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;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

MOTOR VEHICLE ACCIDENT CLAIMS FUND

Applicant

- and -

ECONOMICAL INSURANCE COMPANY

Respondent

ARBITRATION DECISION

COUNSEL:

Robert W. Kerkmann for the Applicant

Peter Yoo for the Respondent

ISSUES:

1. Was Dilfuza Rustamova struck by a vehicle operated by Sheila Sheen and insured by Economical Insurance on February 15, 2006, as alleged?

2. Did the Motor Vehicle Accident Claims Fund provide notice of its intention to dispute its obligation to pay benefits to Economical Insurance, in compliance with section 3 of Regulation 283/95 of the *Insurance Act*?

These two questions were put before me at the arbitration hearing held on July 29 and 30, 2008. Evidence was solicited on both issues, but submissions were only made with regard to the first one. In the interest of saving time, both counsel agreed to adjourn the remaining portion of the hearing pending the release of my decision on the first issue. I will only address the first issue in this decision.

RESULT:

Ms. Rustamova was not struck by a vehicle operated by Sheila Sheen and insured by Economical Insurance on February 15, 2006.

HEARING:

The hearing was held on July 29 and 30, 2008 in the City of Toronto, in the province of Ontario, before me, Shari L. Novick, Arbitrator.

BACKGROUND FACTS:

The issue before me is essentially a "she said/she said" situation in which the two protagonists tell very different stories.

I heard the evidence of the following four witnesses over the course of two days of hearing – Dilfuza Rustamova, Jay Yehuda Sheen, Sheila Sheen and Lilya Kogut, an accident benefits supervisor at CGI, the Fund's outside adjusters. The first three witnesses had also been examined under oath earlier on in the proceeding, and the transcripts of their evidence were also referred to and relied on at the arbitration hearing.

The general background that gives rise to this dispute is as follows – Dilfuza Rustamova is a twenty-five year old woman who alleges that she was struck by a vehicle operated by Sheila Sheen as it was reversing out of the driveway at 173 Torresdale Avenue in North

York, on February 15, 2006. She states that she was taking a walk around a park near her home with her four-month old baby, and was knocked down by the vehicle as she walked past some houses on a residential block abutting the park. She claims to have suffered injuries from the impact.

Ms. Rustamova states that after she was struck, the woman driving the car stopped the vehicle, came out to apologise to her, but resisted her requests for a cell phone to call for help or a pen to record the details of the car. She then went off in seek of a pen, and after finding one and returning to the scene, the car and the woman were gone.

Ms. Rustamova claims to have subsequently seen the same vehicle in the same driveway a short time after the alleged "hit and run" incident, with the woman who struck her sitting in the passenger seat. After this viewing, she provided the license number of the vehicle to her representative.

Ms. Rustamova's application for accident benefits was filed with the Motor Vehicle Accident Claims Fund in June of 2006, and after doing some initial investigation, the Fund accepted the claim and paid benefits to Ms. Rustamova. Further investigations were conducted, and the Fund's adjusters concluded that the car that struck her was a Chevrolet Epica, insured by Economical Insurance, and driven by Sheila Sheen. The vehicle was owned by Ms. Sheen's husband, Jay Yehuda Sheen. Ms. Sheen's mother lived at 173 Torresdale Avenue at the relevant time.

The Fund put Economical on notice of its intention to dispute its obligation to pay benefits on January 8, 2007, and subsequently commenced an arbitration on April 11, 2007. Ms. Rustamova's accident benefits claim was resolved on a full and final basis on March 14, 2007. The Fund now seeks reimbursement from Economical for the benefits it paid out to Ms. Rustamova.

Sheila Sheen denies any involvement in the matter whatsoever. She acknowledged that her mother lived at 173 Torresdale Avenue at the relevant time, and that she would

frequently visit with her at her home. She could not recall whether she had gone to visit her on February 15, 2006, but insists that if she had done so she would have been driving her own car, a 2001 Acura. She acknowledged that her husband owned a Chevrolet Epica with the license number cited, but claimed that she could not recall ever driving his car. Ms. Sheen claims to not have ever met Ms. Rustamova, and insists that she was never involved in the hit and run incident described.

Given this factual backdrop, I must assess and determine the credibility of the witnesses, as clearly, either Ms. Rustamova or Ms. Sheen is not telling the truth. As they both presented their evidence in a straightforward manner, this presents a very difficult task. I am left to delve into the details of the stories told, in order to flush out the inconsistencies or assess whether certain parts of the evidence presented lack "the ring of truth".

ANALYSIS OF EVIDENCE AND FINDINGS:

I turn first to Ms. Rustamova's evidence. Given that that there is no corroborating evidence of her version of events, she faces a heavy onus in that her word must "carry the day". As mentioned above, Ms. Rustamova was a likeable witness, who presented her evidence in a straightforward manner. However, after reviewing all of the evidence carefully, I have come to the conclusion that her version of events that Mrs. Sheen struck her as she was reversing the Chevrolet Epica out of her mother's driveway does not ultimately withstand scrutiny.

The evidence provided at the hearing was lengthy and detailed. I will set out the important points and highlight the inconsistencies in Ms. Rustamova's evidence that led me to the above determination.

Was the baby stroller knocked down in the incident?

Ms. Rustamova was walking with her baby in a stroller at the time of the incident. At the hearing, she explained that the baby was actually lying in a car seat that snaps into the stroller. She stated that the car struck her as she walked past the driveway, and that the force of the impact caused her to fall down. She also testified that the stroller was

knocked over, and that the car seat detached from the stroller when it hit the ground. This was consistent with the evidence she provided when examined under oath in January 2008.

However, in a statement provided to a CGI adjuster for the Fund in August 2006, she made no mention of the stroller having been involved in the incident. In that adjuster's report of his meeting with Ms. Rustamova, he reported "the baby stroller did not get knocked over and there are no injuries sustained to her daughter". When this was put to Ms. Rustamova in cross-examination, she could not explain this discrepancy and insisted that she told the adjuster who had taken the statement that the stroller had been knocked down.

I find that it is unlikely that the adjuster misrepresented what he had been told by Ms. Rustamova. There would simply be no reason for him to do so. I would expect that he would have asked about the baby's involvement once he was told about the circumstances of the incident, and would have simply recorded the answer he was given. I would have expected Ms. Rustamova's memory to have been consistent on a point as fundamental as whether or not her baby had been knocked down, and this discrepancy on an important point leads me to question her credibility.

Did she think about seeking medical attention for her baby?

Ms. Rustamova testified at the hearing that her baby was crying after the stroller was knocked down, but that she was not injured. When asked in cross-examination how she knew that her four month old baby had not been hurt, she replied that while the car seat had detached from the stroller, the baby had not fallen out of the car seat, so "she assumed she was OK".

At the hearing, when Mr. Yoo asked why she had not brought the baby to the hospital to be assessed for possible injury, Ms. Rustamova stated that she had in fact taken the baby to the pediatrician a few days later, explaining that she herself had been feeling too ill to

do so earlier. No evidence was filed at the hearing confirming this visit to the pediatrician.

Mr. Yoo suggested in his submissions that it would be unusual for someone in Ms. Rustamova's position, a young first-time mother who is not medically trained, not to seek immediate medical attention for a four month old whose stroller was knocked down with enough impact for the car seat to dislodge from the stroller. I tend to agree. While I appreciate that parental responses on an issue like this may differ, I find that when this is considered in conjunction with the other inconsistencies in Ms. Rustamova's evidence it certainly raises a doubt about the veracity of her story.

Was there a witness to the incident?

Ms. Rustamova's statement, provided to the Fund's adjuster on August 9, 2006, states "There was a witness, but I do not know who she is". Yet, when asked about this both at the examination under oath in January 2008 and at the arbitration hearing, Ms. Rustamova stated that she was not aware of any witness to the incident alleged, nor could she explain why the above reference appears in her statement.

I find this evidence difficult to reconcile. It is unlikely that it can be attributed to a fading memory. The likely explanation is that Ms. Rustamova initially felt that her story might be bolstered by reporting that there was a witness to the incident, but subsequently decided that concocting a story about a witness would unduly complicate matters, so she backed away from that part of it.

Was the incident reported to the police, and if so, when?

The joint document brief filed at the hearing contains a letter from Gary Petrov, Ms. Rustamova's representative, to Ms. Kogut, the CGI adjuster working on this file on the Fund's behalf, dated January 24, 2007. It encloses the form required to be filed with the Fund for consideration of payment of accident benefits, and states that while no police report was issued regarding the alleged incident, "Ms. Rustamova reported the accident in July 2006 only, and constable Evans did not complete the form." The police report was

one of the missing documents that Mr. Petrov knew was required to be provided to the Fund along with the submission of an application for benefits.

Ms. Rustamova testified at her examination under oath that she recalled going to the police station and reporting the incident "within a couple of months". Yet, in the statement she provided in August 2006 she advised that she did not call the police "because I did not know what to do", and stated that she had not yet reported it to the police. This would have been approximately six months after the alleged incident.

When asked at the arbitration hearing why she had not reported the incident to the police earlier, especially after spotting the vehicle that allegedly struck her a few weeks afterwards in the same location and confirming the license number, Ms. Rustamova first stated that she was feeling ill in the aftermath of the accident. When presented with Mr. Petrov's letter stating that she had reported it to the police in July 2006, she agreed that she had advised him that she had done so in July. When she was then presented with the statement she had provided in August stating that she had not yet reported the incident to the police, she first answered that she could not explain why the statement provided that, and subsequently agreed with the suggestion that she must not have done so prior to August 9, the date the statement was taken.

After further questioning, however, she reverted back to her earlier answer, and confirmed that it was her belief that she did report the incident in July 2006, as set out in Mr. Petrov's letter.

I am not sure how to interpret this "flip flop" in Ms. Rustamova's evidence. My impression was that she was attempting to explain away the inconsistency by suggesting that she had not initially been aware that she was required to report the incident, and that once it became evident that she would need to own up to the fact that one of the documents put to her had an inaccurate date, she was unsure which would be considered to be a more serious misrepresentation, and so changed her answer to suit the question asked. This approach is different than that of a witness who simply does not remember a

detail or a date. This part of Ms. Rustamova's evidence further supports my concern regarding her credibility.

Physical description of Sheila Sheen

This was perhaps the most troubling part of Ms. Rustamova's evidence.

When asked at the hearing to describe the driver of the vehicle that allegedly struck her, Ms. Rustamova stated that she was middle aged, had blonde hair, and no glasses. When asked in cross-examination why she was able to state with certainty that the woman did not wear glasses, given that she had testified at her examination under oath some eight months earlier that she could not recall whether or not she wore glasses, Ms. Rustamova responded "I can imagine that she's talking to me, I have her face right behind my eye…I can picture her, she has no glasses." When pressed on the issue, she stated on three different occasions that the woman who drove the car that struck her was not wearing glasses.

When asked to give further details about the type of blonde hair the driver had, she stated that it was "light yellow".

Further on in the cross-examination, Mr. Yoo referred Ms. Rustamova to the colour photo that an investigator retained by CGI had taken of Ms. Sheen, as she walked through a parking lot with her daughter. Ms. Rustamova had been shown this photo a few weeks prior to her claim for benefits being settled with the Fund, and she had identified Ms. Sheen as the woman who had been driving the vehicle that struck her. The evidence of Ms. Kogut from CGI was that the Fund decided to pay a lump sum to settle the claim on a full and final basis because of Ms. Rustamova's identification of the woman in the photo, and Ms. Rustamova herself allowed under cross-examination that there was probably some connection between her identification of this woman in the photo, and the settlement of her claim.

When shown the photo at the hearing, in which Ms. Sheen is wearing glasses, Ms. Rustamova acknowledged that she was mistaken about the glasses, but insisted that "it's the same lady".

Ms. Sheen testified at the hearing. She has brown hair, and explained that her hair has been the same colour for the last several years. She also stated that she always wears glasses to drive.

I find this further undermines Ms. Rustamova's credibility. After repeatedly testifying that Ms. Sheen was not wearing glasses and that she could picture her clearly in her mind, Ms. Rustamova was still not prepared to waver from her statement that it was Ms. Sheen who was driving the car that allegedly struck her when she was shown the photo that clearly contradicted her statements. This defensiveness also leads me to doubt the truthfulness of her evidence.

For all of the reasons outlined above, I find that Ms. Rustamova's evidence was inconsistent on many important points, and is thus unreliable. I find that Ms. Sheen's evidence is to be preferred over that of Ms. Rustamova, and consequently find that Ms. Sheen was not the driver of the car that allegedly struck her in February 2006.

The one coincidence that is somewhat difficult to reconcile with this result is the fact that Ms. Sheen's mother did live at the address where Ms. Rustamova alleged that the incident had occurred, and Ms. Sheen acknowledged that she visited her mother regularly during that time. However, both Mr. and Ms. Sheen were adamant in their evidence about the fact that Ms. Sheen would not have been driving the Chevrolet Epica to visit her mother, given that she always drove her Acura, and Mr. Sheen always drove the Epica to work, in another part of town. Yet, it was the Epica's license number that was identified by Ms. Rustamova as the car that struck her while being driven by Ms. Sheen.

Mr. Sheen testified that he would often go with his wife on the weekends to visit his mother-in-law, and that he would drive the Epica. This vehicle was described as a mid-

size, four door car, grey in colour. There are many cars on the road that could fit this description. It is entirely possible that the incident took place as alleged by Ms. Rustamova, but that another vehicle was involved, and that she either consciously or subconsciously transposed the details of the Epica, which she likely saw a few times on the weekends parked in the driveway at 173 Torresdale, with the other vehicle that struck her.

CONCLUSION:

In the result, I conclude that Economical Insurance is not responsible to indemnify the Fund for the benefits it has paid out to Dilfuza Rustamova.

If the parties are unable to agree on costs, I may be spoken to.

DATED AT TORONTO, ONTARIO this _____ day of December 2008.

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Shari L. Novick
Arbitrator