IN THE MATTER of the *Insurance Act,* R.S.O. 1990,
c.I.8, s. 268 (as amended) and Regulation 283/95 (as amended);

AND IN THE MATTER of the *Arbitration Act,1991,*
S.O. 1991, c.17, (as amended);

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

GORE MUTUAL INSURANCE COMPANY

Applicant

- and –

WAWANESA MUTUAL INSURANCE COMPANY

Respondent

AWARD

COUNSEL:

Arthur Camporese and Kristen Bailey
Counsel for the Applicant, Gore Mutual Insurance Company ("Gore")

Kevin Mitchell
Counsel for the Respondent, Wawanesa Mutual Insurance Company (" Wawanesa")

ISSUES:

This arbitration involves a priority dispute between insurers. The issues, as set out in the Arbitration Agreement, are paraphrased as follows:

1. As between Gore and Wawanesa, which insurer is responsible to pay statutory accident benefits to the claimant, Anwar[1], arising out of a motor vehicle accident occurring on August 28, 2014?

2. If the answer to the foregoing question is Wawanesa, then there are issues / questions as to the quantum of reimbursement, interest, the quantum of costs and which party has the obligation to pay costs.

[1] By reason of privacy concerns, the claimant's last name, together with the last name of Gore's insured, are not reflected in these reasons.

Procedurally, there were originally two issues to be determined by me. The first issue was resolved between the parties. Prior to the commencement of the arbitration hearing before me, the parties agreed that Anwar was the spouse of Wawanesa's named insured such that priority would move from Gore to Wawanesa on that basis, subject to Wawanesa's ability to re-establish priority on the part of Gore.

For this to occur, the onus was on Wawanesa to establish, pursuant to section 3(7)(f) of the *Statutory Accident Benefits Schedule - Effective September 1, 2010* [2]("SABS"), that Anwar was a person living and ordinarily present in Ontario deemed to be the named insured under the Gore policy insuring a Honda automobile at the time of the accident of August 28, 2014 if, at the time of the accident, the Honda automobile is being made available for Anwar's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity.

There was no disagreement between the parties that the onus or burden of proof rests with Wawanesa. There was no disagreement between the parties that Anwar was a person living and ordinarily present in Ontario. The issue for determination by me turns on a consideration and interpretation of the phrases "other entity" and "regular use". There was no disagreement regarding the adequacy or timeliness of notice respecting this priority dispute by Gore to Wawanesa nor in relation to the commencement of the within arbitration.

EVIDENCE:

The following documents were marked as exhibits at the hearing which proceeded before me on Monday, June 19, 2017.

Exhibit 1 - Long form arbitration agreement signed June 8, 2017
Exhibit 2 - Wawanesa document brief
Exhibit 3 - Gore document brief
Exhibit 4 – Wawanesa supplementary document brief
Exhibit 5 - Supplementary document brief of Gore

I did not receive *viva voce* evidence. Rather, the parties proceeded by agreement to file the transcripts of examinations under oath conducted by counsel to this arbitration of the claimant, Anwar, and Gore's named insured, Omar, held on March 10, 2017 along with the transcript of an examination under oath of the claimant conducted by Gore on October 9, 2014.

The facts which give rise to the within arbitration are not terribly in dispute. Rather, it is the inferences to be drawn from the facts and the application of the law which requires me to make a determination in this matter.

Omar's evidence is to the effect that he was the president of a limited corporation which carried on business as Spinetec - Health Care Solutions. This business provided treatment to, among others, those involved in automobile accidents under the SABS. Anwar visited this facility from time to time as he was friendly with Omar and friendly with a number of individuals who attended at the clinic for treatment.

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[2] Ontario Regulation 34/10

At some point in time in advance of August 28, 2014, Anwar asked Omar for work, part-time or otherwise. Omar had branched out into medical assessments through a branch of the same limited corporation carrying on business as Meditecs or Spinetec Independent Medical Examinations. This began at some point in July 2014. If at all possible, Omar, through these entities, would try to secure the agreement of the insurance company to pay for transportation to and from the medical assessments which would be arranged through a taxi or transportation company. On perhaps 5 or 6 occasions, this was not possible and Omar would be required to provide transportation to and from medical assessments for those undergoing the assessment. Omar decided to try out Anwar as a driver with a view toward possibly engaging him. Omar gave evidence that, at the time of the accident, his need to use the Honda vehicle to transport clients to and from medical assessments was very, very rare.

The accident occurred while Anwar, using the Honda vehicle supplied by Omar, was transporting a patient to or from a medical assessment. This was the 2nd or 3rd occasion of use in this fashion. Omar intended to engage Anwar as a part-time driver had the accident not intervened. The evidence is that Omar did not begin conducting assessments until July 2014. Consequently, Anwar's usage occurred over one to two months maximum.

There was no schedule regarding usage. Omar would call Anwar on his little as one day's notice and as much as one week's notice to advise that Anwar was required as a driver. Anwar had no opportunity use the vehicle for personal purposes and did not do so; rather, he used the vehicle to drive to and from medical assessments.

Anwar's evidence on March 10, 2017 is to a similar effect. He tended to downplay the likelihood of employment following his use of the vehicle on August 28, 2014 [being his 2nd or 3rd use in this regard]. He thought there were employment prospects. He thought he would be paid not less than $10 per hour and perhaps $15 per hour. That said, he described his efforts at the time of the accident as voluntary and described himself as a volunteer. He recalled receiving one day's notice in advance of the need to drive for Omar.

Anwar's evidence on October 9, 2014 characterized his relationship with Omar as friends. This may have existed for a couple of years before Omar asked Anwar to do a favour for Omar and drive a client to an assessment. The accident occurred on the 3rd occasion where Anwar performed this favour for Omar. Anwar hope this would evolve into employment. Omar had given no specific indication as to how long the trial period would last.

The insurance arrangements respecting the Honda vehicle are relevant in relation to the "other entity" issue. Omar was dealing with a broker. He obtained a Honda vehicle on or about March 29, 2014. The vehicle purchase agreement, which apparently involved some sort of financing, indicates the purchaser to be Spinetec Health Care Solutions and Omar. The seller of the vehicle required confirmation of insurance and this was provided by the broker. The document issued by the broker and sent to the seller indicated the buyer/insured name to be Spinetec Health Care Solutions and Omar. The broker confirmed insurance in this fashion by letter dated April 2, 2014. The broker informed Gore to the same effect by email dated April 2, 2014. A certificate of automobile insurance was issued to this effect on April 11, 2014 effective April 4, 2014. This was sent to Omar.

The broker followed up with Spinetec by email on April 16, 2014 requesting a copy of the ownership for the Honda vehicle. This was provided and showed Omar as the sole owner. The broker sent an email to Gore on May 28, 2014 indicating that effective that day, the policy should be amended to show the named insured as Omar only. The company name should be

removed. A certificate of automobile insurance was issued on June 3, 2014, effective May 28, 2014, which showed the named insured as Omar only. This was sent to Omar.

While nothing necessarily turns on this point, it should be noted that the original certificate and the amended certificate both indicate that the vehicle was to be driven 10,000 km annually, driven to and from work and that the commute was not more than 16 km. Neither the broker nor Gore knew that Omar was going to put the vehicle to a business use commencing July 2014.

LAW:

A priority dispute arises when there are or may be multiple motor vehicle liability policies which might respond to a statutory accident benefits claim made by an individual involved in a motor vehicle accident. Section 268 (2) of the *Insurance Act* [3]sets out the priority rules to be applied to determine which insurer is liable to pay statutory accident benefits. Since the claimant was an occupant of a vehicle at the time of the accident, the following rules with respect to priority of payment apply:

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

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,

   iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other 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 occupant has recourse against the Motor Vehicle Accident Claims Fund.

For purposes of the arbitration before me, the sub clauses in dispute is 268 (2) 1. i. Anwar is an insured under the Wawanesa policy as a spouse. If section 3(7)(f) of the SABS applies, Anwar is deemed to be the named insured under the Gore policy. Since Anwar was an occupant of the vehicle insured under the Gore policy at the time of the accident, the Gore policy would have the highest priority.

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[3] RSO 1990, c. I 8

Section 3(7)(f) of the SABS provides:

> *(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,*

REVIEW OF CASE LAW:

There is no dispute between the parties for the proposition that the provisions of the SABS are incorporated into the interpretation of the provisions of the *Insurance Act* generally and the priority dispute provisions specifically. As a result, it is appropriate to consider section 3(7)(f) of the SABS, and the case law interpreting this section, for purposes of analyzing and determining the priority dispute between the parties herein.[4]

I have reviewed and considered all of the case law provided to me by counsel. I will only reference some of the case law to the extent that it directly bears on my analysis and decision.

"OTHER ENTITY"

In *Kingsway General Insurance Co. v. Gore Mutual Insurance Co.*,[5] the case turned on whether a vehicle was made available to the claimant by a "corporation, unincorporated association, partnership, sole proprietorship or other entity". Kingsway took the position that the vehicle, being a tractor-trailer, was made available by the owner to the trucking company rather than vice versa.

In that case, Gore attempted to distinguish the case law referenced by Arbitrator Bialkowski. Gore contended that the insured automobile was made available for the claimant's regular use by a "sole proprietorship" or "other entity". The other entity was a sole proprietorship operated by the claimant any party to the owner operator agreement with the transportation company. In the alternative, Gore submitted that there was a joint venture between the sole proprietorship, operated by the claimant, and the transportation company which made the vehicle available to the individual claimant.

In that case, Gore relied upon a decision of Arbitrator Torrie, discussed below. This is the so-called "nanny case". Arbitrator Torrie held that the family was an "other entity" which made the vehicle in question available to the nanny for her regular use.

Gore also relied upon a decision of Arbitrator Jones – August 2002 in the *Co-Operators Insurance Co. v Lloyds of London* (upheld on appeal by Mesbur J. in an unreported decision dated November 27, 2002), discussed below. Janette Bolger had purchased a taxi cab and a taxi license. She would not be able to operate the cab in Kitchener/Waterloo without being a

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[4] Co-Operators Insurance Co. v AXA Boreal Assurances (2000), 50 O.R. (3d) 395
[5] Private arbitration award of Kenneth J. Bialkowski, October 15, 2009

shareholder in Cambridge City Cab Company. She acquired shares in this company. She allowed the claimant to operate the taxicab. It was held that the claimant had the taxicab made available to him by a joint venture consisting of Janette Bolger and the Cambridge City Cab Company.

On appeal, the court noted that the arbitrator found the individual and cab company to operate as a joint venture or an "other entity". The court found whether a "joint venture" granted authority or not, the owner of the cab was clearly acting in a business capacity and not as an individual in making the taxi available. She purchased the vehicle, purchased shares in the cab company and an assignment of the taxi owner's license for a single purchase price. The fact that she did so in her own name was immaterial. Everything she did with the vehicle was in the nature of her operating a business although not registered as such. She was operating a business as a sole proprietor or sole owner. In that capacity, she made the vehicle available to the claimant.

Arbitrator Bialkowski found that the legislative intent of section 66 of the SABS, and its predecessor, is to place the truck insurer in priority to the individual' is private automobile insurer in circumstances where the accident occurred involving the truck in the course of the commercial arrangement between the parties. He found that the claimant had the subject vehicle made available to him by either a sole proprietorship or "other entity" [the joint venture comprised of the sole proprietorship and the transportation company pursuant to the owner/operator agreement]. He noted that many of the arbitration decisions did not give consideration to the joint venture and "other entity" theory as set out by arbitrator Torrie and arbitrator Jones.

Arbitrator Bialkowski noted that his decision was in conflict with a recent decision of arbitrator Novick in *Certas v. ICBC*. However, he notes that she did not consider the joint venture or "other entity" theory nor did she consider the 1998 decision of arbitrator Fidler in *Axa Insurance Company v. Markel Insurance Company of Canada*.[6]

Arbitrator Bialkowski concluded that the joint venture or "other entity" concept ought to apply to owner/operator situations such as the case before him. The business relationship created by the owner/operator agreement forms the "other entity" which makes the vehicle available to the operator.

This decision was appealed to the Ontario Superior Court and heard by Perrel J.[7] The court began its analysis by noting the oddity of the position taken on behalf of Kingsway. Kingsway took the position that an individual who carries on business as a sole proprietorship cannot have his or her vehicle made available to himself or herself. It can only make a vehicle available to someone other than the individual who is the sole proprietor. After reviewing Arbitrator Fidler's decision in *AXA Insurance Co. v. Markel Insurance Company of Canada*[8], the court found nothing in the language of what was then section 66 of the SABS which forced Arbitrator Fidler to the troubling conclusion he reached. The words in section 66 can be taken literally or for their plain meaning. There is no reason to exclude, exempt or disqualify a sole proprietor from being able to make a vehicle available to himself or herself. The court disagreed with the conclusion of Arbitrator Fidler [and the analysis of Justice Day].

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[6] Private arbitration award of Jonathan Fidler, December 18, 1998, overturned on appeal by Matlow J. (unreported decision of April 20, 1999); award of Arbitrator Fidler restored by the Court of Appeal for Ontario, unreported decision dated February 2, 2001)

[7] [2010] O.J. No. 4073; 2010 On. S.C. 5308; [2010] ILR I-5049; 89 C.C.L.I. (4th) 263; 2010 Carswell Ont. 7267

[8] Private arbitration award of Jonathan Fidler, December 9, 1996 (upheld on appeal by Day J.)

Ultimately, the court supported Arbitrator Bialkowski's analysis that a sole proprietorship can make a vehicle available to the individual who is one and the same as the sole proprietorship. The Court expressed no view on the joint venture argument other than to note that, for purposes of the appeal, it was not necessary to rule on this rationale. That said, the Court expressed obiter to the effect that a joint venture for business purposes may be an "other entity" for purposes of section 66 (1) of the SABS and, therefore, Arbitrator Bialkowski's rationale was reasonable and without any reversible legal error.

This matter was appealed further to the Court of Appeal for Ontario.[9] The question before the court was whether section 66 (1)(a) permits an insured vehicle to be made available for an individual's regular use by the individual's sole proprietorship. The court found this question could be answered in the affirmative based on the language of the provision and its legislative purpose. The court found there was no legitimate reason why a sole proprietorship should not be permitted to make a vehicle available to the sole proprietor. As for legislative purpose, the court agreed that this section, similar to a company or rental automobile, was designed so that if a vehicle is made available for regular use by any of the listed entities, the risk is to be borne by the insurer of that vehicle.

The court noted, once again in obiter, that a joint venture for business purposes may be an "other entity" for purposes of s. 66(1). That said, the court specifically declined to rule on the point.

In *Liberty Mutual Insurance Co. v. Markel Insurance Co. of Canada*,[10] Arbitrator M. Guy Jones indicated a willingness to accept, in appropriate circumstances, that a person may be an "other entity" for purposes of section 66(1). He found this section was designed to capture the risk when a business organization is a named insured. In order for an individual to be an "other entity", the individual must be operating in essence as a business. He was not prepared to make this finding on the facts of the case before him.

In *TD General Insurance Co. v. Pilot Insurance Co.*,[11] Arbitrator Torrie decided what is known as the "nanny case". While the family may not have a business purpose, the list of entities includes unincorporated associations. The arbitrator found that qualifying as an "other entity" is not restricted to having a commercial or for-profit objective. Moreover, the design of the subsection is to capture the insurance risk when an employer or entity grants regular use to an employee or individual. In this case, the family gave permission to the claimant to use the vehicle to further the objectives of the family. The subsection does not require those objectives to be commercial. The family was found to share sufficiently similar characteristics with the other entities listed in the subsection so as to be considered an "other entity" for purposes of the subsection.

In *Unifund Assurance Company v. Intact Insurance Company*[12], Arbitrator Bialkowski addressed, among other things, the interpretation of "other entity". A vehicle was owned and insured by Blanche. She died in 2006. Neither the broker nor the insurer were advised. The vehicle continued to be treated as effectively owned and insured by Blanche's daughter, Andrea. The question for determination was whether Andrea was a "deemed named insured" by reason of section 3 (7)(f) of the SABS. Arbitrator Bialkowski found that this section did not apply.

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[9] (2012), 112 O.R. (3d) 1; 2012 ONCA 683
[10] Private arbitration award of Arbitrator Jones, July 18, 2006
[11] Private arbitration award of Arbitrator Torrie, May 31, 2007
[12] Private arbitration award of Arbitrator Bialkowski, April 17, 2015

This was an instance of one individual having regular use of another individual's vehicle. The term "other entity" should not be applied to someone who is clearly an "individual" in this context. He found support for this interpretation in the decision of Arbitrator Samis in *State Farm Mutual Automobile Insurance Co. v. Kingsway General Insurance Co.*[13] The balance of the analysis in this case is not relevant for our purposes.

"REGULAR USE"

In *ACE INA Insurance v. Co-Operators General Insurance Co.*[14] the court had to consider the phrases "regular use" and "being made available at the time of the accident". In that case, the court found that the claimant had regular use as a customer service representative with Enterprise Rent-A-Car. However, the claimant did not have a vehicle available to him at the time of the accident.

In the case before me, there is no question that the claimant had a vehicle available to him at the time of the accident. The question remains whether the claimant had "regular use".

In *TD General Insurance Company v. Markel Insurance Company*,[15] the claimant was a passenger within a tractor pulling a trailer when involved in an accident which gave rise to the payment of statutory accident benefits. The claimant was insured with a personal policy with TD Gen. The tractor was insured with Markel. The claimant may have been shadowing the driver. According to the claimant, he was on this first trip on a one-time basis. Arbitrator Samis - December 13, 2013 found the claimant's evidence to be contrived or shaped to avoid Workers' Compensation issues. The evidence of the driver was that he and the claimant were going to share the compensation associated with this trip. The evidence of the individual who had effective control over the use of the vehicle was to the effect that he knew the claimant was to be a driver of the tractor. The use was not long-standing but it was regular, in that it involved many hours of use of the vehicle on this particular trip. Moreover, there was an expectation that there would be further use.

The arbitrator found that there is some reluctance to find "regular" use in circumstances where the relationship is short-lived. However, duration of the relationship with the vehicle is not the direct issue. The direct issue is whether the permitted usage was "regular". The arbitrator was not satisfied that regular use requires that it be long-standing in nature (though that would be greater evidence of use that is regular). The arbitrator found that if the accident had not occurred, absent any change in the relationship, there would be every expectation that the use of the vehicle would continue. The regulation does not require that the use be frequent, exclusive or personal. The fact that there is some use available which can be said to be regular is sufficient.

Zurich Insurance Co. v. The Personal Insurance Co.[16] is an appeal from a decision of Arbitrator Bialkowski. Zurich insured a limited company which owned a number of vehicles. The claimant secured work as a licensed truck driver through an employment agency and was supplied to Zurich's insured. The claimant had driven 13 different vehicles from May 2 through August 15, 2006. He had not driven the specific vehicle involved in the accident on any prior occasion. He had driven various trucks for the limited company on a total of 28 occasions.

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[13] Private arbitration award of Arbitrator Samis, October 20, 1999
[14] 2009 Can LII 13625 (Ont. S.C.)
[15] Private arbitration award of Arbitrator Samis, December 13, 2013
[16] 2009 Can LII 26362 (Ont. S.C.)

The court noted that the SABS does not define the term "regular use". The jurisprudence, considering section 66 and its predecessor sections, discloses that "regular use" is not restricted to personal use nor is it restricted to exclusive use; the use of a vehicle only for business use may constitute "regular use".

While there is certainly case law describing "regular use" as "habitual, normal and recurred uniformly according to a predictable time and manner", there is also law to the effect that constancy of use is not required to make the use "regular". Regular use has been found in the case of a part-time limousine driver of a vehicle used several days each month over a period of 1.5 years (a pattern of use which the arbitrator described as "erratic" and "not predictable").

The court noted that the arbitrator informed himself properly about the applicable legal test for determining "regular use". At one end of the spectrum are obvious and apparent cases of regular use. At the other end are cases where the characterization of the use was "irregular at best and out of the ordinary". The court upheld the arbitrator's decision by reason of the frequency and regularity of use.

"Regular use" is a concept which invites an examination of the person's pattern of use of a vehicle over the period of time leading up to the accident in order to understand and to characterize the nature of the use "at the time of the accident". Regularity of use generally connotes use on more than one occasion. Courts and arbitrators have looked at the pattern of use, amongst other evidence, to ascertain whether, at the time of the accident, the vehicle was made available to the claimant for "regular use".

In *York Fire & Casualty Insurance Co. v. Kingsway General Insurance Co.*[17], the claimant had a personal policy of insurance issued by York Fire. On the day of the accident, and perhaps for a day or two before, the claimant was involved in moving a load of commercial value using a vehicle insured by Kingsway. The arbitrator indicated that there was a complicated history of corporate organizations, registrations, permits and various intercompany business arrangements that could easily confuse someone trying to fully understand the various entities and their role in the business transactions.

At the time of the accident, the claimant had secured some work in connection with transportation services. The claimant was only briefly engaged with respect to the company's vehicles. The accident may have occurred on his first trip but, at most, it was his 2nd or 3rd trip. Indeed, the arbitrator found the evidence unsatisfactory as to the possibility of there being prior runs by the claimant. The arbitrator found that the relationship as driver commenced about 3 weeks prior to the motor vehicle accident. The arbitrator found that while there was a continuity of a relationship over a period of time, it was not intended to go on indefinitely.

Despite the arbitrator finding that the accident occurred on the first trip made by the claimant, he did find there was a relationship of some nature between the owner the vehicle and the claimant for a period of weeks prior to the accident. The vehicle present at the accident scene was made available to him in the sense that he was given dominion and control over the vehicle to deliver a commercial load.

The provisions of the SABS do not require that the vehicle be made available for use by the insured under the policy or by any other particular specified entity. It suffices if the vehicle is made available for regular use by the owner or the person or entity having dominion and control over the vehicle on behalf of the owner.

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[17] Private arbitration award of Arbitrator Samis, January 15, 2014

The arbitrator ultimately concluded that the only question left to determine was whether or not the use by the claimant in this case could be construed as "regular use". He noted that it is not necessary that the vehicle actually be used by the person in order for it to have been "made available". While actual use is certainly evidence that the vehicle was made available, it is conceivable that a vehicle could be made available for someone's use without that person actually ever engaging in its operation.

The arbitrator reviewed the decision Brown J. in *Zurich Insurance Co. v. The Personal Insurance Co.* (discussed above). The arbitrator found that the fact that the accident occurred on the first trip was not determinative of the regular use question. The arbitrator noted that the vehicle was made available to the claimant exclusively and completely for the duration of the trip. The arbitrator found the critical evidence was that the claimant was going to be engaged as a driver until someone else could be found. There was no evidentiary basis to conclude that the relationship was limited to the single trip.

The arbitrator rejected the notion that "regular" means "recurring uniformly according to a predictable time and manner". This would be inconsistent with insurance underwriting principles and entirely too rigid to reflect the reality of automobile usage. He notes that this would be an exceptional use of an automobile. The arbitrator noted that usual, normal and customary are also sufficient to establish regular use.

ANALYSIS:

Of the two issues I am required to determine, I believe one is relatively straightforward and simple; the other is not.

I am satisfied, on the evidence adduced and applying the law described above, that Omar, whether as the principal or directing mind of Spinetec or operating as a joint venture with Spinetec, was an "other entity" capable of granting use of the Honda vehicle insured by Gore. Anwar's use of the Honda vehicle was to advance the business purposes of Spinetec just as a parent, employing a nanny, gave use to the nanny to advance the purposes of the family. It is not simply one individual granting use to another individual.

I follow the decisions of Arbitrator Bialkowski in *Kingsway General Insurance Co. v Gore Mutual Insurance Co.* (with support in obiter from the Ontario Superior Court and the Court of Appeal for Ontario), the decision of Arbitrator M. Guy Jones *in Liberty Mutual Insurance Co. v Markel Insurance Co.*, and the decision of Arbitrator Torrie in *TD General Insurance Co. v Pilot Insurance Co.*

The issue which troubles me relates to "regular use". I am obliged to follow the decision of Justice Brown in *Zurich Insurance Co. v The Personal Insurance Co.* In that case, the claimant had driven 13 different vehicles over some 3.5 months. While he had not driven the specific vehicle involved in the accident on any prior occasion, he had driven a variety of vehicles for the company on a total of 28 occasions.

The court noted that the SABS does not define the term "regular use". While there is some authority to the effect that regular use must be "habitual, normal and recurred uniformly according to a predictable time and manner", there is also law to the effect that constancy of use is not required to make the use "regular". Regular use has been found in the case of a part-time limousine driver who used a vehicle several days each month over a period of some 1.5 years,

a pattern of use which the arbitrator described as "erratic" and "not predictable". [As an aside, I would observe that this would involve use of a vehicle on a total of at least 54 occasions or more (3 times monthly times 18 months) and usage over an extended period of time (some 18 months)].

The court noted that the arbitrator concluded that there was sufficient frequency of use and sufficient regularity of use for the claimant to be found a "regular user". The claimant's use of the vehicle could not be characterized as "irregular at best and out of the ordinary". The court upheld the arbitrator's decision by reason of the frequency and regularity of use.

"Regular use" is a concept which invites an examination of the person's pattern of use of a vehicle over the period of time leading up to the accident in order to understand and to characterize the nature of the use "at the time of the accident". Regularity of use generally connotes use on more than one occasion. Courts and arbitrators have looked at the pattern of use, amongst other evidence, to ascertain whether, at the time of the accident, the vehicle was made available to the claimant for "regular use".

I have considered various sources which define "regular".

Dictionary.com defines regular as "usual; normal; customary".

The Online Cambridge Dictionary defines regular as "happening or doing something often; usual or ordinary."

Omar gave evidence to the effect that the Honda vehicle insured by Gore may have been used for business purposes to transport clients/patients to assessments once or twice monthly (which could be as few as 2-4 times) and no more than 5 – 6 times by the time of the accident which gives rise to this proceeding. This includes Omar's use of the vehicle for this purpose and Anwar's use of the vehicle for the same purpose. He described the vehicle usage in this regard as "very random". Omar gave evidence that, at the time of the accident, his need to use the Honda vehicle to transport clients to and from medical assessments was "very, very rare".

Furthermore, my analysis is focused on the time of the accident and a reasonable period of time leading up to the time of the accident. In this case, Anwar's use of the Honda vehicle, be that 2 or 3 times including the accident, may have been for as little as 30 days and as much as almost 2 months. It was far from certain that Anwar would be employed or engaged going forward. It was far from certain as to the frequency or regularity of vehicle usage going forward. While I am not ruling out consideration of facts, circumstances and events occurring after the time of the accident, the evidence must be much clearer than the evidence before me in this case. There was no consistent evidence that, but for the accident, Anwar could have expected part-time employment as a driver or steady work as a part-time independent contractor / driver.

I find that Anwar's use of Omar's vehicle was irregular at best and out of the ordinary. Indeed, if we look at the overall use of Omar's vehicle, it would appear that it was regularly used as a private passenger vehicle by Omar. He drove the vehicle to and from work. He may have used the vehicle on 2 or 3 occasions to drive clients to and from medical assessments. He may have asked Anwar to do the same on 2 or 3 occasions. The predominant use of the vehicle was personal. Omar use the vehicle regularly. Omar's use was irregular.

Counsel for Wawanesa submitted that regularity of use should be considered in the context of Omar's business. As a starting place, I do not believe there is evidence before me as to the total number of assessments arranged by or through Omar or his companies [so as to put the 5-6

uses of the Honda vehicle into context as against other assessments for which the insurers paid for or provided transportation]. Moreover, I do not think the law which I have reviewed supports this submission. The focus is on the "individual's regular use" and not on how that use fits within the structure, organization or activities of the "corporation, unincorporated association, partnership, sole proprietorship or other entity" which grants use of the vehicle.

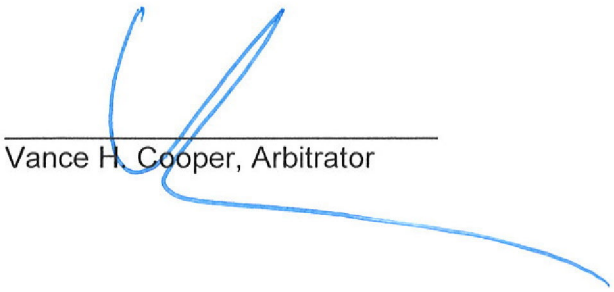
Considering the evidence and applying the law, I cannot find that the vehicle insured by Gore was being made available for Anwar's regular use at the time of the accident of August 28, 2014. To put the matter another way, Wawanesa has failed to discharge the onus or burden of proof as it has failed to prove that Anwar's use of the Honda vehicle at the time of the accident of August 28, 2014 was regular.

As a result, Wawanesa, having admitted priority by reason of the claimant and the Wawanesa insured being spouses, is the higher priority insurer responsible to respond to claims for statutory accident benefits on the part of Anwar arising from the motor vehicle accident of August 28, 2014.

I remain seized of this matter to address issues such as the quantum of reimbursement, interest, the quantum of costs and which party has the obligation to pay costs. I order that Wawanesa pay the costs of the Arbitrator in accordance with the terms of the executed Arbitration Agreement.

I am most appreciative of the efforts of counsel and for their courtesy and cooperation extended to me and to each other from the inception of the Arbitration through to its conclusion and wish to thank counsel for their thoughtful, comprehensive and intelligent submissions.

Dated at Toronto this 13th day of July, 2017.



Vance H. Cooper, Arbitrator