incident" is not defined in the SABS, but *Black's Law Dictionary* (9th Ed. 2009) states: "A discreet occurrence or happening".

Economical argues that Mr. Newman's injuries arose over a period of time, and are not the result of a single occurrence. Economical relies on the Court of Appeal decision in *State Farm Mutual Insurance*

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[1] *Construction of Statutes*, R. Sullivan, beginning at page 9 (5th Ed. 2009),

[2] This decision should not be construed as affecting another tribunal's determination of Mr. Newman's SABS entitlements. *Wawanesa Mutual Insurance and Unifund Assurance and MVAC*, (S. Novick, November 15, 2013

Company v. Old Republic Insurance Company, 2015 ONCA 699 (CanLII), a case that arose under the Loss Transfer provisions of section 275 of the *Insurance Act*, R.S.O. 1990. The Court interpreted the Fault Determination Rules[3] in the context of that Loss Transfer dispute by allocating responsibility only to the vehicle striking the one directly ahead. Economical interprets this decision to mean an "incident" is a single occurrence, and should be applied to priority determinations.

In my view, the Court of Appeal's interpretation of the term in the context of that Loss Transfer should not apply to priority disputes. The Court's interpretation avoided an obvious absurdity of one insurer bearing the cost of the entire series of collisions in its application of the Fault Determination Rules. At paragraph 77, the Court said, "...the legislature cannot have intended that one insurer be indemnified 150 per cent of SABS payments made. That would be an absurd result." I am guided by the Court of Appeal's pragmatic and functional approach to interpreting the term "incident" in the context of the legislation and facts.

There are no explicit words in the SABS definition of an "accident" or the dictionary definition of "incident" that lead me to accept Economical's submission that multiple minor injuries are excluded from the definition of an "incident". The *Legislation Act 2006* also indicates the word should be "...interpreted as being remedial and given such fair, large and liberal interpretation as best suits the attainment of its objects", which is consumer protection. *Smith v Co-operators General Insurance Company*, 2002 SCC 30 (CanLII)

Economical's position on the term "incident" leads it to propose that State Farm must produce an expert report identifying the exact place and time of the accident injury. I can reasonably infer that accepting such an argument would tend to encourage more insurers to dispute the accident injury time and mechanism in priority disputes, establish an additional burden to obtain expert evidence and thereby increase costs, complexity and undermine the efficiency of the priority scheme. This is an absurd result to be assiduously avoided.[4] I reject Economical's position that an "incident" is necessarily limited to a single specific moment in time, and instead focus my attention on the causation issue.

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[3] R.R.O. 1990, *Regulation* 668

[4] Chapter 9, *Construction of Statutes*, R. Sullivan 5th ed. 2008

The parties' briefs include case law dealing with indirect and direct causation questions involving motor vehicle accidents. They include, a driver shot during a van hijacking in *Amos v. ICBC*, 1995 CanLII 66 (SCC), the driver who left a snow-bound car to become frostbitten seeking help in *Greenlaugh v. ING Halifax Insurance*, 2004 CanLII 21045 (ON CA), a person injured during a vehicle robbery in *Martin et. al v. 2064324 Ontario Inc.*, 2013 ONCA 19, another individual shot while driving, *Chisholm v. Liberty Mutual Group*, 2002 CanLII 450020 (ONCA), and in *Citadel General Insurance v. Vytlingam and IBC*, 2007 SCC 46 the driver was catastrophically impaired when boulders were thrown onto the car from a highway overpass. These precedents considered significant intervening events.

In the present case, the evidence does not support there was an intervening force. Mr. Newman explained during his examination under oath that his Dodge was in excellent condition, nothing had been wrong with his car before or during the May 2014 period. There is no evidence that either he or his vehicle had been involved in any other occurrences affecting his health before or during the late May 2014 period, and no contradictory evidence was introduced. On this, I reasonably conclude there were no intervening factors that would have caused Mr. Newman's severe back symptoms in May 2014.

Economical submits that Mr. Newman's back pain symptoms post-May 2014 are similar to beforehand and likely due to his pre-existing health problems. There is no doubt that Mr. Newman had health concerns before May 2014. He fell and fractured his left elbow unloading the taxi in 2013. The fracture did not heal well and caused him left arm/shoulder pain. He underwent successful joint replacement surgery in late 2014, after he left Citywide. His family physician, Dr. Charlene Lockner, indicates he was overweight, out of shape, and had a left drop foot condition from a peroneal nerve problem prior to his cessation of work. Mr. Newman's radiology records show he had disc degeneration in his low back, occasionally had back pain which caused him to sometimes use a cane for support. He also took slow release hydro-morphine for pain in May 2014.

The parties' health experts evaluated the cause of Mr. Newman's back condition. State Farm retained Dr. J. Hummel, an orthopaedic specialist, who in April 2015 examined Mr. Newman, reviewed his records and reported on the origin and extent of his back problem. He was provided with the radiology imaging reports and nerve studies that allowed him to understand Mr. Newman's pre-existing health. Dr Hummel knew that Mr. Newman had pre-existing spondylolisthesis L5 S1 with associated nerve injury, and opined that although he incurred no additional physical damage to his back from driving in the

collapsed seat, the degeneration was exacerbated by the driving. He initially said the back pain became spontaneously symptomatic from driving the taxi and that Mr. Newman was consequently unable to operate the vehicle for his taxi work.

Dr. Hummel examined Mr. Newman again on December 2, 2015, and changed his view on causation:

> You will recall that Mr. Newman reported that this accident occurred over a period of time. It is my opinion that it is very difficult to determine what was the specific cause of this injury. However, from the description of the actual events, it is unlikely that there was a single precipitating cause since this occurred over a time period and there was also evidence of a pre-existing condition.

And further on states:

> ...it is my opinion that although he has a significant problem at this present time, it is most likely not precipitated by what Mr. Newman describes as a broken seat in the taxi cab. It is likely due to a pre-existing condition which is slowly worsening.

It is significant that Dr. Hummel does not cite any new information or plausible reason to support reversing his opinion on causation, and I ascribe little weight to his later opinion.

Mr. Newman retained an orthopaedic surgeon, Dr. Ken Fern, who also reviewed the radiology reports, records and tests. Dr. Fern's August 16, 2016 report recites the most significant factors in determining causality as Mr. Newman's lack of evidence he suffered chronic back pain prior to his driving in the defective taxi seat, his accurate historical presentation and his regular work right up to the end of May 2014.

Dr. Fern's report explains that in his professional experience as an orthopaedic and spinal surgeon it is not uncommon for a patient with documented chronic back changes, such as Mr. Newman's, to be completely asymptomatic until an actual insult to that area occurs:

> It is much more likely that the injuries sustained in May 2014 were the precipitating and casual event that resulted in his back becoming symptomatic. The back would be considered to be vulnerable to injury given the degenerative changes that were present. In my opinion, it is more likely than not, based on the balance of

> probabilities that his current difficulties are related to the injuries of May 2014 rather than being due to the progression of a pre-existing degenerative condition.

Economical asks me to give Dr. Fern's opinion little weight in that he did not specifically consider Mr. Newman's consumption of hydro-morphine for pain control at the time of his driving incidents in May 2014. Although it is clear Dr. Fern did not specifically document Mr. Newman's pain medication or discuss any prescription drugs in his report, I reasonably infer he knew Mr. Newman took medication to his control pain resulting from the 2013 elbow fracture that had not healed. I do not ascribe less weight to Dr. Fern's opinion, and rely on him in finding that Mr. Newman's driving in the collapsed Buick seat in late May 2014 directly caused his severe chronic back pain symptoms.

Economical argues that Mr. Newman's pre-claim back pain cannot be differentiated from his post-claim condition. The clinical notes of Mr. Newman's family physician show he experienced occasional back pain beforehand, but in June 2014 those notes indicate chronic and severe pain. I draw the reasonable conclusion that Mr. Newman could not have been regularly driving 12 hour shifts 3-4 days a week for months before the accident if his back pain had been chronic and severe before May 20, 2014.

Dr. Lockner's June 2014 notes of severe back pain following Mr. Newman's work departure, the radiology reports, together with Dr. Fern's opinion persuade me that Mr. Newman's severe chronic back pain was a direct result of his driving the Buick taxi with the unrepaired seat. I find he suffered an impairment driving the Economical insured taxi in May 2014, under the definition of an "accident" in section 3(1) of the *Schedule.*

State Farm maintains I should determine that its adjusting decisions were reasonable. They cite the arbitration in *Commercial Union Assurance and Boreal Property and Casualty*[5], where the arbitrator set out the elements of an unreasonable adjusting decision in the Loss Transfer context.

In this case, State Farm did not introduce evidence about it decision-making. The adjuster(s) did not testify and their notes are not in evidence. Moreover, State Farm did not provide precedent or

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(P. Samworth, December 21, 1998)[5]

reasoning to import Loss Transfer principles into the *Dispute Between Insurers* regime. I decline to address this issue.

Was Mr. Newman a "Deemed" Insured?

Section 268(2) of the *Insurance Act* sets out the order of insurer priority to pay SABS to a claimant:

1. In respect of an occupant of an automobile,
   i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,
   ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant ...

If a driver of an automobile is not specifically named in an insurance policy, SABS section 3(7) provides coverage as a "deemed" named insured, where the person has regular use of a vehicle:

> (f) an individual who is living and ordinarily present in Ontario is deemed to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,
> (i) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity, or....

Economical relies on the case of *ACE INA Insurance and Co-Operators General Insurance Company,* 2009 CanLII 13625 (ON SC) as support for its position Mr. Newman did not qualify as a "deemed" named insured under its policy. The *ACE INA* case involved an accident claimant who was riding in a friend's insured car during off work hours. His employer was a rental car agency, whose policy covered its agents having regular access to drive its vehicles. The Court held that an employee's auto coverage for work was not intended to "float" to non-work hours. Economical argues that without a definitive accident time, Mr. Newman has not established his occupancy of their insured taxi at the time of his injury and it could have easily arisen from driving his own car.

However, there is no controversy Mr. Newman had no collisions in his personal car or another vehicle or that he was injured outside of his work hours or suffered any other traumatic health problem during the

late May period. Mr. Newman possessed keys to the Buick, regularly drove the taxi with authority from its owner during his employment hours prior to and at the time of his back complaints to his family physician. This evidence refutes Economical's speculation.

Determination of a "deemed" named insured is predicated on the circumstances of the case. *Unifund Insurance and State Farm Mutual Insurance* (Arbitrator K. Bialkowski, January 7, 2013) I find that the Economical insured taxi was available for Mr. Newman's regular use at the time of his driving with the collapsed seat between May 20 and 29, 2014 and that he qualified as a "deemed" named insured under the Economical taxi policy during that time period.

There is no dispute that the Economical and State Farm policies are on equal priority level once Mr. Newman qualifies as a "deemed" named insured. As a result, Mr. Newman can choose which one of the two carriers he wants to adjust his SABS claims under section 268(5) of the *Insurance Act*:

> **(5.1) Same.** Subject to subsection (5.2), if there is more than one insurer against which a person may claim benefits under subsection (5), the person, at his or her discretion, may decide the insurer from which he or she will claim benefits.

State Farm provided Mr. Newman with a November 17, 2014 Notice To Applicant of Dispute Between Insurers, which said: "Economical Mutual, Prestige Group has the highest priority as Richard Newman had regular use of the taxi." On December 18, 2014, Mr. Newman signed back this Notice to State Farm, by ticking a box to signify he objected to the transfer of his SABS claim to Economical.

Mr. Newman made a definite choice in December 2016, confirmed by his 2016 evidence at examination that he preferred State Farm to handle his claim because he'd dealt with them for over 20 years.

However, if Mr. Newman's choice is overridden by the legislation:

> **(5.2) Same.** If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the accident, an occupant of an automobile in respect of which the person is the named insured or the spouse of the named insured or a dependant of the named insured, the person shall claim statutory

accident benefits against the insurer of the automobile in which the person was an occupant.

Mr. Newman occupied the Economical insured vehicle at the time he was injured during his regular use of the defective taxi seat between May 20 and 29, 2014, and section 5.2 section applies. I therefore find that Economical is the priority insurer for Mr. Newman's SABS claim, and the Company must assume carriage of his SABS claims.

Expenses:

State Farm is successful in this matter and Economical is responsible to pay State Farm's expenses of this arbitration along with the costs of the arbitration process. I suggest the parties promptly work to resolve any disputes they may have about the payments and expenses. If they cannot agree, I invite them to contact me to schedule a conference or hearing on those issues.

Order:

1. Economical shall assume responsibility for adjusting and payment of Mr. Newman's SABS benefits, and reimburse State Farm for benefits paid previous to this Order.
2. Economical shall pay the costs of this arbitration and reimburse State Farm for its expenses of this process.

March 24 2017

Fred Sampliner, Arbitrator