IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c. I.8, s 268, 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 between:

ECONOMICAL INSURANCE COMPANY

Applicant

And

FEDERATED INSURANCE COMPANY OF CANADA

Respondent

AWARD

COUNSEL

Angelo Sciacca, counsel for the Applicant, Economical Insurance Company (hereinafter called "Economical").

Kevin S. Adams, counsel for the Respondent, Federated Insurance Company of Canada (hereinafter called "Federated").

BACKGROUND

This matter comes before me pursuant to s. 268 of the *Insurance Act*, R.S.O. 1980, c. I8 as amended, Ontario Regulation 283/95 and the *Arbitrations Act*, S.O. 1991, c. 17 as amended.

This is a priority dispute between two insurers with respect to which insurer is responsible for paying statutory accident benefits arising out of an accident on July 4, 2022 and as well what reimbursement, if any, should be awarded if priority is found to rest with the Respondent.

On July 4, 2022 the claimant was a pedestrian when she was struck by an Uber that was insured by Economical.

Federated insures a GMC cube van. It is alleged that the claimant's spouse had regular use of the

cube van through his employer, Sax Electrical.

Economical argues that priority rests with Federated on the basis that the claimant's spouse had regular use of the Federated insured vehicle and that it was available to the spouse at the time of the accident. Economical argues that this makes the claimant a deemed named insured under the Federated policy pursuant to s. 3(7)(f) of the Statutory Accident Benefits Schedule.

Federated denies that its insured vehicle was available to the claimant's spouse at the time of the accident and takes the position that Economical is the proper insurer in terms of priority. Federated also takes issue with various claims for reimbursement being made by Economical in the event priority shifts to Federated.

PROCEEDINGS

The parties selected me on consent as their arbitrator pursuant to Regulation 283/95. Various pre-hearings were held. The matter proceeded to a written hearing and the parties also made oral submissions although no witnesses were called.

The following documents were filed as part of a joint document brief:

- OCF-1 dated August 11, 2022
- OCF-2 dated August 23, 2022
- OCF-3 dated August 11, 2022
- Statutory Declaration of the claimant dated August 22, 2022
- Various AutoPlus searches and reports
- EUO transcript of the claimant dated November 4, 2022
- EUO transcript of the claimant's spouse dated February 10, 2025
- EUO transcript of the owner of SAX Electrical dated February 10, 2025
- Timesheet of the claimant's spouse for July 4, 2022
- Company vehicle policy (Sax Electrical) signed by the claimant's spouse dated August 24, 2020
- Federated-Insured Master Vehicle Schedule September 14, 2021 to September 14, 2022
- Federated Certificate of Insurance
- Section 50 Benefits Statement from Economical dated March 3, 2025

- Various invoices with respect to claims for indemnification being made by Economical relating to payments made to the claimant
- Release and Settlement Disclosure Notice of the accident benefit file dated August 21, 2025
- Davis Martindale IRB calculators with respect to income replacement benefits paid
- Letter from Economical to claimant dated July 3, 2023.

FACTS

The claimant was born on December 19, 1992. She was married to her husband on December 17, 2021. Her husband was born June 12, 1990.

Dan the claimant's husband prior to their marriage would spend weekends at his parent's home in Bradford. Once the couple were married they lived together in Brampton.

The accident occurred on July 4, 2022 at approximately 2:00 p.m. to 2:10 p.m. It took place at the intersection of Brookview Road and McLaughlin Road in Brampton. The claimant was a pedestrian. While she was crossing the street she was struck by the Economical insured vehicle.

The Applicant submitted an OCF-1 to Economical dated August 11, 2022. Economical paid statutory accident benefits to the claimant including an income replacement benefit, medical and rehabilitation benefits and also paid various costs of assessments under s. 44 and incurred expenses relating to transportation and securing clinical notes and records.

The underlying accident benefit file settled for $35,000 on August 21, 2025. The Settlement Disclosure Notice shows that $5,000 was allocated to income replacement benefits and $30,000 towards medical benefits.

Economical claims in terms of reimbursement a total of $111,418.60 together with interest. That number is broken down below:

1. Cost of assessments: $34,875.21
2. IRB: $22,915.43
3. Med rehab: $53,627.96

The cost of assessments noted above are further broken down as follows:

1. Section 44: $25,670
2. Transportation: $4,126.82
3. Costs of securing clinical notes and records: $1,085.65

The Notice of Dispute was sent out to Federated and the claimant on September 15, 2022 and the Notice of Arbitration was issued on April 11, 2023. Wawanesa Insurance Company was originally included in this arbitration but they were released by order dated March 3, 2025.

At the time of the accident the claimant had a G2 licence. However, she was not insured under any motor vehicle liability policy and did not in fact own a motor vehicle herself. She generally took a bus to and from work.

The claimant's husband Dan was employed as an electrician with Sax Electrical Services. He had been so employed for some 12 to 13 years at the time of loss.

Sax Electrical is co-owned by Dan's uncle Jim and his father Robert.

Dan's work hours were generally 7:00 AM until 3:00 or 3:30 PM, five days a week. However, Sax Electrical describes itself as a 24/7 company which I understand to mean from the evidence that electricians would be available for calls 24 hours a day. Dan would work some weekends if needed.

Dan was provided a white GMC Savannah work van from Sax. This is a GMC cube van and was insured under a policy with Federated. The named insured under that policy was Sax Electrical Services. Dan was a listed driver on that policy, number 3048420. The policy was in full force and effect on the date of loss.

As the parties' evidence differed somewhat at their examinations under oath, I will summarize the relevant portions of their EUO separately.

Dan: Spouse

Dan's evidence was that he had permission to drive the GMC van home every day of the week. He had permission to keep it overnight at his home. He would drive the vehicle to work (usually a work site) with his tools. He would use it during the day. He would then drive it home and park it in his driveway until he went to work the next day.

Dan also gave evidence that he would also use it for personal use. For example, to buy groceries, but only if he was on his way home from work.

Dan's evidence was that before he was married on the weekends he would drive the work van on Friday to his parent's home in Bradford. He would stay there for the weekend. The van would be in the driveway. However he would not use the van on the weekend. He used a Jeep that was available to him. Then on either Sunday night or Monday morning he would take the van and drive back to Brampton.

However while the evidence is not abundantly clear it would appear that after Dan married he resided with his spouse in Brampton and the van would stay in the driveway there 7 days a week unless he went to visit his parents. It is unclear how often subsequent to his marriage Dan would visit his parents on the weekend. The evidence indicates that wherever Dan was the van would

be with him either being used for work or parked in the driveway. Dan did not have access to any other vehicles at the time this accident occurred.

Dan gave evidence that he and the claimant lived in a basement apartment in Brampton. There was only 1 parking space available. The parking space was used for the work van.

Dan confirms his work hours were from 7:00 until approximately 3:30. Generally, once he returned to work he would not use the work van again but did state that if there was some emergency he would use the van.

He had the keys to the van with him at all times and he confirms that the white GMC Savannah was his dedicated vehicle.

When asked whether he had permission to regularly use the company's vehicle after work Dan's answer was

> "Not necessarily, no."

(See question 49.) He noted that he needed the vehicle to be ready to go out if there was a service call after hours. Otherwise, he believed that it was prohibited for employees to use the company vehicle after work.

On the day of the accident involving his spouse Dan's evidence was that his wife had agreed to come home from work early (usually she was home after 5:00) in order to meet to arrange for insurance on a vehicle that was being transferred to her from Dan's parents.

Dan was home by 2:00 that day. He was home when he heard about the accident. He confirms that he had finished work for the day and had no intention of returning to work. The van was parked in the driveway.

When Dan received the call advising him about his wife’s accident Dan drove the van to go and help and see her.

EUO: Robert: Owner of Sax

Robert confirms that Dan is his son Robert is one of the owners of Sax Electrical. With respect to his son's hours, he says he would work from 7:00 until 3:00 normal hours but that the company also does a lot of overtime and weekend work and that the company is a 24/7 company.

With respect to the use of vehicles Robert's evidence was that in the area that they were in there were a large number of break-ins and trucks were being stolen. Therefore, the company made a decision that rather than keep the trucks at the shop where these break-ins and thefts were occurring, that the employees be allowed to take the vehicles home. The employees who were assigned trucks were permitted to take them home for the week.

With respect to Dan, Robert advised that Dan would sometimes be at his spouse's-to-be house

and sometimes live at his parents' home. Dan used the company van for work and to go home. Dan was also a part-time driver on two vehicles that Robert owned. On the weekends he would use the Jeep as a part-time driver. Both Dan and Robert gave evidence that the Jeep was a more comfortable vehicle to drive than the work truck.

Robert also confirmed that before Dan married on the weekends he would come to their home in Bradford and park the van in the driveway. He would then drive the Jeep on the weekend but then return to Brampton on Sunday or Monday with the van.

However, after Dan and the claimant married and they started living together then the truck would have been at Dan's house seven days a week. That was part of the reason that Robert was gifting a vehicle to the claimant (an older Mercedes) and why she needed to secure insurance on that in or around the time of the motor vehicle accident.

With respect to personal use Robert's evidence was that the employees were not allowed to use the truck for personal errands. It was against the company policy.

However, Robert acknowledged that sometimes the trucks were used for personal use. For example, if the truck was the last vehicle in the driveway it would be a "pain" to back it out then get the other vehicle out if they were just running to the grocery store to get a loaf of bread. Robert's evidence suggests that that type of personal use would be tolerated. However, Robert's evidence also was that if the employee used the truck to take it on a camping trip or go to Blue Mountain to ski then that would be inappropriate personal use. The vehicle was not to be used for social things but could be used to run out to the grocery store.

Evidence of the Claimant

With respect to Dan's work hours the claimant's evidence was that he usually works Monday to Friday but sometimes if they have a contract that requires it he will work Saturday and overtime.

She confirmed that Dan would bring the truck home because he would have to leave early in the morning around 4:00 or 4:30 to get to work and it would be hard for him to go back and forth and bring the vehicle back.

On the day of the accident Dan was working and he had come home early because they were going to be arranging for insurance on a vehicle that was being gifted to her. As he had come home early from work, sometime around 12:00 or 1:00, he messaged her advising that she should leave early that day so that she could come home and they could deal with the car insurance together.

She confirms that the accident happened at 2:10 that day.

The claimant also confirmed that sometimes her husband would have midnight calls from his employer and that he took responsibility for that because it was his family's business. So sometimes in the middle of the night he would have to go. Therefore, one of the reasons for having the van in the driveway was so he would not have to go and pick it up in order to go for

the emergency call (see question 52).

A copy of the Sax Electrical Services Limited: Company Vehicle Policies and Procedures was produced. This particular copy was signed by Dan on August 12, 2020. Under paragraph 4 is the following:

> "The vehicle is not to be used for personal use. You may drive your vehicle to and from work only."

When the accident occurred around 2:10 on July 4, 2022 the work vehicle was parked in Dan's driveway. He had completed work for the day. A timesheet was produced indicating Dan claimed he worked eight hours on July 4, 2022.

REGULAR USE

Relevant Legislation

The key provision relating to this issue between the parties is s. 3(7)(f) of the Statutory Accident Benefits Schedule which provides as follows:

> "(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 the 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 proprietor or other entity."

The parties do not dispute that Dan, had regular use of the Sax work van and that Sax is a corporation that provided that vehicle to Dan for his regular use.

The wording under s. 3(7)(f) that is critical in this case is whether the van was "being made available at the time of the accident".

POSITION OF THE PARTIES

Submissions of Economical

Economical acknowledges that as the claim was submitted to it first, that it bears the burden of proving that priority rests with Federated.

Economical submits that Federated is the priority insurer under s. 268 of the *Insurance Act* as the claimant is a deemed named insured pursuant to s. 3(7)(f) of the SABS. In that regard, Economical submits that there is no dispute that the claimant's spouse had regular use of the Sax Electrical van. Economical submits that that van was being made available to the spouse at the time of the accident and accordingly s. 3(7)(f) is applicable. With respect to the issue of "being made

available", Economical submits that there does not have to be a specific vehicle being made available at the time of the accident to the employee. Nor does the employee have to be operating the vehicle that was being made available to them when the accident occurs.

Economical submits that as long as the accident occurred during an employee's working hours and that some vehicle was available to him from the employer during that time, then it does not matter whether the activity that the individual was engaged in at the time the accident occurred was personal or work-related. Economical relies on the decision of Arbitrator Scott Densem in *Dominion v. Federated* (October 31, 2012).

In the *Dominion* case an 11-year-old was a passenger in a Punjab Auto Sales vehicle insured by Federated. The dealership had some 60 or 70 cars and the father of the claimant drove some of these cars during business hours. After business hours he would drive one home. On the day of the accident the father had given the keys to one of these cars to another individual so that she could drive her son and her brother home. The accident happened on the way home. The father was not at the dealership at the time.

The issue for Arbitrator Densem was whether a Federated insured vehicle was being made available to the father at the time the loss occurred. Arbitrator Densem confirmed that the claimant's father was a deemed named insured under the Federated policy issued to Punjab Auto Sales as he had regular use of a Punjab vehicle that was made available to him at the time of the accident.

In reaching this conclusion Arbitrator Densem relied on the fact that the accident occurred during the claimant's father's work hours. He concluded:

> "As long as the accident occurred during the employee's work hours, the same time that the employer's vehicles were being made available to him, it did not matter whether the activity he was engaged in at the moment the accident occurred was personal or work-related, he was nevertheless a deemed named insured pursuant to section 66(1)(a). It is the terms of the employee's relationship with his employer in respect of access to vehicles that determines whether vehicles are being made available at a particular time."

Economical also relies on the decision of Justice Belobaba in *ACE INA v. Co-operators*, 2009 CanLII 13625. This decision is also relied upon by Arbitrator Densem in the *Dominion v. Federated* decision. In the *ACE v. Co-operators* decision the claimant worked for Enterprise Rent-A-Car as a customer service rep. ACE insured Enterprise Rent-A-Car. The claimant had access to cars in the rental fleet and could use them while working to pick up or drop off customers. However, once the work day was over, the claimant was not permitted to drive any of his employer's vehicles. The accident occurred on a Saturday when the claimant was going downtown in a friend's car. He was not working. Justice Belobaba held that because the employee had finished his shift and was off work at the time of the accident, that the company vehicle was not being made available for his regular use when the accident occurred.

Justice Belobaba gave two examples of a deemed named insured under this regulation where somebody may be provided a vehicle for their regular use at the time of the accident when they were not actually driving the company vehicle.

In the first example he noted that if the employee drives the vehicle to work but stops to buy a coffee at a restaurant and then is struck as a pedestrian, that he would be a deemed named insured under the company vehicle policy.

The second example he gives is when an employee drives the car as a sales rep. He is allowed to take the car home and use it for personal transportation. One Saturday night he leaves the car in the driveway and is a passenger in his friend's car. In those circumstances, Justice Belobaba again felt that the employee would be a deemed named insured under the company's insurer.

Relevant to this case is Justice Belobaba's comments at paragraph 22, set out below:

> "Section 66 is not like a floating charge. It does not confer a portable status that 'remains' with the insured - the status is only conferred at, and for, a moment in time, namely the time of the accident. The employer's insurer is liable to pay accident benefits if and only if at the time of the accident *a company-insured car was being made available to the employee*. Section 66 does not ask whether a 'specific vehicle' is being made available to the employee but whether any vehicle was being made available."

Economical submits that Dan was on call 24/7. On the day of the accident he had returned home early from work and the vehicle was parked in his driveway and he had the keys. His work hours were 7:00 a.m. to 3:00 p.m. or 3:30 p.m. Therefore, argues Economical, with the accident happening at 2:00 , it happened during the claimant's regular work hours.

Economical also points to the timesheet of Dan confirming that he worked eight hours on July 4 and that means the time period covered 7:00 a.m. to 3:00 p.m. and encompassed the time of the accident.

Economical also submits that Dan had authority and control over the van at the time the accident occurred. Economical acknowledges that authority and control alone is not the test with respect to regular use and whether the vehicle is being made available, but it can be used as evidence of availability (see *Intact Insurance v. Old Republic*, 2016 ONSC 3110).

Economical also relied upon the decision of *Murphy v. Savoie, 144 O.R. (3D299OSC) affirmed Court of Appeal 148 O.R. (3D)225.* While this case did not involve a priority dispute Economical submits that the ratio of the case is applicable to the circumstances here.

In that case the claimant’s wife was injured as a pedestrian. Her husband was on his way to work when the accident occurred. He worked as a delivery driver for a flower company. He was the only delivery driver and a company van was made available to him for deliveries on a daily basis throughout the workday. Aviva insured the work van. The issue before the court was whether the

Aviva policy provided coverage to the wife under the OPCF-44R Family Protection Change form.

The facts were that on the day of the accident Emblem Flowers opened at 9:00 a.m. The husband had a flexible schedule but normally he would arrive at work at around 9:30. He did not require permission to take the van and to get the keys in order to make his daily deliveries. The husband went to work on his bicycle on the morning of the accident and he received a phone call about his wife's injuries prior to arriving at work. However the accident occurred after the flower store opened at 9:00.

Justice Morgan who heard the initial motion held that the van was being made available for the husband's use at the time of the accident. The business was open and while he had not yet arrived as the accident occurred during work hours the vehicle was being made available to him.

The Court of Appeal dismissed the appeal. They agreed with the motion judge that the van was available for the husband's regular use any time after the business opened and that meant he had regular use at the time of the accident even though he had not yet got to work.

Economical therefore submits that Federated is the priority insurer.

Submissions of Federated

While Federated acknowledges that the Sax vehicle was regularly used by Dan, Federated disputes that the company vehicle was being made available to Dan at the time of the accident.

Federated submits that based on the evidence of both Dan and Robert and the Sax Electrical Company vehicle use policy, that it was clear Dan did not have permission or authority from his corporate employer to operate the company vehicle at the time of the accident for anything other than work. Federated submits that Dan was prohibited from using the company vehicle for personal use.

Federated submits that to find that the vehicle was being made available to Dan at the time of the accident would in essence be contrary to the reasons of Justice Belobaba in *ACE v. Co-operators* (*supra*). It would result in a finding that there was more or less a "floating charge" over the Sax vehicles and that they were therefore being made available to the claimant every day, all day, including weekends. This conclusion would not be consistent with the case law.

Federated submits that the *ACE v. Co-operators* decision (*supra*) is on all fours with the facts of this case. Federated submits that Dan had finished his shift and had come home and was no longer working. Therefore the vehicle was no longer being made available for him as his work day had ended.

Federated submits that one should not look at what Dan's regular work hours were but whether he was factually working at the time the accident occurred. The evidence is clear he was not. The accident occurred at 2:00 p.m. and the claimant had stopped work and come home by 1:00 p.m. He had no intention of returning to work and he had parked the company vehicle for the day. His working hours were finished. Therefore he was no longer working and no longer

entitled to use the company vehicle and therefore it was not actually being made available to him when the accident to his spouse occurred.

Federated also relies on a decision of Arbitrator Samis in *Wawanesa Mutual Insurance Company v. Peel Mutual Insurance Company* (April 15, 2014). In that case the issue was whether the claimant's spouse had regular use of a company vehicle at the time of the accident. The spouse worked for a company called Bond Securcom. Some two to three months prior to the accident the claimant's spouse had regular use of the company vehicles. He had a vehicle assigned by the company and he was a listed driver on that vehicle. However, a few months before the motor vehicle accident circumstances changed. There was a motor vehicle accident and the vehicle that had previously been assigned to the spouse was no longer available and he began using his own personal vehicle. At the time of the claimant's accident the spouse acknowledges that Securcom had not actually given him another vehicle to use.

Arbitrator Samis concluded that the spouse did not have regular use of a company vehicle. He distinguished between looking at the circumstances at the time of the accident and looking at the time period leading up to the accident. Arbitrator Samis noted that whether a vehicle may have been made available to the spouse months before the motor vehicle accident is not relevant to a determination as to whether a vehicle was actually being made available at the time of the accident.

Federated relies on this in support of their position that looking at customary hours and prior use is not relevant. Rather, Federated submits that I must focus on the actual time of the accident and the evidence is clear that the claimant was not working.

Federated also relies on the decision of Arbitrator Shari Novick in *TD Insurance Company v. The Dominion of Canada General Insurance Company*, 2018 ONSC 2594. The decision of Arbitrator Novick was upheld by Justice Nishikawa.

In that case a school bus driver admittedly had regular use of the school bus during the time she drove the bus to transport children to and from school. The bus was not operated by the bus driver on the weekends. The employee manual provided that unauthorized use of the company vehicle included permission to use the bus for personal use during business hours only.

In that case the accident occurred on a weekend. Arbitrator Novick, upheld by Justice Nishikawa, held that in the circumstances, as the bus driver was not permitted to use the bus outside work hours and the accident occurred on a weekend, that therefore she was not a deemed named insured under the bus company's policy.

Federated submits that the circumstances in this case are the same. Dan was not permitted to use the company vehicle outside of work hours and this accident occurred after he had finished work.

Federated also relies on the decision of Justice Stinson upheld by the Court of Appeal in *Continental Casualty Company v. Chubb Insurance Company of Canada*, 2022 ONCA 1888. In that

case the owner of a company had access to all the various vehicles of the company, all of which were insured by CNA. However, not once had the owner of this company ever actually driven one of the company vehicles. It was argued that it did not matter that he had never driven the vehicle, they were still available to him for his use and that that was the circumstance at the time of the accident.

The Court of Appeal held (as did Justice Stinson) that regular use could not be imputed in the absence of any use up to the time of the accident.

While the owner of the company clearly had control over the fleet of corporate vehicles and that that may mean some of them were theoretically available to him to use at the time of the accident, that does not translate into finding that the vehicle was actually being made available to him when the accident occurred.

Federated relies on this submitting that while theoretically one might argue that the van was available to Dan due to the 24/7 nature of the business, that the fact that it was theoretically open to him is not sufficient to establish a finding that it was actually available to him when the accident occurred. Federated submits that even if Dan was on call or was usually working at that time of day, that he was not actually authorized and did not actually have permission to use the vehicle unless he was working. He was in fact not working and therefore s. 3(7)(b) is not applicable.

Federated notes that the Sax Electrical written policy was clear in that employees were not permitted to drive company vehicles for personal use. There was no written exception to the policy. The policy had been signed by Dan prior to the date of loss. In addition his evidence under oath aligned with the terms of the policy although he didn't actually remember signing the agreement.

Federated also submits that even though Dan "docketed" having worked from 7:00 to 3:00 on the day of the accident that there is no evidence that he was actually paid for those hours.

Lastly with respect to the case of *Murphy v. Savoie (supra)* Federated notes that this case is clearly distinguishable from this priority dispute. The Murphy case involved the OPCF44R which had different wording. In addition the Court of Appeal specifically held in that case that it was not helpful to look at priority decisions involving regular use in determining the issue before them. The court stated

> "In the circumstances of this case, we would not accede to counsel's argument as to the usefulness of the *SABS* jurisprudence. Its purpose is to provide rules to determine priority among insurers, but the purpose of the endorsement is to extend coverage to insureds. These are different purposes. These different purposes provide interpretive context."

Reply

By way of reply, Economical submits that the cases relied upon by Federated are factually distinguishable.

Economical submits that the *ACE v. Co-operators* case is factually different as the employee was only allowed to drive the Enterprise Rent-A-Car when he was on his shift at work. Once his work day was over, he could not drive the car and specifically could not take the vehicle home. In this case Dan was permitted to take the vehicle home.

With respect to the *Wawanesa v. Peel* decision (*supra*) Economical submits that those facts are significantly different as the employee in that case had not had regular use of a vehicle for a few months leading up to the accident and in fact was only using his personal vehicle at the material time.

With respect to *TD v. Dominion* (*supra*) Economical submits that in that case the accident happened on a weekend and that the evidence was clear that the employee bus driver could only operate when they were taking the students to and from school on weekdays. In this case, as Dan was on 24/7 he would not only operate the vehicle during work hours but also for overtime and on weekends if called in. Sax Electrical operated their business on weekends while the bus company did not.

With respect to *Continental v. Chubb* (*supra*) in that case the owner of the company had never once driven the company vehicle prior to the accident while in this case Dan regularly used the commercial vehicle during regular work hours and that his work hours extended not only from 7:00 a.m. to 3:00 p.m. each day, but through the entire week including the weekend.

ANALYSIS AND DECISION

The respondent has conceded that Dan had regular use of the company van. Therefore the issue is whether "the insured automobile was being made available at the time of the accident".

Having carefully reviewed the parties submissions and the case law I agree with Economical that at the time of the accident the claimant's spouse had the company vehicle made available to him for his regular use.

On this issue I find the following facts to be compelling in reaching my conclusion.

Dan had the van in his possession 24 hours a day 7 days a week. It was either parked in his driveway in Brampton or, parked in his parent's driveway in Bradford or he was driving it. While in Brampton Dan had no other vehicle available to him. Clearly the company was aware of this as the company was owned by his father and uncle.

In addition to driving the vehicle to and from work he would drive it to his parent's home on weekends outside of work hours. He would also drive it for some personal business such as picking up groceries. While there is no doubt that there was a company agreement that Dan had

signed with respect to the proper use of the vehicle I find that there were exceptions and that those exceptions were approved by the company. For example, Robert in his evidence acknowledged that it was okay if trucks were sometimes used for personal use. If somebody was just running to the grocery store or out to get a loaf of bread and the company truck was the first vehicle in the driveway then Robert acknowledged that was a permissible use.

While Dan's evidence was that he only used the company vehicle to go to a grocery store occasionally I find that it is more likely than not he had much more personal use of the company vehicle than he admitted. It was the only vehicle he and his spouse had access to and there was no evidence to suggest that he had any other vehicle he could use during the work week for personal use after work if needed. In fact the evidence suggests to the contrary. On the day the accident occurred Dan used the van to respond to his wife call that she had been involved in an accident.

While Dan may have stopped work around 1 or 2 o'clock on the day of the accident his business was still open. I find it a key fact that this business was in fact open 24 hours a day 7 days a week and that Dan and other employees were expected to be available to respond to after hour emergencies. The only vehicle that Dan had access to if there was an after hours emergency or a weekend job was the van.

This is consistent with the decision of Arbitration Densem in *Dominion & Federated.* This accident occurred within the employees working hours and in my view it does not matter whether he was actually engaged in work at the time the accident occurred or was engaged in a personal activity. The vehicle was still being made available to him. Like Arbitrator Densem I find that Dan's work relationship with Sax Electric was such that the company van was made available for his regular use on a 24 hour basis due to the nature of the business.

I am cognisant of Justice Belobaba's comments in *Ace INA v. Co-op (supra)* with respect to the issue of this regulation not being a floating charge. In my view in the circumstance of this case the company vehicle was being made available to Dan at the time of the accident. He had care, custody and control of the vehicle 24/7. The vehicle was also parked in his driveway and available if needed. He had the keys. To top it off the accident happened during his regular work hours.

I therefore find that Federated is the priority insurer in this case.

REIMBURSEMENT

Economical claims reimbursement is in the amount of $111,418.60 with interest. During oral submissions counsel confirmed that they do not require me to find a specific amount owing. In other words, they are content to work out the quantum of reimbursement if I find reimbursement is appropriate. They have agreed that where I find reimbursement is appropriate, I can simply categorize the benefit or the expense and counsel will try to reach an agreement on the actual quantum. To that end I will therefore direct my analysis and decision to the principles that inform the parties' differing positions on the right to reimbursement as well as possible categories of payments for reimbursement.

There are two main arguments being made. Federated takes the position that there is no right of an arbitrator to order reimbursement of past benefits or expenses paid in light of the decision of the Court of Appeal in *Echelon General Insurance Company v. Unifund Assurance*, 2025 ONCA 324. Economical's position is that the priority scheme set out under s. 268 of the *Insurance Act* and Regulation 283/95 provides for reimbursement.

The second dispute is if there is a right for an arbitrator to order reimbursement, what is subject to reimbursement in a priority dispute? Federated relies on *Echelon v. Unifund* and takes the position there is no right to reimburse for s. 44 assessments, related transportation costs and securing clinical notes and records. Federated's position is based on the Court of Appeal decision in *Echelon v. Unifund* (*supra*) and it argues that Economical's claims for reimbursement constitute pre-arbitration expenses like legal fees or costs or disbursements and as such are not recoverable unless there has been a deflection. Economical's position is that these expenses are recoverable as they form part of the overall scheme for the payment and approval process of statutory accident benefits.

I now turn to their submissions in more detail.

Federated

Federated's position is that there is no right for reimbursement with respect to the statutory accident benefits paid or any related expenses paid by Economical. Federated argument is entirely based on the *Echelon v. Unifund* decision of the Court of Appeal.

The facts in that case involve an accident in 2012 when the claimant was a passenger in a vehicle insured by Echelon. Echelon paid accident benefits as required once it received the application for accident benefits but claimed that Unifund was the priority insurer based on a dependency argument.

The case proceeded to an arbitration before Arbitrator Bialkowski who concluded that Unifund was the priority insurer and ordered reimbursement for benefits it had paid as well as its costs relating to the arbitration. What the parties could not agree upon was whether Unifund should also reimburse Echelon for money it had spent defending and adjusting the SABS claim prior to the shifting of responsibility for priority to Unifund. These expenses were more than $100,000. They included independent adjusting fees, mediation fees, legal costs and disbursements.

In a supplemental decision, Arbitrator Bialkowski concluded that these expenses were not recoverable.

Echelon appealed this decision to the Superior Court of Justice and the appeal judge allowed the appeal concluding that the doctrine of unjust enrichment entitled Echelon to be reimbursed by Unifund for "those reasonable expenses that were incurred for the ultimate benefit of Unifund".

The Court of Appeal concluded that Regulation 283/95 reflected a deliberate regulatory policy choice by the government to have insurers ordinarily bear their own pre-arbitration expenses

except under certain circumstances.

The circumstances are outlined in s. 2.1(7) of the Regulation which is set out below:

> "An insurer that fails to comply with this section shall reimburse the Fund or other insurer fees, adjusters fees, administrative costs and disbursements that are reasonably incurred by the Fund or other insurer as a result of the non compliance."

Federated points out that this amendment authorizes arbitrators to impose sanctions on the insurers who improperly deflect claims. Therefore Federated argues things such as cost of assessments and clinical notes and records are only subject to reimbursement if Federated deflected the claim in this matter and no such argument is being made.

Federated also points out that the Court of Appeal held that this interpretation is consistent with previous case law [*Kingsway General Insurance Company v. West Wawanosh Insurance Company (2002) 58 O.R.3d 251 Court of Appeal]* where the court noted that the priority dispute regulation requires clarity and certainty of application as a primary concern. The court also noted:

> "Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records. Given this regulatory setting, there is little room from creative interpretations or for carving out judicial exceptions designed to deal with the equities of particular cases."

Federated also refers to the Court of Appeal's comments in Echelon v. Unifund. The Court of Appeal noted:

> "Since clarity and certainty of application are of primary concern' to insurers, if the Lieutenant Governor in Council had wanted to permit arbitrators to routinely make pre-arbitration expense reimbursement orders even where there had been no deflection, one would expect them to have done so explicitly, rather than leaving a gap in the regulatory scheme and hoping that arbitrators would fill this gap by invoking the doctrine of unjust enrichment."

The Court of Appeal agreed with Arbitrator Bialkowski's analysis that this choice makes sense as it would reduce the length and cost of priority arbitrations. The court concluded:

> "Considering all of these factors together, I conclude that the balance tips in favour of interpreting Regulation 283 as reflecting a deliberate regulatory policy choice to have insurers ordinarily bear their own pre-arbitration expenses, unless there has been improper deflection of a SABS claim."

Federated, in its broader analysis of this case, points to comments by the court which they submit raise a question as to whether an arbitrator has any right to order reimbursement at all, not just with respect to pre-arbitration expenses. Federated points to paragraph 48 of the court's

decision. The relevant paragraph is set out below:

> "In his reasons, the arbitrator suggested that expense reimbursement orders might properly be made on the basis of unjust enrichment when there are 'special circumstances'. Echelon does not suggest that there are any special circumstances in this case. However, it argues that introducing this carve-out would undermine the policy goal of reducing the cost of arbitrations, since it would encourage insurers to litigate the question of whether special circumstances exist. The question of whether Regulation 283 should be interpreted as implicitly barring arbitrators from invoking equitable principles even in exceptional cases is best left to be decided in an appeal where this issue actually arises."

Federated submits that there is no statutory authority for an arbitrator to order indemnification or reimbursement in the context of a priority dispute once a decision has been made to shift priority from one insurer to another. Federated submits that the only basis upon which that can be done is possibly based on equitable principles and acknowledges that the *Arbitration Act* does authorize arbitrators to resolve disputes "in accordance with law, including equity" (*Arbitration Act*, 1991, s. 31). However, Federated submits that the paragraph above from the Court of Appeal raises a question as to whether in fact arbitrators have the right to invoke equitable principles. While acknowledging these comments are obiter from the *Echelon v. Unifund* decision, Federated urges me to find that I do not have jurisdiction to make an award for reimbursement of benefits nor for pre-arbitration expenses.

At the very least, Federated's position is that even if I do not accept their submission with respect to jurisdiction in terms of actual benefits paid and the right to reimbursement, on the facts of this case there is no right for Economical to be reimbursed for s. 44 expenses, clinical notes and records and transportation expenses. Federated notes that the transportation expenses are all related to s. 44 assessments on behalf of the insurer and as such do not fall within the "benefit" category. Federated submits that these expenses are the same as the pre-arbitration expenses that the Court of Appeal in *Echelon v. Unifund* found were not recoverable unless there had been deflection. There is no deflection in this case and therefore no right to reimbursement.

Federated points out that in the *Echelon v. Unifund* case the costs that Echelon was claiming included surveillance costs, mediation expenses and legal fees, and these were found not to be recoverable. Federated submits that s. 44 expenses for insurer's exams, related transportation and the cost of collecting clinical notes and records fall within the same category of expenses.

Federated also relied on a previous decision of Arbitrator Bialkowski: *Scottish & York Insurance Company Ltd. v. Zurich Insurance Company* (August 18, 2021). In that case Arbitrator Bialkowski held that the costs of s. 44 assessments under the Statutory Accident Benefits Schedule were unrecoverable administrative expenses in the context of a priority dispute. The arbitrator held that these were not "benefits paid to or on behalf of the claimant". They were part and parcel of defending the underlying accident benefit claim and therefore are not recoverable except under special circumstances. Federated submits that while this decision predated *Echelon v. Unifund*, it is consistent with the findings of the Court of Appeal.

Federated also likens their position in this priority dispute to loss transfer cases where it has been concluded that these types of expenses, including s. 44 expenses, are not recoverable (see *Wawanesa Mutual Insurance Company v. AXA Insurance Canada*, 2012 ONCA 582). In that case, the Court of Appeal upheld prior decisions concluding that there was no right to indemnification in loss transfer for administrative costs or loss control measures including insurer-generated medical assessments.

Federated also submits that if an arbitrator does have jurisdiction to invoke equitable principles then that is only done in exceptional cases. Economical has not presented any evidence of any exceptional circumstances nor is there any evidence of deflection. Accordingly, there is no mechanism available in the priority dispute framework to order a responding insurer to reimburse the Applicant insurer for any benefits paid or expenses incurred.

SUBMISSIONS OF ECONOMICAL

Economical's main submission is the Court of Appeals decision in Echelon & Unifund has not altered the law with respect to the reimbursement of statutory accident benefits. Economical submits that the decision focused squarely on whether a non priority insurer could recover their legal fees, adjuster's fees, administrative costs and similar expenses pursuant to the doctrine of unjust enrichment in circumstance where there was no deflection. The court held that it could not. Economical submits that the court made no pronouncement with respect to the reimbursement of actual benefits. In fact in that case Unifund as the priority insurer was required to reimburse Echelon for the statutory accident benefits that had been paid to the claimant.

Economical submits that in this case it is not seeking any "adjuster's fees, administrative costs, legal feels or disbursements". Rather it is seeking entitlement to reimbursement for benefits paid with respect to the claim for accident benefits. Economical argues that benefits not only includes things such as income replacement benefits or medical and rehabilitation benefits but expenses incurred in furthering the payment of those benefits such a section 44 costs of assessments, securing information to assist in understanding the benefit that is being claimed such as clinical notes and records or similar expenses such as transportation costs to and from assessments.

Economical specifically notes that it has not sought any equitable jurisdiction in the course of this arbitration as a basis for the reimbursement of benefits paid to the claimant. Rather Economical relies on the arbitrator's statutory jurisdiction to order reimbursement. Economical submits that jurisdiction arises from the *Insurance Act*, Regulation 283/95 and section 31 of the *Arbitration Act*.

With respect to the *Insurance Act* Economical relies on section 268 (2). That section provides that the priority rules set out therein apply to the insurer who "is liable to pay statutory accident benefits". In other words the whole scheme set out under section 268 is to determine who should be paying benefits and would therefore be deemed to include a reimbursement entitlement once it is determined which insurer should properly be paying those benefits.

Economical submits that section 268 (3) of the *Insurance Act* also establishes the right to

reimbursement. It provides that the insurer against whom a person has recourse for the payments of statutory accident benefits is "**liable to pay the benefits**". Therefore if Federated is determined to be the insurer to whom the claimant has recourse for the payment of statutory accident benefits than it follows that Federated is liable to pay those benefits which would include reimbursement.

Economical then turns to Regulation to 283/95 and submits that this sets up the framework for the priority scheme and how to determine priority and then reimbursement flows from that as well. Economical points to section 2 (1) of the Regulation which requires the insurer that receives the first completed application for accident benefits to pay benefits to an insured person "pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act". Economical submits that once Federated is determined to be the insurer required to pay benefits under section 268 of Act that the only way to enforce section 2 (1) is to to allow an order for reimbursement once the dispute has been resolved. Economical notes that Regulation 283/95 section (7) (1) requires that any dispute is to be resolved through an arbitration pursuant to the *Arbitrations Act.* Economical then relies on section 31 of the *Arbitrations Act* which indicates that an arbitrator shall decide a dispute in accordance with law, including equity and "may order specific performance injunctions and other equitable remedies".

This scheme Economical submits clearly establishes that once priority is determined under section 268 of the *Insurance Act* that the non priority insurer is then entitled to reimbursement of " benefits" paid pending the dispute.

Economical also points to the decision of Justice Perell (Ontario Minister of Finance) v. Lombard Insurance Company of Canada 100 O.R.(3D)51. This was a priority dispute that revolved around who had received a "completed application". Justice Perell concluded that the arbitrator had erred in law in determining this issue and that her award should be set aside and an order made Lombard be liable to pay ongoing statutory accident benefits. Justice Perell stated at paragraph 67:

> "It also follows that Lombard should reimburse the Fund for the accident benefits already paid."

Economical also relies and paragraph 70 where Justice Perell states:

> "There is a divergence in the arbitration case law and no judicial pronouncement about whether an arbitrator on a priority dispute has the jurisdiction to award reimbursement beyond the repayment of statutory accident benefits".

Economical submits this case clearly establishes is that an arbitrator out authority to order a reimbursement of benefits

Economical also relies on Justice Perell's decision in support of their position that the jurisdiction of the arbitrator with respect to reimbursement is not solely with respect to the actual benefits

paid such as income replacement benefits it extends beyond that to include expenses paid for benefit related activities in accordance with the *Statutory Accident Benefit Schedule*.

Economical notes paragraphs 70 Justice Perell's decision:

> " I agree with Arbitrator Robinson did in the circumstances of resolving a priority dispute between insurers under Ontario Regulation to 283/95 that an arbitrator has the jurisdiction to order reimbursement beyond repayment of the statutory benefits".

Economical submits that the Court Of Appeal decision of Echelon & Unifund has not changed the law and the analysis outlined above. Economical submits that all the Court Of Appeal stated was that certain pre arbitration expenses are not recoverable unless there has been a deflection. Those pre arbitration expenses are limited to things such as surveillance, mediation costs, legal fees or adjusting fees. Economical submits that their claim for section 44 expenses related to transportation expenses and securing clinical notes and records do not fall within the Court of Appeals pre-arbitration category but rather they are part of the overall scheme in administering and paying statutory accident benefits and are therefore properly recoverable and within an arbitrator's jurisdiction without any need to resort to equitable relief.

Economical notes that s. 44 of the Statutory Accident Benefits Schedule provides that an insurer is to pay for assessments to determine if an insured person is entitled to a benefit under the SABS. Therefore clearly a s. 44 assessment is one that can inure to the benefit of the insured as it can determine ongoing entitlement.

Economical submits that transportation expenses are separately authorized under s. 3(1) of the SABS. While in this case the transportation expenses relate to travel to and from the assessments, Economical submits that irrespective of that the SABS authorizes transportation expenses to be considered as a benefit and flows as part of the s. 44 benefit approval process.

Economical submits that the payment of medical records such as clinical notes and records is authorized by the SABS pursuant to the OCF-5 (Request for Medical Information) as well as records requested pursuant to s. 33(1) of the SABS. This section authorizes an insurer to request "any information reasonably required to assist the insurer in determining the Applicant's entitlement to a benefit." Medical records such as clinical notes and records are therefore relevant to determine entitlement for various benefits, including income replacement benefits or medical and rehabilitation benefits, and should be accepted as a recoverable expense in the overall benefit approval scheme.

Economical notes that it is not submitting that all insurer-incurred costs would be considered benefits. Costs arising from discretionary investigations such as surveillance, litigation strategy, interpretation costs or the costs of an examination under oath would remain insurer overhead and not recoverable.

Economical also relies on the decision of Arbitrator Bialkowski in *Scottish & York Insurance Company Ltd. v. Zurich Insurance Company Ltd* (Arbitrator Bialkowski, August 18, 2021).

This case involved a priority dispute and a question of reimbursement which included some $31,000 for investigation and legal fees. In determining that the legal fees and investigations were not recoverable, Arbitrator Bialkowski stated:

> "On its face Ontario Regulation 283/95 provides for the reimbursement of **'benefits'** paid to or on behalf of the insured. It is silent with respect to the reimbursement of expenses. I, like Arbitrator Malach in Certas (*supra*) believe that the legislative intent was that each insurer would bear its own expenses of handling the accident benefit claim of an insured, even if ultimately another insurer may be found in priority and responsible to pay the benefits to the claimant. There are strong policy reasons so to hold."

Economical relies on this with respect to Arbitrator Bialkowski's clear statement that Ontario Regulation 283/95 provides for reimbursement of benefits and distinguishes his conclusion on the issue of expenses as it dealt with pre-arbitration legal fees relating to the SABS claim itself not being recoverable which Economical concedes and is not in fact claiming in this case.

Lastly, Economical distinguishes between priority disputes and loss transfer disputes. It notes that Federated has suggested that loss transfer cases that conclude that the loss transfer insurer cannot recover non-benefit expenses can be relied upon to support their position in this case that s. 44 expenses, for example, are not recoverable. Economical points to s. 275 of the *Insurance Act* and notes that it specifically provides for "indemnification in relation to such benefits paid by it". Economical notes that no such words are found under Regulation 283/95. Further, Economical seeks to distinguish between indemnification under s. 275 of the *Insurance Act* and reimbursement pursuant to the priority provisions.

Economical submits that loss transfer is a very different process than a priority dispute. Loss transfer is a rough and ready method of spreading a loss between certain classifications of insurer, with an entitlement to indemnification for benefits paid based on fault.

A priority dispute involves a determination as to which insurer should be paying statutory accident benefits. Ultimately, if an insurer is found not to be in priority under s. 268 of the *Insurance Act*, then that insurer never had the obligation to pay statutory accident benefits and therefore it should be entitled to full reimbursement and to be made whole. Therefore, Economical submits that it is entitled to recover all benefits paid to the claimant as well as the s. 44 costs, related transportation expenses and the cost for securing clinical notes and records.

FEDERATED REPLY

Federated submits that there is no authority to support Economical's submissions that the ancillary costs incurred by an insurer to access or adjudicate benefits should themselves be

considered part of the benefits scheme while costs arising from discretionary investigation or litigation strategy would remain an insurer overhead. Economical submits that statutory accident benefits that might be recoverable in a priority dispute are the actual benefits paid themselves such as an income replacement benefit and not ancillary costs even if provided for under the Statutory Accident Benefits Schedule to determine entitlement to those benefits.

Federated notes that a s. 44 assessment is not conducted for the insured's benefit but rather is conducted for the insurer's benefit. It is designed to determine entitlement but is a precondition to the insurer being permitted to stop the payment of benefits. One cannot therefore say that s. 44 expenses and transportation expenses are those being done to provide or assist with the benefits being paid to the insured. They clearly fall within an overhead expense for the purposes of the insurer to limit benefits or for loss control purposes.

Federated submits that the same is true of securing clinical notes and records. There is no evidence, Federated submits, that the request for clinical notes and records in this case was for the benefit of the insured or to approve a benefit, but rather was for loss control purposes.

Federated also notes that none of these expenses reduce the accident benefit coverage limit. Further, they would be considered unrecoverable "expenses" according to loss transfer case law. Federated submits loss transfer case law is relevant as it examines the nature of these expenses in the context of the Statutory Accident Benefits Schedule. An analysis that determines benefit versus expenses is equally applicable to a priority dispute as it is to loss transfer, whether one is looking at indemnification or reimbursement.

Federated submits that the Court of Appeal in *Echelon v. Unifund* has changed the landscape not just with respect to the pre-arbitration style expenses, but with respect to the whole issue of reimbursement in its broadest sense.

ANALYSIS AND DECISION

Has Echelon and Unifund altered the law with respect to the reimbursement of benefits between insurers in a priority dispute?

With respect to this issue, I agree with Economical that the decision of the Court of Appeal in *Echelon v. Unifund* (*supra*) has not changed the law with respect to the right of an insurer who paid statutory accident benefits to a claimant as it received the first OCF-1 to claim reimbursement of benefits paid to that claimant from the priority insurer as determined under s. 268 of the *Insurance Act* and Regulation 283/95.

A review of the case law submitted by the parties suggests that there has never been an issue raised in the past with respect to the right to reimburse actual statutory accident benefits paid by the claimant in the context of a priority dispute. By actual benefits, I mean those benefits payable to the insured as part of their coverage under their automobile policy. Those benefits

would include income replacement benefits, non-earner benefits, medical and rehabilitation benefits, attendant care, educational expenses, visitors' expenses, death benefits, etc.

I accept Economical's submissions with respect to the case law they rely upon that judges and arbitrators have consistently ruled that the priority scheme provides for reimbursement between the non-priority insurer and the priority insurer with respect to benefits.

I have carefully reviewed the comment from the Court of Appeal that is relied upon by Federated with respect to its position that, while obiter, the Court of Appeal raises the possibility that benefits may not be payable as part of the reimbursement scheme. This is set out in paragraph 48 of the court's decision. My reading of this paragraph suggests that the court is referring to expense reimbursement orders on the basis of unjust enrichment when there are special circumstances. The original arbitrator's decision in the matter before the Court of Appeal had concluded that Regulation 283/95 only permitted expense reimbursement orders where there was deflection under s. 2.1(7). However, the arbitrator went on to comment that there may be a case where there were exceptional circumstances that would justify using the doctrine of unjust enrichment to make an expense reimbursement award but that those circumstances were not in the matter before him.

Paragraph 48 of the Court of Appeal's decision seems to be referencing that comment by the arbitrator concerning possible expense reimbursement based on special circumstances and unjust enrichment. The court held that whether Regulation 283/95 should be interpreted as implicitly barring arbitrators from invoking equitable principles in those circumstances should be left for a case where one of the parties was actually arguing it and the issue had clearly arisen. I do not read this as suggesting that the Court of Appeal is leaving open an argument that benefits, as opposed to expenses, are included in their analysis.

Federated argues that the Court is suggesting that Regulation 283/95 could be interpreted as implicitly barring arbitrators from invoking equitable principles and that that is the only basis upon which an arbitrator awards reimbursement. Federated's argument is that there is no statutory provision for an award for benefits and therefore it is only based on equitable principles and therefore that must mean what the Court of Appeal is suggesting in their obiter comments.

I do not agree with Federated's analysis. I agree with Economical that the statutory scheme, including the *Insurance Act* and Regulation 283/95, clearly provides that reimbursement flows naturally from the resolution or determination of a priority dispute under s. 268 of the *Insurance Act*. It is not necessary for an arbitrator to resort to equitable principles in order to make an order of reimbursement. I find that the Court of Appeal's comments are limited to whether Regulation 283/95, with respect to the prohibition on recovery of administrative expenses unless there is deflection, would also implicitly bar an arbitrator where exceptional circumstances are being argued to justify an award of pre-arbitration expenses in non-deflection cases would be prohibited even if relying on equitable principles.

I also find that the interpretation of this paragraph from the Court of Appeal's decision as put forward by Federated would not make any legislative sense in the context of the priority scheme. It would mean that an insurer who had paid out statutory accident benefits as required as it received the first Application for Accident Benefits would never have the right to recover any benefits paid from the rightful priority insurer. If that were to be the accepted interpretation of this Regulation then there would be no incentive for the proper priority insurer under s. 268 of the *Insurance Act* to concede priority or to move an arbitration along its course to a decision. It would be to the benefit of that insurer to delay as long as possible taking over the administration and payments of the statutory accident benefits with the knowledge that it would never have to pay any benefits or expenses incurred by the non-priority insurer. Clearly, that cannot be the intent of the legislature. Regulation 283/95 is designed to move the arbitration process along in a timely fashion without interference with a claimant's right to receive statutory accident benefits. There are timelines laid down for arbitrators to ensure that hearings and decisions are made promptly. That is counterintuitive to Federated's position which would suggest that delay would be to the benefit of the proper priority insurer.

As a result, it is my decision that Economical is entitled to be reimbursed for the following categories of benefits that it has incurred on behalf of the claimant:

1. Income replacement benefits
2. Medical and rehabilitation benefits

I do not make any finding with respect to the quantum of those benefits being claimed as agreed upon by the parties. I also award interest in accordance with s. 57 of the *Arbitration Act*, 1991, S.O. 1991, c. 17. Interest is payable from the date Economical commenced proceedings on April 11, 2023 with the applicable prejudgment interest rate of 4%.

What expenses of Economical, if any, are recoverable?

For the reasons that will be outlined below, it is my decision that none of the expenses claimed by Economical are recoverable in this priority dispute.

The nature of the expenses being claimed by Economical in my view are clearly what one would refer to as loss control expenses. I do not accept Economical's argument that these expenses fall within the overall concept of a benefit or benefit scheme within the statutory accident benefits provisions. I find that these expenses are clearly for the purposes of the insurer in adjusting the entitlement to benefits with the main purpose to be to determine entitlement and deny entitlement where warranted.

I will deal with each of the expenses independently.

Clinical Notes and Records

While the SABS authorizes an insurer to request any information reasonably available to assist

the insurer in assessing entitlement to a benefit, I do not find the expenses of securing clinical notes and records to be a recoverable expense within the priority scheme. The cost of clinical notes and records in my view cannot be described as a benefit. I find that it is more in the nature of a disbursement and falls squarely within the conclusions of the Court of Appeal in *Echelon v. Unifund*. Expenses to secure clinical notes and records would only be payable if there was evidence that Federated had attempted to deflect this claim, and there is no such evidence. I find that the costs of clinical notes and records fall within the pre-arbitration expenses such as "legal fees, adjuster's fees, administrative costs and disbursements".

My decision is consistent with the views of Arbitrator Bialkowski set out in *Scottish & York v. Zurich* (*supra*). In that case Arbitrator Bialkowski noted that Regulation 283/95 was silent with respect to the reimbursement of expenses as opposed to the reimbursement of "benefits". Arbitrator Bialkowski felt that there were strong policy reasons to deny recovery to the successful insurer of the priority dispute for its legal costs that had been incurred to defend the underlying accident benefit claim. If these types of expenses were to be recoverable, it would lead to additional issues as to the reasonableness of those costs. It would lead to an endless examination of accounts and the reasonableness of their accounts. Accordingly, Arbitrator Bialkowski concluded in that case that legal fees paid to defend the underlying SABS claims were not recoverable. This was of course prior to the decision of the Court of Appeal in Echelon and Unifund. I therefore find that the cost of securing clinical notes and records from the claimant are not recoverable as an "expense" or as a "benefit" in a priority dispute under Regulation 283/95 and such expenses are only recoverable as determined by the Court of Appeal in Echelon and Unifund where the priority insurer has been found to deflect the claim.

Section 44 and Related Transportation Expenses

I will deal with the costs of s. 44 assessments and the related transportation expenses together as the transportation expense would only be recoverable in my view if the s. 44 cost of assessments were recoverable. The transportation expenses being claimed here do not fall within the policy coverage for medical and rehabilitation expenses as they are not transportation expenses involved in taking the insured person to or from treatment. Rather, this is the cost of transporting the insured to a s. 44 assessment arranged by the insurer to assess entitlement to a benefit.

I find that these expenses also fall within the Court of Appeal's decision in *Echelon v. Unifund*. An assessment under s. 44 is arranged by the insurer to assess entitlement to various benefits under the Schedule. While this may benefit the insured if the assessment comes back in its favour, it is primarily a loss control measure as generally an insurer is required to conduct a s. 44 assessment prior to denying any benefits. The costs of the assessments are not part of the medical and rehabilitation limits. These expenses are paid outside the policy limits and are classified as expenses and not as a benefit by insurers.

Even though the conduct of s. 44 assessments falls within the benefit process within the Statutory Accident Benefits Schedule, I do not find that it qualifies as a benefit, nor do I find that Regulation

283/95 can be interpreted as broadening the level of recovery in priority disputes to expenses such as these, even though the Schedule provides for those assessments such as their costs within the same Regulation.

While clearly the SABS provides for benefits that are also described as expenses (educational expenses, transportation expenses, prescription expenses), that does not mean that all expenses fall within the benefit category and are thus part of the reimbursement scheme under Regulation 283/95.

I note that the Court of Appeal in *Echelon v. Unifund* set out the question that they must decide as to "whether Regulation 283 should be interpreted as reflecting a deliberate governmental policy choice to have insurers bear any expenses they incur handling SABS claims before an arbitrator finds that a different insurer has priority". The court concluded that Regulation 283 did reflect a deliberate government policy to have insurers bear those expenses unless there was any evidence of deflection. It is important to note the broadness of the wording of that question: "to have insurers bear any expenses they incur handling SABS claims". I find that the cost of assessments under s. 44 are expenses that the insurer incurs handling SABS claims. It qualifies as a pre-arbitration expense and therefore falls within the rubric of the decision of the court in *Echelon v. Unifund*.

As the costs of the assessments are not subject to reimbursement, it follows that the transportation to take an insured to those assessments is also not subject to reimbursement.

RESULT

Economical is entitled to recover from Federated by way of reimbursement monies paid with respect to income replacement benefits and medical and rehabilitation benefits. Economical is not entitled to recover by way of reimbursement from Federated its expenses incurred for costs of assessments under s. 44, transportation expenses relating to s. 44 assessments and the costs of clinical notes and records.

COSTS

The parties did not make any submissions with respect to costs. The Arbitration Agreement signed by the parties did provide that the costs of the arbitration and legal costs are in the discretion of the arbitrator but legal costs are not to be quantified in the original award.

The parties have 90 days to reach an agreement on the issue of costs with respect to both the payment of costs and the quantum of those costs. If the parties cannot reach agreement they are to contact me and we will schedule a further pre-hearing to set the matter down for a costs hearing.

Similarly, if the parties are not able to agree on the quantum of the income replacement benefits and medical and rehabilitation expenses that are to be the subject matter of the reimbursement

then they are to contact me promptly to schedule a further pre-hearing and we can set down a hearing solely on the issue of quantum.

DATED THIS 24th day of March, 2026 at Toronto.

_____

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP
Barristers and Solicitors

800 – 150 York Street

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