IN THE MATTER of the *Insurance Act,* R.S.O. 1990, c.I.18, and Regulation 283/95 as amended;

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

AND IN THE MATTER of an Arbitration

B E T W E E N :

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

- and –

ACE INA INSURANCE

Respondent

A W A R D

Counsel:

Kevin Mitchell and Kathleen O'Hara

Counsel for the Applicant, Economical Mutual Insurance Company

Kevin Adams and Brian Sunohara

Counsel for the Respondent, ACE INA Insurance

Issues:

1. Economical Mutual Insurance Company ("Economical") seeks indemnification pursuant to a priority dispute for statutory accident benefits that it paid to its insured, Andrees Ahmed, arising from a single vehicle motor vehicle accident which occurred on May 20, 2009. ACE INA Insurance ("ACE INA") initially disputed priority (though ACE INA ultimately accepted priority responsibility as reflected in a letter from its counsel dated March 9, 2011 (with such responsibility taking effect on or before April 8, 2011)).

2. The issue for determination is whether Economical's failure or refusal to launch an application to the Workplace Safety and Insurance Act Tribunal (WSIAT) has any implications or effect on the amount to which Economical would otherwise be entitled to indemnification from ACE INA. To put the issue another way, does Economical's failure or refusal to launch an application to WSIAT in a timely fashion render its payment of statutory accident benefits from some point in time to be unreasonable and therefore not subject to indemnification.

Facts:

3. Economical provided insurance coverage, including statutory accident benefits coverage, to Mr. Ahmed pursuant to a standard motor vehicle liability policy respecting a private passenger motor vehicle

4. On or about May 20, 2009, Mr. Ahmed was a passenger in a 2002 Freightliner tractor trailer which was operated by a Mr. Virk and apparently owned by Simran One Enterprises Ltd. (though apparently registered to Light Speed Logistics Inc. (an Alberta company) and plated and insured through Light Speed Logistics with ACE INA).

5. Mr. Ahmed apparently sustained injuries and applied to Economical for statutory accident benefits. Mr. Ahmed's completed application for statutory accident benefits was received by Economical on July 24, 2009.

6. The claimant was, at all material times, represented by counsel. His counsel sent a demand letter on July 10, 2009 to Mr. Virk (with a copy to ACE INA presumably as Mr. Virk's liability insurer), evidencing an intention to commence an action of bodily injury as against Mr. Virk. A copy of this letter was ultimately provided to Economical under cover of March 4, 2010.

7. Economical retained an independent adjuster who took a detailed statement from Mr. Ahmed on June 29, 2009 in the offices of Mr. Ahmed's counsel.

8. As a result of the substance of the information contained within Mr. Ahmed's statement, Economical came to appreciate by July 2, 2009 that an issue existed as to whether Mr. Ahmed was entitled to receive benefits under the Workplace Safety and Insurance Act (WSIA). Economical wrote to the claimant on July 2, 2009 outlining the provisions of the Statutory Accident Benefits Schedule relating to the WSIB exclusion and requesting that the claimant execute an assignment of WSIB benefits in favour of Economical.

9. The assignment was ultimately executed by the claimant and approved by the WSIB.

10. Economical began the payment of statutory accident benefits on or about August 19, 2009 and continued to adjust the claim and make payments until February 23, 2011. As indicated, ACE INA subsequently accepted priority responsibility in this regard and assumed responsibility for the adjustment of the claim commencing at some point on or before April 8, 2011.

11. ACE INA, as the statutory accident benefits insurer, launched its application to the WSIAT under cover of May 30, 2011. According to the documentation filed, the application was made on notice to the claimant (through his counsel). No notice appears to have been given to Mr. Virk, Simran One Enterprises Ltd. or Light Speed Logistics Inc. (all but Simran One Enterprises Ltd. being defendants in the bodily injury action described below).

12. The claimant commenced a bodily injury action by statement of claim issued June 29, 2011 in Toronto. The defendants to that action were Mr. Virk, as operator, and Light Speed Logistics Inc., as owner. Light Speed Logistics Inc. is described as an Alberta company.

13. On September 21, 2011, the claimant and ACE INA entered into minutes of settlement such that the WSIAT application, bodily injury court action and accident benefits claim made against ACE INA were all settled. The claimant agreed that he was a worker in the course of his employment, employed by a Schedule I employer at the time of the accident and was not entitled to commence an action against a Schedule I employer or the director, executive officer or worker employed by any Schedule I employer.

14. The claimant executed a full and final release and settlement disclosure notice in favour of ACE INA in relation to his claim for statutory accident benefits. In addition, the claimant executed a full and final release respecting his bodily injury claim and the court action in favour of Mr. Virk and Light Speed Logistics Inc.

15. I note that Simran One Enterprises Ltd. was not named as a defendant in the bodily injury court action nor was it named in the release. Similarly, it does not appear that notice of the WSIAT application was given to Mr. Virk, Light Speed Logistics Inc. and Simran One Enterprises Ltd. so that their positions in relation to the issues which were the subject matter of that application are unknown.

16. At the risk of oversimplification of the careful and thoughtful submissions of counsel for ACE INA, ACE INA takes the position that Economical's failure or refusal to pursue a viable WSIB defence impacts on Economical's ability to recover indemnification by reason of their admittedly successful priority application. While it is conceded by ACE

INA (properly so, I might add) that Economical had no legal duty to pursue such a defence, their failure to do so is at their peril. In effect, ACE INA takes the position that such conduct (or lack of action) renders Economical's payment of statutory accident benefits after a point in time (ACE INA suggests this should be 6 months following Economical's receipt of the completed application for accident benefits) to be unreasonable and, thus, not the subject of indemnification despite the acknowledgement of priority by ACE INA.

17. As an arbitrator constituted under the Insurance Act, Regulation 283/95 made thereunder, and pursuant to the Arbitration Act, 1991 (specifically section 31), I am authorized to decide the dispute in accordance with law, including equity, and may order, inter alia, equitable remedies. The parties are in agreement on this aspect of the matter.

18. ACE INA urges me to decline to order indemnification of statutory accident benefits paid to or for the benefit of Mr. Ahmed and other expenses properly the subject of indemnification by reason of the priority dispute after a point in time (suggested to be six months after receipt of the completed application), on the basis of reasonableness, fairness and/or equity.

19. In order to provide a context for the analysis that follows, reference should be made to Section 59 of the SABS in effect at the time of the accident which gives rise to this matter. The entire section is reproduced as follows:

WORKERS' COMPENSATION BENEFITS

59. (1) The insurer is not required to pay benefits under this Regulation in respect of any insured person who, as a result of an accident, is entitled to receive benefits under any workers' compensation law or plan. O. Reg. 403/96, s. 59 (1).

(2) Subsection (1) does not apply in respect of an insured person who elects to bring an action referred to in section 30 of the *Workplace Safety and Insurance Act, 1997* so long as the election is not made primarily for the purpose of claiming benefits under this Regulation. O. Reg. 403/96, s. 59 (2); O. Reg. 281/03, s. 30 (1).

(3) If a person is entitled to receive benefits under this Regulation as a result of an election made under section 30 of the *Workplace Safety and Insurance Act, 1997*, no income replacement, caregiver or non-earner benefit is payable to the person in respect of any period of time before the person makes the election. O. Reg. 403/96, s. 59 (3); O. Reg. 462/96, s. 9; O. Reg. 281/03, s. 30 (2).

(4) If a person who would be entitled to benefits under this Regulation in the absence of subsection (1) elects to bring an action referred to in section 30 of the *Workplace Safety and Insurance Act, 1997* and there is a dispute concerning the insurer's liability to pay an expense for a vocational rehabilitation program that the person was attending at the time of the election and continues to attend, the insurer shall pay the expense pending resolution of the dispute. O. Reg. 403/96, s. 59 (4); O. Reg. 281/03, s. 30 (3).

(5) Despite subsection (1), if there is a dispute about whether subsection (1) applies to a person, the insurer shall pay full benefits to the person under this Regulation pending resolution of the dispute if,

(a) the person makes an assignment to the insurer of any benefits under any workers' compensation law or plan to which he or she is or may become entitled as a result of the accident; and

(b) the administrator or board responsible for the administration of the workers' compensation law or plan approves the assignment. O. Reg. 403/96, s. 59 (5).

20. In *Wawanesa Mutual Insurance Company v. Old Republic Insurance Company*, (October 15, 2009), Arbitrator Jay Rudolph was asked to determine whether Wawanesa was entitled to dispute priority in view of a potential WSIB defence. Put another way, did Wawanesa have to make an application to WSIAT before pursuing priority against Old Republic? Arbitrator Rudolph ruled that Wawanesa did not have to make an application to WSIAT for pursuing priority against Old Republic. I agree with Arbitrator Rudolph's reasons in that regard.

21. There was a second issue as to whether Wawanesa could recover indemnification prior to determination of the Section 59 defence issue. Arbitrator Rudolph determined that if Old Republic was found to be the priority insurer, Wawanesa could recover indemnification of accident benefits paid by it prior to the Section 59

defence being determined. Once again, I am in agreement with the reasons expressed by Arbitrator Rudolph.

22. Arbitrator Rudolph noted that his "decision in this case should not be seen as commenting on whether or not Old Republic would have or might have a right to pursue a claim for restitution (or some other claim) against Wawanesa in the event that Old Republic is determined to be the priority insurer. Old Republic reimburses Wawanesa for the amounts of statutory accident benefits that Wawanesa has paid to its insured and if it is later determined that Mr. Narusevicius was a worker at the time of the accident for a Schedule I employer and was in the course of his employment at the time of the accident".

23. Counsel for ACE INA asserts, in the matter before me, that there is no need for ACE INA to resort to a claim for restitution. Rather, it is appropriate for me to exercise my equitable authority and deny full recovery to Economical.

24. Counsel for ACE INA points to the decision of Arbitrator Kenneth J. Bialkowski in *State Farm Automobile Insurance Company v. Aviva Insurance Company of Canada,* (January 12, 2009*)*. In that matter, State Farm sought indemnification from Aviva by reason of loss transfer (as distinct from priority dispute). Aviva took the position that State Farm had no jurisdiction to pursue loss transfer indemnification as the claimant was entitled to WSIB benefits (alleging that State Farm had a successful, but not yet asserted, WSIB defence) or, in the alternative, that the loss transfer claim and arbitration be stayed, pending State Farm launching an application to WSIAT which should be heard and determined before the stay might be lifted.

25. For reasons with which I am in agreement, Arbitrator Bialkowski ruled that where the provisions of Section 59(5) of the SABS are satisfied, loss transfer claims are permitted to proceed.

26. Arbitrator Bialkowski referred to and relied upon the decision of Arbitrator Guy Jones in *Royal & SunAlliance Insurance Company v. Aviva Insurance Company of Canada* (June 2006). In that case, Arbitrator Jones held that once the provisions of Section 59(5) of the SABS have been complied with, Aviva (which had paid statutory accident benefits and sought loss transfer indemnification), was in a position to pursue the claim for loss transfer indemnification against RSA (in spite of RSA's assertion that there was a viable WSIB defence).

27. In the course of Arbitrator Bialkowski dealing with the jurisdictional issue in *State Farm Automobile Insurance Company v. Aviva Insurance Company of Canada*, he stated "I recognize that the quantum of State Farm's loss transfer claim remains a live issue in the outstanding arbitration proceeding. The quantum of recovery will be the subject of an analysis of the conduct of the State Farm adjudicators in the particular circumstances of this case and the body of case law dealing with the "reasonableness" of payments".

28. Counsel for the parties to the instant arbitration have not provided me with any further decisions or awards from Arbitrator Rudolph, in *Wawanesa Mutual Insurance Company v. Old Republic Insurance Company*, Arbitrator Bialkowski, in *State Farm Automobile Insurance Company v. Aviva Insurance Company of Canada* or Arbitrator Jones, in *Royal & SunAlliance Insurance Company v. Aviva Insurance Company of Canada*, to support or negate the assertion that the failure on the part of the "paying" insurer to assert its WSIB defence, launch an application to the WSIAT and/or proceed

to and through a full hearing at WSIAT can or should impact on the quantum of indemnification (whether in the context of a priority or loss transfer claim).

29. ACE INA submits that while Section 59(5) of the SABS allows for Economical to pay statutory accident benefits to the claimant, pending resolution of the dispute as to whether Section 59(1) applies, this does not allow Economical to do so indefinitely. While I agree with this submission in general terms, it is an application of the principle that “hindsight is 20/20” to assert that Economical could have or should have done so such that within 6 months of its receipt of a completed application for accident benefits, the AB claim would have been brought to a conclusion.

30. I have a number of difficulties with this argument. The actual or potential defendants in the contemplated bodily injury court action should be notified and parties to the WSIAT application. Counsel for Economical submits that if claims were made against the manufacturer of the tractor or trailer or both, the vendor of the tractor or trailer or both or the road authority (on the theory that there was some defect in the tractor, the trailer or the condition of the roadway), those claims may well not be subject to a WSIB defence. Moreover, it could be argued to be unduly harsh to require a claimant to advance a bodily injury court action at an early date when issues such as the seriousness or permanence of their injuries are unknown and not yet discovered.

31. Furthermore, on a careful review of the documentation filed before me, it was far from clear or certain that Mr. Ahmed was not entitled to make the election to pursue his bodily injury action and thereby receive the benefit of statutory accident benefits. If Mr. Ahmed was a self-employed tractor trailer driver, he would not be a worker employed by a Schedule I employer nor would he be a Schedule I employer (without opting in for WSIB coverage). In this regard, I note the following:

(a) In the application for accident benefits, Mr. Ahmed indicated that he did not file a claim with the WSIB. He indicated that he was self-employed and described his employer as Andrees Ahmed.

(b) In the statement dated June 29, 2009, Mr. Ahmed indicated that he was in the course of his employment. He indicated Mr. Virk's company to be Light Speed Logistics Inc. He indicated that he was employee of Mr. Virk at Light Speed Logistics Inc. and set out a Calgary, Alberta address while providing a Mississauga, Ontario address for Mr. Virk. He indicated Mr. Virk reported this claim to the WSIB.

(c) Detailed claim notes prepared by Economical and/or its independent adjuster indicate, as at August 17, 2009, that Mr. Ahmed had not elected to receive benefits from the WSIB. If an individual does not sign and return such an election form, the WSIB treats the matter as abandoned.

(d) According to the same claim notes, a variety of financial statements, bank statements, personal income tax returns and GST returns were reviewed in early August 2009. Reference is made to an Ontario company (2125821 Ontario Inc.). As of August 5, 2009, Economical and/or its independent adjuster note that the "financial documents received clearly indicate this claimant is self-employed: 2125821 Ontario Inc. c/o Andrees Ahmed".

(e) On August 19, 2009, Economical and/or its independent adjuster sent the financial documents to an accountant requesting a calculation of the self-employed income replacement benefits.

31. The same “hindsight is 20/20” criticism can be made in response to a submission made on behalf of Economical to the effect that ACE INA could or should have immediately accepted priority and thus been in a position to launch an application to the WSIAT. Economical initiated priority dispute by sending notice to the claimant and to ACE INA’s independent adjuster under cover of August 21, 2009. There was a follow-up request made in this regard under cover of December 11, 2009. Neither request appears to have received any form of reply from or on behalf of ACE INA.

32. Once counsel were retained for Economical, the demand made by counsel for Economical under cover of February 4, 2010, was acknowledged by counsel for ACE INA on February 16, 2010 and this proceeding ensued.

33. Counsel for ACE INA properly inquired regarding the existence of optional benefits under Section 27 of the SABS. If the Economical policy contained such optional benefits, then Economical could not have pursued the priority dispute pursuant to Section 27(3.1) of the SABS and Policy Change Form 47 (OPCF 47) which was required to be issued by insurer in favour of its policyholder under such circumstance.

34. Documentary productions ultimately put this issue to rest by October 21, 2010 and, following negotiations between counsel in the matter of some 4.5 months, priority was acknowledged on behalf of ACE INA in favour of Economical.

35. In the circumstances, could it be reasonably expected for ACE INA to have accepted priority in response to the first notice of August 21, 2009 (so that ACE INA could have pursued the course of conduct which it ultimately pursued after accepting priority)? In my view, that would hold ACE INA to too high a standard of conduct. I am not suggesting that ACE INA could have or should have proceeded any faster once counsel were retained by ACE INA in February 2010. I am mildly troubled by ACE INA’s

failure to respond to the notice between August 21, 2009 until counsel were retained by the insurers (though I do not find that anything turns on this).

36. It is common ground between the parties that Economical did not have a legal obligation to launch an application to WSIAT. Section 59(5) of the SABS is permissive. I am not prepared to find, on the record before me, that Economical's failure or refusal to launch an application to WSIAT was unreasonable or (to put the matter somewhat differently), that Economical's ongoing adjustment of the accident benefits claim and its payment of statutory accident benefits was unreasonable.

37. I imagine that there are circumstances where an insurer in the position of ACE INA could challenge the reasonableness of ongoing payment of statutory accident benefits by an insurer in the position of Economical on the basis that Economical could have or should have conducted surveillance of the claimant or performed one or more insurer examinations or otherwise taken a more aggressive stance in the adjustment of the claim. I imagine that there may be occasions where such arguments, supported by evidence, can and should limit the amount of indemnification. Similarly, there may be circumstances where it is plain, obvious and clear that a claimant's election to receive statutory accident benefits (rather than to receive WSIB benefits) is made primarily for the purposes of claiming benefits under the SABS (rather than for purposes of pursuing a bona fide bodily injury claim in negligence). However, I find that the evidence in the record before me fails to meet what would be a significant evidentiary burden.

38. That said, I believe the principal deficiency which gives rise to the instant arbitration lies with the legislative and regulatory provisions. Unless and until the Legislature imposes a positive obligation on the first insurer receiving a completed application for statutory accident benefits to launch an application to WSIAT, in the

appropriate circumstances, the responding insurer is left in the challenging and unenviable position of essentially contesting the reasonableness of the adjustment and adjudication of the claim by the first insurer. This inevitably leads to second guessing and criticism of 20/20 hindsight. While I imagine that there are cases where proof of unreasonableness can be established, the instant matter is not one such case.

39. I confess that in coming to my decision, I have had to wrestle with some very serious concerns and reservations. Automobile insurers in the Province of Ontario are members of a relatively small community and have responsibilities not only to their policyholders and their shareholders but one to another. Where the facts and circumstances make it clear to an accident benefits insurer that a claimant's election to pursue a bodily injury action is made primarily for the purpose of claiming statutory accident benefits, then such insurer should launch an application to WSIAT. This application need not necessarily wait for the issuance of the bodily injury statement of claim. The mere launching of the application to WSIAT may prompt the claimant to issue a statement of claim (or explain why it is premature to do so, who the intended defendants are, etc.). If the claimant should properly be receiving WSIB benefits, then the application to WSIAT may prompt the claimant to acknowledge same or the WSIAT may order same. Under such circumstances, the financial responsibility for the claim should be visited on the WSIB and not on the automobile insurance community.

40. This course of action should be pursued by every responsible member of the Ontario automobile insurance community (without regard for issues of priority or loss transfer). Presumably, an insurer will incur costs and expense in this regard on some occasions and be the benefactor of such efforts on other occasions. Moreover, there is certainly an argument to be made in the context of a priority dispute that the legal costs and expenses of launching and pursuing a WSIAT hearing and decision can and should

be borne by the responding insurer in the context of a priority dispute. There is an argument to be made that those expenses are similar in kind and quality to surveillance, insurer exams, independent adjusting expenses and the like.

41. By the same token, if the insurer responding to a priority dispute wishes to challenge the reasonableness of paying statutory accident benefits in the face of what is asserted to be a complete defence to the claim (the WSIB defence) or to otherwise challenge the reasonableness of one or more payments, such insurer should provide an Arbitrator with a complete evidentiary record. Arguably, evidence (whether from an expert or otherwise) needs to be adduced as to the standard of care expected of the reasonably prudent accident benefits insurer and of the reasonableness (or not) of claims handling decisions.

42. Indeed, I can imagine circumstances where an insurer, in the position of Economical, advances a WSIB defence, pursues an application to and through a hearing at WSIAT only to be unsuccessful. If such insurer has a successful priority claim, will the responding insurer (in the position of ACE INA) accept such expenses as reasonable? Once again, a fulsome evidentiary record needs to be assembled and put before the Arbitrator.

ORDER:

43. I hereby order that ACE INA cannot deny repayment of any portion of the indemnity amount demanded by Economical and otherwise properly recoverable by reason of Economical's handling of the underlying SABS claim (specifically, Economical's decision not to do more in relation to the WSIB defence or to pursue an application to WSIAT).

44. The parties agreed that the issue of quantum of indemnification remains to be dealt with. As a result, if the hearing needs to be resumed for this purpose (dealing with the appropriateness of indemnification for reasons apart from the issues decided herein), then arrangements should be made to schedule a pre-arbitration teleconference so that we can work through the issues in that regard and schedule a hearing for such purpose.

45. On the assumption that the parties are able to resolve the issue of the quantum of indemnification without a further hearing, I am prepared to receive submissions as to the quantum of costs. In light of Economical's success on the issue arbitrated before me, Economical is entitled to its costs of the arbitration in accordance with the terms of the Arbitration Agreement and ACE INA is responsible for the costs of the arbitration (my fees and expenses associated with the conduct of the arbitration).

46. I am indebted to counsel for their cooperation throughout the arbitration process, their comprehensive and thoughtful submissions in advance of and at the hearing and their advocacy at the hearing.

Dated at Toronto, this day of December, 2011.

Vance H. Cooper, Arbitrator