

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

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

***HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, as represented by
the MINISTER OF GOVERNMENT AND CONSUMER SERVICES
("MOTOR VEHICLE ACCIDENT CLAIMS FUND")***

Applicant

- and -

ROYAL & SUNALLIANCE INSURANCE COMPANY OF CANADA

Respondent

DECISION

COUNSEL:

Marie Sydney for the Applicant

Brenda M. Lockwood for the Respondent

BACKGROUND:

1. DP¹ alleges that she was struck by a vehicle as she was crossing the street in downtown Toronto on November 19, 2014. She states that she was walking in an eastbound direction on the south side of Dundas Street East, crossing Jarvis Street, when a Beck taxi driving eastbound on Dundas turned right onto Jarvis Street and struck her. The accident occurred around 8:50 a.m., as she was on her way to school. The driver did not stop at the scene. Ms. Prost sustained an injury to her right knee.

2. The Claimant applied to the Motor Vehicle Accident Claims Fund (“the Fund”) for payment of accident benefits under the *SABS*. She reported that the vehicle that struck her was a Beck taxi bearing taxi plate #698. The Fund investigated and determined that the vehicle to which this plate number was attached was owned by Morris Taxi, and had the green and orange Beck Taxi colours. It was driven by a Mr. Mahmood at the time of the accident, who was insured with Economical Insurance (“Economical”).

3. The Fund put Economical on notice of its intention to dispute its obligation to pay benefits to the Claimant under section 3 of the priority regulation. Economical responded that the above vehicle was not near the accident location on the date in question, and provided GPS records in support of that fact. Based on these records, the Fund did not pursue arbitration against Economical.

4. At the time of the accident, Beck Taxi was a named insured under a Commercial General Policy, issued by Royal & SunAlliance Insurance Company of Canada (“RSA”). That policy included a SPF 6 (Standard Non-Owned Automobile Policy) endorsement. The Fund provided notice of its intention to dispute its obligation to pay benefits to RSA, and subsequently commenced arbitration against them under section 7 of the regulation. The Fund claims that RSA is the insurer of the automobile that struck the Claimant by virtue of the SPF 6 endorsement, and is therefore in higher priority to pay benefits in accordance with section 268(2)2(ii) of the *Insurance Act*.

¹Given the sensitive nature of some of the medical evidence cited, the Claimant’s name has been anonymized.

5. RSA disputes that the evidence supports a finding that DP was struck by a Beck taxi that was dispatched by its insured. It also claims that in any event, while the SPF 6 endorsement issued to Beck provides excess coverage for liability arising out of the use or operation of non-owned vehicles, it is not “insurance on an automobile” providing coverage for accident benefits.

ISSUES:

1. Did the accident that led to DP’s injuries involve a Beck Taxi dispatched by the RSA insured?
2. If so, does the SPF 6 endorsement to the CGL policy issued by RSA provide *SABS* coverage to the Claimant, resulting in RSA being the insurer of that vehicle and accordingly in priority to pay DP’s claims under section 268(2)(ii) of the *Act* ?

RESULT:

1. The evidence is unclear regarding whether a Beck taxi dispatched by the RSA insured struck the Claimant. However, the SPF 6 endorsement issued by RSA does not provide *SABS* coverage, and leads to the conclusion that the Fund is responsible for the payment of DP’s claims under the *Schedule*.

THE EVIDENCE:

6. The parties filed a detailed Statement of Agreed Facts, setting out many undisputed facts. Several documents were also filed, including transcripts from Examinations Under Oath conducted of the Claimant as well as Linda Paccanaro, the Vice-President of Claims & Quality Control at Baird McGregor Insurance Brokers. Counsel exchanged detailed written submissions in advance of the hearing, and each made extensive oral submissions at a “hearing” conducted via videoconference. No *viva voce* evidence was called.

7. As set out above, Ms. P claims that she was struck by a Beck Taxi on the day in question. She stated that she was struck by the front of the taxi as she was walking across the intersection, “and then through the side”. She recalled hitting the car with her hands “at the top”, or front part of the vehicle. She stated at her EUO that the vehicle was a Toyota Corolla that was painted in the green and orange Beck colours, and had a Beck sign on its rooftop light. She advised that she did

not see the car's license plate number, but that she recorded the number of the taxi plate – number 698 – in the notepad function of her phone immediately following the incident. She testified that she was “one hundred percent confident” that she had recorded the correct taxi plate number.

8. When asked when she had recorded the taxi plate number, Ms. P responded that she had done so “as soon as I turned around and looked back at the cab when he left”, while she was still in the middle of the intersection. She stated that she “freaked out” after being struck, started yelling, and punched the front door of the taxi.

9. Ms. P called 911 to report the accident shortly after it happened, when she arrived at school. She subsequently met with a police officer, and provided a statement. On both occasions, she stated that she had been struck by a Beck taxi bearing taxi plate number 698. She provided the same details when she submitted her application for benefits to the Fund a few months later, and in a signed statement that she provided to the outside adjusters handling the claim for the Fund.

10. Ms. P was questioned about her emotional state at the time of the incident. She stated that she felt distraught, and was shocked and angry that the driver had not stopped. She explained that she began to feel pain in her leg after speaking with the police officer, and decided to go to the hospital. When it was suggested to her at the EUO that she was “not cognitively all there” in the aftermath of the accident, she agreed, stating that she had collapsed as she was leaving the school building to go to the hospital. She stated that she has no memory of how she got to the hospital, but has subsequently been told that one of her classmates drove her there.

11. Interestingly, Ms. P gave a very detailed description of what the driver of the taxi looked like. She described him as being “35-37 years old” with short black hair, brown skin and no facial hair. She recalled that he was wearing headphones and a winter jacket with fur cuff. She also provided a detailed description of the passenger in the back seat, including her approximate age, hairstyle and clothing. She claimed to have a very clear recollection of these details, despite the fact that neither the driver nor passenger had exited the vehicle, the taxi fled the scene of the accident, and her examination took place almost four years later.

12. As noted above, the GPS records provided by Economical, the insurer of the taxi with plate number 698, indicate that that vehicle was not in the vicinity of Dundas Street East and Jarvis on the day in question. The parties agree that there is only one taxi with this plate number in the Toronto area. The Fund chose not to pursue Economical for priority after reviewing those records.

13. The parties filed many medical records related to treatment received by the Claimant and assessments she underwent after the accident. These records reveal that Ms. P routinely asked for more than the number of Tylenol #3 pain pills that she was prescribed by her doctors, and that at least one doctor was concerned enough about her selling pills to order a urine sample. One of the ER records filed indicates that her health history was significant for depression, anxiety, bipolar disorder and PTSD. Ms. P allegedly told one of the IE assessors that she was suspended from her school program because one of the directors “pissed her off” and she punched the wall and broke her hand. A note from her family physician indicated that she smoked marijuana every day.

14. As referenced above, Beck Taxi had coverage through a Commercial General Liability policy issued by RSA that spanned the date of loss, that included an SPF 6 endorsement. The SPF 6 form is titled “Standard Non-Owned Automobile Policy”. Section 3 of the form states that the “automobiles in respect of which insurance is to be provided are those not owned in whole or in part by, nor licensed in the name of the Applicant, used in the Applicant’s business of Taxi Dispatch”. It also describes the automobiles being operated “under contract” on behalf of Beck Taxi Limited as “850 taxis”.

The second page of the SPF 6 contains the following paragraph –

Section A – Third Party Liability

The Insurer agrees to indemnify the Insured against the liability imposed by law upon the Insured for loss or damage arising from the use or operation of any automobile not owned in whole or in part by or licensed in the name of the Insured, and resulting from

BODILY INJURY TO OR THE DEATH OF ANY PERSON OR DAMAGE TO PROPERTY OF OTHERS NOT IN THE CARE, CUSTODY OR CONTROL OF THE INSURED:

Provided always the Insurer shall not be liable under this policy:

- a) for any liability which arises from the use or operation of any automobile while personally driven by the Insured if the Insured is an individual; or*
- b) *for any liability imposed upon any person injured by this policy:
 - 1. by any workman's compensation law; or*
 - 2. by any law for bodily injury to or the death of the Insured or any partner, officer or employee of the Insured while engaged in the business of the Insured; or**
- c) for any liability assumed by any person insured by this policy voluntarily under any contract or agreement; or*
- d) for loss or damage to property carried in or upon an automobile personally driven by any person insured by this policy or to any property owned or rented by, or in the care, custody or control of any such person; or*
- e) for any amount in excess of the limit stated in item 7 of the application and expenditures provided for in the Additional Agreements of this policy; subject always to the provisions of the section of the Insurance Act (Automobile Insurance Part) relating to the nuclear energy hazard.*

** Not applicable in the Province of Ontario*

15. The parties agree that Beck Taxi did not own any taxi vehicles at the time of the accident. RSA has advised in writing that the vehicle to which plate number 698 was attached was “not insured” under their policy on the date of loss. While the Agreed Statement of Facts filed by counsel before the hearing provides that the taxi bearing plate 698 was owned by Morris Taxi and “dispatched by Beck Taxi”, counsel for RSA advised at the start of the hearing that her client did not agree with this fact, and that it had been included in the Statement of Agreed Facts inadvertently.

16. As noted above, counsel conducted an Examination Under Oath of Linda Paccanaro, the VP of Claims and Quality Control at Baird McGregor Insurance Brokers. Ms. Paccanaro has over 35 years of experience in the insurance industry, and has held many senior roles in different organisations. She advised that Baird McGregor was the acting broker on behalf of RSA when the CGL policy was issued to Beck Taxi, and that the SPF 6 endorsement was issued as part of the

policy. She confirmed that RSA had not issued an owner's policy to Beck covering any owned or leased vehicles.

17. Ms. Paccanaro also explained that the purpose of the SPF 6 Endorsement is to cover a business for any vicarious liability claims, and that it would apply as excess coverage for bodily injury claims arising from the operation of the 850 taxis dispatched by Beck. She stated that Beck was essentially insuring itself against any potential vicarious liability claims arising from the taxis it dispatched, or other vehicles that it did not own, such as those belonging to its employees. When asked whether the SPF 6 provides *SABS* coverage, Ms. Paccanaro stated that it did not, explaining that the coverage provided only applies to liability for non-owned autos. She stated that if a business owned automobiles, an insurer would generally issue a "fleet policy" which would provide *SABS* coverage.

18. One of the documents filed by the parties includes an email exchange between Ms. Sydney, counsel for the Fund, and the Financial Services Commission of Ontario ("FSCO"), in which she inquired about the history of the SPF 6 endorsement and whether it had been approved by the Superintendent of Insurance. The FSCO representative advised that the SPF 6 was a standard Canada-wide form, and had therefore not been specifically approved by FSCO. It was developed by a group of Canadian insurance superintendents prior to 1990, who met to issue and develop "forms on common issues". The representative also advised that the "SPF 6 was adopted by Ontario prior to 1990 and continues to be in use as per Auto Insurance Bulletin A – 02/90".

19. That Bulletin provides as follows -

Re: Standard Policy Forms: 6 (Non-owned Policy), 7 (Excess Automobile Policy) and 8 (Lessors contingent Automobile Policy)

Bulletin

No. A-02/90

Property & Casualty

-Auto

Ontario Policies O.P.F. 1 (Owner's Policy), O.P.F. 2 (Driver's Policy) and O.P.F. 4 (Garage Policy) as reviewed by a committee of industry and government representatives were approved by the Commissioner and made available to the industry on May 30, 1990.

The review of the Standard Policies S.P.F. 6, S.P.F. 7 and S.P.F. 8 has not been completed yet. On implementation date, June 22, 1990, you should continue to use these forms until further notified. However, it should be noted that S.P.F. 8 has accident benefits included in the contract. On June 22, 1990, this contract will be amended by law to include the no-fault benefits in accordance with the No-Fault Benefits Schedule (see section 201(2), (3), and (4) of the Insurance Act).

*Donald C. Scott
Commissioner*

June 19, 1990

Counsel for the Fund suggested in her submissions that the reference to amending the SPF 8 regarding accident benefits appears in the bulletin because the term for these first-party benefits changed from “accident benefits” prior to the 1990 change outlined to “no-fault benefits” under the *Schedule*.

RELEVANT PROVISIONS:

The following provisions are relevant to my determination of this matter:

Insurance Act

1. In this Act, except where inconsistent with the definition sections of any Part,

“motor vehicle liability policy” means a policy or part of a policy evidencing a contract insuring,

(a) the owner or driver of an automobile, or

(b) a person who is not the owner or driver thereof where the automobile is being used or operated by that person’s employee or agent or any other person on that person’s behalf,

against liability arising out of bodily injury to or the death of a person or loss or damage to property caused by an automobile or the use or operation thereof;

268. *(1) Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the Statutory Accident Benefits Schedule is made or amended, shall be deemed to provide for the statutory accident benefits set out in the Schedule and any amendments to the Schedule, subject to the terms, conditions, provisions, exclusions and limits set out in that Schedule.*

(2) *The following rules apply for determining who is liable to pay statutory accident benefits:*

2. *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.*

Statutory Accident Benefits Schedule

3. (1) *In this Regulation,*

“insured automobile” means, in respect of a particular motor vehicle liability policy, an automobile covered by the policy;

“insured person” means, in respect of a particular motor vehicle liability policy,

(a) *...[not applicable]*

(b) *a person who is involved in an accident involving the insured automobile, if the accident occurs in Ontario,*

PARTIES’ ARGUMENTS:

Fund’s submissions

20. Counsel for the Fund contended that the evidence supports a finding that Ms. Prost was struck by a Beck Taxi. She conceded that the Claimant had likely recorded the incorrect taxi plate number, but noted that her evidence has been consistent over the years since the accident that the vehicle that struck her was a taxi with green and orange colours. She noted that Beck is the only taxi company dispatching vehicles with these colours, and suggested that research studies show that as colours are more vivid than numbers, they are easier to remember. Counsel suggested that

there is no reason to disbelieve Ms. P's contention that she was struck by a Beck taxi on the day in question, and urged me to reach that conclusion.

21. Ms. Sydney acknowledged RSA's contention that the Beck taxi with plate number 698 was not dispatched by Beck. She noted, however, that Ms. Paccanaro advised at her EUO that while the SPF 6 endorsement did not provide coverage for the vehicles themselves or their drivers, it did cover Beck for any liability that might arise from the operation of the entire fleet of taxis that the company dispatched. Counsel submitted that if the vehicle that struck Ms. P had the Beck taxi colours and a "Beck" sign on its roof, it was likely dispatched by Beck, in the absence of any evidence suggesting otherwise.

22. Counsel for the Fund submitted that if I accept that the Claimant was struck by a Beck taxi, I should find that RSA was the insurer of the automobile that struck her and is therefore in priority to pay her claim, by virtue of section 268(2)2(ii) of the *Act*. She noted that the SPF 6 meets the definition of "motor vehicle liability policy" in section 1 of the *Act*, and that section 268(1) of the *Act* states that all motor vehicle liability policies are deemed to provide the statutory accident benefits set out in the *SABS*. Counsel contended that the SPF 6 issued by RSA would accordingly provide accident benefits to Ms. P in these circumstances.

23. Ms. Sydney contended that the deeming language in section 268(1) of the *Act* is the ultimate expression of legislative intent, and makes it clear that regardless of whether a policy explicitly provides for *SABS* coverage, it is deemed to provide that coverage.

24. Counsel for the Fund referred to the FSCO Bulletin cited above, and noted that it advises that a review of SPF 6, 7, and 8 forms "has not been completed yet". She submitted that no further bulletins have been issued to advise of any changes or updates to these forms, and suggested that the regulators have not reviewed the SPF 6 endorsement since the *Act* was amended in 1990. She suggested that was certainly not the case since section 268(1) was changed to its current form in 1993.

25. Counsel for the Fund also submitted that Ms. Prost would qualify for the payment of *SABS* under the RSA policy, as she meets the definition of an “insured person” under section 3(1) of the *Schedule*. She noted that this definition includes a person who is involved in an accident involving the “insured automobile”, and that the term “insured automobile” refers to an automobile covered by the policy. Counsel submitted that once third-party liability is provided under a policy for a loss arising from the operation or use of an automobile, as is the case with the SPF 6 in question, the automobiles in question would be covered by the policy.

26. Ms. Sydney acknowledged that the SPF 6 endorsement issued to Beck Taxi is not the same as an owners’ policy, and that it does not insure the owners or drivers of the 850 taxis referenced. She submitted, however, that the fact that Beck does not have control over these vehicles is of no impact, given the wording of section 268(1) of the *Act* and the fact that the endorsement meets the definition of a “motor vehicle liability policy”. Counsel noted that *SABS* coverage is available in respect of non-owned vehicles under other policies, such as the OAP 4 Garage Policy, and gave the example of a mechanic who gets involved in an accident while doing a test drive of a customer’s vehicle, who would be entitled to accident benefits coverage under that policy.

27. Counsel for the Fund cited the Superior Court’s decision in *Ontario v Daimler Chrysler Insurance Company* (2009) CanLii 24909, an appeal of an arbitrator’s decision in a priority dispute, in support of her position. In that case, a driver leased a Mercedes vehicle and the lease was assigned to Daimler Chrysler. A term of the lease required the driver to obtain insurance covering the vehicle, which he did through Optimum Insurance. Daimler Chrysler issued a SPF 8 Standard Lessor’s Contingent Automobile Policy, providing coverage to the lessor for any loss or damage incurred as a direct result of the lessee’s failure to maintain insurance required by the lease.

28. The lessee driver was involved in an accident with a pedestrian. The policy he had obtained with Optimum was cancelled prior to the accident, for non-payment of premiums. The injured pedestrian sought payment of accident benefits from the Fund, who then pursued Daimler Chrysler for priority. Arbitrator Robinson was asked to decide whether the SPF 8 Endorsement was a “motor vehicle liability policy” within the meaning of section 268(1) of the *Act*. He found that it was, and

that coverage under the SPF 8 was triggered upon the cancellation of the lessee's policy. He concluded that the policy issued by Daimler Chrysler was therefore deemed to provide coverage under the *SABS*, and that it was in priority to pay accident benefits. The court upheld his findings.

29. Ms. Sydney highlighted Arbitrator Robinson's finding, and Justice Pitt's confirmation on appeal that the SPF 8 was a "motor vehicle liability policy" as defined in the *Act*, and that all coverages "come into play once a policy of automobile insurance is established". She noted that Justice Pitt also cited the Court of Appeal's decision in *Young v. Ontario (Minister of Finance)* (2003) 68 O.R. (3d) 321, in which McPherson J.A. stated (at para. 28) that all motor vehicle liability policies are deemed to provide the accident benefits set out in the *Schedule*, and that section 268(2) of the *Act* provides the priority rules to determine which insurer is responsible to pay those benefits.

RSA's submissions

30. Counsel for RSA contended that in order to support its argument that RSA is in priority to pay Ms. P's claims, the Fund must prove, on a balance of probabilities, that she was struck by a Beck taxi, that the vehicle that struck her was dispatched by the RSA insured, and that the SPF 6 endorsement issued to Beck Taxi provided coverage for accident benefits in these circumstances. She submitted that on the evidence before me, it cannot be determined what vehicle was involved in the accident. She stated that even if a Beck taxi did strike Ms. P, we cannot be certain that it was one of the 850 taxis referenced in the SPF 6 endorsement to RSA's policy, given the note from a RSA representative that taxi plate number 698 was not part of the Beck "fleet" on the date of the accident.

31. Ms. Lockwood submitted that the Fund's contention that a Beck taxi that was covered by RSA's policy was involved in the accident depends entirely on the evidence provided by Ms. P. She contended that a close review of her EUO evidence and the documents filed raises many credibility concerns with that evidence. Counsel referred to the Claimant's statement that she had "blacked out" after giving a statement to the police, and has no memory of how she got to the hospital. She noted that Ms. P also admitted to being cognitively impaired in the aftermath of the accident, yet stated that she was "one-hundred per cent confident" that she had recorded the correct

taxi plate number. She noted that that was clearly not the case, as the GPS records obtained by the Fund indicate that that vehicle was not in the vicinity of the accident on that date.

32. Counsel also noted that Ms. P claimed to recall certain details about the driver and passenger's clothing and hairstyles quite vividly four years after the accident, despite the fact that neither of them got out of the vehicle and she would have only have had a second or two to see them through the car windows. Counsel for RSA referred to the records filed that reveal that the Claimant was suspended from school after becoming angry and punching a wall. She submitted that the evidence suggests that Ms. P was a volatile person who had anger management issues, and that it was difficult to discern which part of her evidence was true and what was exaggerated. She noted that the clinical notes and medical records filed reveal that Ms. P admitted to smoking marijuana every day, and contended that that could have affected her memory of events she experienced.

33. Ms. Lockwood stated that even if I were to accept the Claimant's evidence that she was struck by a Beck taxi that was one of the 850 taxis referenced in the SPF 6, the only way that RSA could be found to be in priority is if it is determined to be the "insurer of the automobile that struck" the Claimant under section 268(2)2(ii) of the *Act*. She argued that RSA was not an insurer of Beck taxis, as the SPF 6 endorsement did not provide coverage for the 850 taxis referred to, or the drivers or owners of those vehicles, but rather provided coverage to Beck for liability that might be imposed for any claims arising out of the use or operation of non-owned vehicles. She claimed that this vicarious liability coverage does not trigger the application of section 268(2)2(ii) or(iii) of the *Act*, as the policy merely insures the company against liability rather than insuring the automobile involved in the accident.

34. Ms. Lockwood disputed the Fund's argument that section 268(1) of the *Act* deems the SPF 6 endorsement to include coverage for accident benefits. She argued that this endorsement is not a "motor vehicle liability policy" as it does not meet the definition of that term in section 1 of the *Act*. She noted that the definition refers to an owner or driver of an automobile, or a "person who is not an owner or driver" where the automobile is being used or operated by that person's

employee, agent or any person on that person's behalf . She submitted that as RSA's policy insures Beck Taxi Limited – a corporation, rather than a person – it does not fit within that definition.

35. Counsel also cited Arbitrator Samis' decision in *ING Insurance Company v Temple Insurance* (May 7, 2008) in support of her contention that an SPF 6 endorsement is not insurance on an automobile. In that case, Temple Insurance issued a CGL policy to a lumber company called Kenogami Lake Lumber. A truck driven by one of the company's employees collided with a passenger vehicle on a private road. The injured passenger sought accident benefits from ING, who then pursued indemnification for the benefits paid from Temple, under the Loss Transfer provisions in section 275 of the Act. The dispute between the parties centred on the factual question of whether the CGL policy included an SPF 6 endorsement, and if so, what impact it would have on a Loss Transfer claim.

36. Arbitrator Samis found that on the facts before him, the policy did include the SPF 6 endorsement. He stated that the purpose of the endorsement was to provide indemnity for a business that may be exposed to claims arising out of the use of a vehicle by an employee in the course of his employment, that was **not owned** by the employer. He determined that as the truck involved in the collision was owned by the logging company, the coverage under the SPF 6 endorsement did not apply.

37. Arbitrator Samis stated that the SPF 6 is unlike most forms of automobile insurance that cover a vehicle, and made the following comments – (at page 8):

At this point in the analysis, it is necessary to recall the nature of the SPF 6 coverage that I have found applicable to the Temple policy. The SPF 6 is not insurance on an automobile, it is not insurance in respect of an automobile. It is unlike most forms of automobile insurance that cover the vehicle and cover liability imposed upon the owner and all consent operators. The SPF 6 does not cover the vehicle, the owner of the vehicle, or the driver of the vehicle. Its sole coverage is for the liability that might be imposed on an insured (employer) in respect of the use or operation of a vehicle which is not owned by the insured. In my view, it can not be said that the Temple policy insures the automobile involved in this accident at all.

38. Counsel contended that as this is the only decision that either party could find regarding the extent of coverage provided by the SPF 6 endorsement, Arbitrator Samis' comments should be considered closely.

Fund's Reply submissions

39. Ms. Sydney countered RSA's argument that the SPF 6 endorsement is not a motor vehicle liability policy because it is issued to a corporation rather than a "person" by noting that many motor vehicle liability policies are issued to companies, including garage policies or owner's policies that insure a fleet of vehicles. She suggested that there are no policy reasons to exclude companies from being named insureds under motor vehicle liability policies, and that that would be inconsistent with the legislative intention to interpret policy provisions in a manner that expands coverage, rather than limits it.

ANALYSIS & REASONS:

40. Counsel have made thorough and well-developed arguments on both the factual and legal issues raised in this case, and on the scope of coverage provided by the SPF 6 endorsement. I have considered all of their arguments, as well as the substantial amount of evidence before me, in determining the following questions – was the vehicle that struck Ms. P one the 850 taxis referenced in the SPF 6 endorsement issued by RSA to Beck Taxi Limited ? If so, does the SPF 6 endorsement issued make RSA the "insurer of the automobile that struck" Ms. P under section 268(2)2(ii) of the *Act* ?

41. The first question is difficult to answer. The only evidence regarding the identity of the vehicle that struck the Claimant is that of Ms. P herself. Her evidence must accordingly be examined closely for consistency and reliability. As noted above, Ms. P's reporting of the details regarding the vehicle that struck her has been consistent over the years following the accident – her 911 call and statement to the police on the day of the accident, as well as her OCF 1 form submitted a few months later and subsequent statement to Claimspro all provide that she was struck by a Beck taxi painted in the green and orange trademark colours, bearing taxi plate number 698. She testified at her EUO that she recorded this plate number in her phone immediately after she was struck, and that she was "one hundred percent certain" that she had recorded it correctly.

42. The Fund was subsequently able to obtain the GPS records for the vehicle with taxi plate number 698. They reveal that that vehicle was not in the vicinity of Dundas and Jarvis streets on the day in question, let alone before 9 am. The parties agree that there is only one taxi in Toronto with plate 698. There is no suggestion that the GPS records are incorrect; it was on this basis that the Fund chose not to pursue arbitration against Economical Insurance. I can only conclude from this that Ms. P's evidence that she was struck by this particular taxi is simply not accurate.

43. Ms. P testified that she noted the taxi plate number of the vehicle while she was in the middle of the intersection, having just been struck by a moving vehicle. She stated that she "freaked out" and was angry enough to have punched the top of the front of the car. While it is easy to imagine that someone in these circumstances could have recorded the incorrect plate number, Ms. P maintained at her EUO that she was absolutely certain that the car bore that taxi plate number. She also claimed to have a clear memory of the driver and passenger's hair styles and details of their clothing, almost four years after the fact. I find this evidence difficult to accept, given that neither the driver nor the passenger exited the vehicle, leaving her with only a fleeting view of them through the car windows.

44. While I did not get to observe Ms. P testifying, the above evidence leads me to conclude that the information that she has provided is not reliable. She is clearly not as accurate an historian as she thinks she is, and I am left with the impression that her enthusiasm for certain facts suggests stubbornness rather than a clear recollection. The medical records filed, outlined in RSA's arguments above, also raise many 'red flags' regarding her credibility.

45. In the end, I cannot accept the Fund's argument that there is no reason to disbelieve the Claimant's evidence regarding the details of the vehicle that struck her. Having chosen not to pursue Economical Insurance because the GPS records indicate that the taxi with plate number 698 was not in the area at the time of the accident, the Fund cannot also argue that the Claimant's recollection of the details of the vehicle that struck her should be accepted.

46. Ms. Sydney noted that Ms. P was clear from the outset that the taxi that struck her was painted orange and green, and that only Beck dispatches taxis with these colours. I accept her

contention that colours are much more easily recalled or remembered than numbers or other details. I am also prepared to accept her suggestion that the colours of taxis that are dispatched by other companies in the area are distinct enough from Beck's – e.g. red and yellow (Co-op Cabs), black and orange (Diamond Taxi) or yellow (Royal /Crown Taxi) – that it is unlikely that the Claimant confused the green and orange coloured Beck taxis with any of these. I am accordingly prepared to accept that Ms. P. was struck by a Beck Taxi.

47. The question then becomes whether the taxi that struck her was one of the 850 taxis dispatched by Beck that are referenced on the SPF 6 endorsement issued by RSA. A representative from RSA has advised in writing that the vehicle to which taxi plate #698 was affixed was not “insured under their policy” on the date of loss. While we know that this was not the vehicle that struck Ms. P, this evidence suggests that there were Beck taxis driving around that were not included in the list of vehicles referenced in the SPF 6 endorsement.

48. On the other hand, the evidence provided by Ms. Paccanaro at her EUO suggests that when the policy was issued to Beck Taxi, the intention was for all of the taxis dispatched to be captured by the SPF 6 endorsement. This statement is hard to reconcile with the above note from RSA that plate number 698 was not “insured under their policy”. The RSA representative who authored this note was not examined under oath, and this statement was not put to Ms. Paccanaro at her EUO. In the end I am left with this inconsistency and a factual gap in the evidence.

49. While in other circumstances I would be inclined to resume the hearing to obtain further evidence on this point, in the end, the answer to this question does not affect the ultimate result in this case. Even if I accepted the Fund's argument that the taxi that struck the Claimant was one of the 850 taxis referenced in the SPF 6 endorsement issued by RSA, I do not agree that this endorsement provides coverage for accident benefits under the *SABS*. The consequence that flows from this finding is that RSA is not the “insurer of the automobile that struck” the Claimant and is therefore not in higher priority to the Fund to pay benefits under section 268(2)2 of the *Act*.

50. As set out above, the SPF 6 form specifies that it provides liability coverage for loss or damage arising from the use or operation of vehicles not owned by the insured. Ms. Paccanaro testified at her EUO that the purpose of the SPF 6 endorsement is to cover a

business or employer for any vicarious liability claims that it may have to defend, arising from the operation of vehicles that it does not own. She referred to it as “excess coverage”. Arbitrator Samis discussed the scope of coverage offered by the SPF 6 endorsement in *ING v Temple Insurance, supra*, and made similar comments. I have excerpted his comments above, and specifically note his conclusion that “it cannot be said that the Temple policy (with the SPF 6 endorsement) insures the automobile involved in this accident at all.” He also stated (at p. 6) –

In my view, the purpose of SPF 6 Non-Owned Automobile Coverage is to provide indemnity for a business which may have liability arising out of the use or operation of an automobile, not owned by the business. This can quite easily arise when an employee, in the course of employment, operates their own car, a rented car, or someone else’s vehicle. The use or operation could create liability for the employer as a result of the master-servant relationship, but the liability does not arise from a vehicle which is owned or licensed in the name of the employer.

51. Counsel for the Fund claims that these comments were made in “obiter” by the arbitrator, as they were not germane to the main finding in the case. She contends that section 268(1) of the *Act* deems “every contract evidenced by a motor vehicle liability policy” to provide the accident benefits set out in the *Schedule*. That is the essence of the Fund’s argument – that even if it was not the parties’ intention to have the SPF 6 provide accident benefits coverage, the statutory language has that effect. Ms. Sydney argued that the ‘deeming language’ in this provision is the ultimate expression of the legislators’ intention, and that even when not referenced explicitly, policies or “parts of a policy” such as the SPF 6 endorsement provide coverage for accident benefits.

52. I do not dispute this contention. However, I find that the SPF 6 endorsement attached to the CGL policy issued by RSA is **not** a motor vehicle liability policy. The deeming language in section 268(1) of the *Act* is therefore inapplicable. In order to meet the definition of a “motor vehicle liability policy” in section 1 of the *Act*, the SPF 6 would need to be “part of a policy evidencing a contract insuring” one of two entities against liability arising out of bodily injury to or death of a person, or loss or damage to property caused by the use or operation of an automobile. The two entities listed are (a) the owner or driver of an automobile – which the parties agree is not

the case here, or (b) a person who is not the owner or driver, where the automobile is *being used or operated by that person's employee or agent or any other person on that person's behalf*.

53. Counsel for RSA argues that as Beck Taxi Limited, noted as the Applicant on the SPF 6 endorsement, is a corporation rather than a “person”, the provision does not apply. I note that while a corporation may enjoy the legal status of a “person” in some contexts, the *Insurance Act* does not define the term “person”. Counsel for the Fund responds that it would make no sense to interpret that term as excluding companies, noting that many auto policies are issued to corporate named insureds rather than individuals.

54. I agree with this statement. However, if a company contracts for coverage for automobiles that it owns or its employees drive, that would be captured by the first part of the definition of “motor vehicle liability policy” described in part (a) as an “owner or driver”. The fact that part (b) of that provision specifies that the second entity that may be insured is a “*person* who is not the owner or driver” in my view must be read with part (a) in mind. I find that the use of the term “person” in part (b) was intentional and that a company, such as Beck Taxi Limited, does not fit within this part of the description.

55. Further, when the words of part (b) are considered closely, it is clear that the definition does not apply to Beck Taxi or any other corporation. It provides that the entity covered under a policy who is not an owners or driver of an automobile may be either an “employee” or “agent” who is using or operating a automobile belonging to “that person” or “any other person on that person's behalf”. The driver who was driving the Beck taxi that struck Ms. Prost was not an employee of Beck Taxi, or its agent. I have no evidence before me to suggest that they would have been driving the taxi on Beck Taxi's behalf. While I am not aware of the monetary or other details of the legal relationship between Beck Taxi and the drivers who drive the vehicles that it dispatches, the Fund has provided no evidence to suggest that they are employees or agents of Beck, nor that they drive those vehicles on Beck's behalf.

56. The result of the above is that the SPF 6 endorsement – while providing excess liability coverage to Beck Taxi for potential vicarious liability claims arising out of the use or operation of its non-owned vehicles – is not a motor vehicle liability policy as defined in the *Act*. It is an

endorsement to the CGL policy issued by RSA, and does not provide coverage for accident benefits in the *Schedule*. I appreciate that the SPF 8 endorsement was determined to be a motor vehicle liability policy in the *Daimler Chrysler, supra*, case, summarised above. In my view, that endorsement is entirely different and distinct from the SPF 6. It provides coverage to a lessor in the event that the lessee of a vehicle no longer has coverage. As it essentially replaces a policy that has either lapsed or been cancelled, it only makes sense that it would also provide coverage for accident benefits.

57. I have puzzled over the 1990 FSCO Bulletin cited above and the evidence obtained by counsel for the Fund regarding the history of the SPF 6 endorsement and its use in Ontario. The bulletin suggests that the SPF 6, SPF 7 and SPF 8 forms were being reviewed, but that the review has “not been completed yet”. Thirty years later, no further bulletins have been issued to suggest that it has now been concluded. It is likely that the Financial Services Commission of Ontario or the Superintendent of Insurance never considered how or if the SPF 6 endorsement applies to the post 1990 amendments to the *Act*. In the end I find that it is not really germane to the analysis called for in this case, and I leave this question to another day.

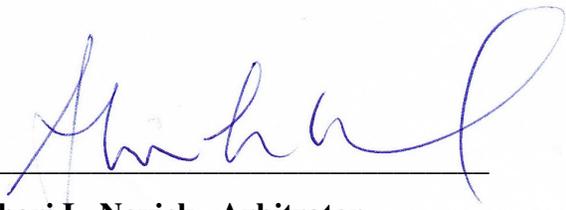
58. For all of the reasons expressed above, I find that RSA is not the “insurer of the automobile that struck” the Claimant. The Fund is therefore in priority to pay her claims in accordance with section 268(2)2(iv) of the *Act*.

59. The application for arbitration is hereby dismissed.

COSTS:

Given the result, and in accordance with paragraph 8 of the parties’ Arbitration Agreement, RSA is entitled to its legal costs, payable on a partial indemnity basis. If counsel are not able to agree on the quantum of costs payable, I invite them to contact me and a teleconference will be arranged at which a process will be discussed for determining this issue.

DATED at TORONTO, ONTARIO this ___26th___ DAY OF OCTOBER, 2020



Shari L. Novick , Arbitrator