

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

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ACE INA INSURANCE

Applicant

and

ECONOMICAL MUTUAL INSURANCE COMPANY

Respondent

**DECISION**

**COUNSEL**

Eli Pullan – Barrister & Solicitor  
Counsel for the Applicant, ACE INA Insurance  
(hereinafter referred to as “ACE INA”)

Jason Frost – Schultz, Frost LLP  
Counsel for the Respondent, Economical Mutual Insurance Company  
(hereinafter referred to as “Economical”)

**ISSUE**

In the context of a priority dispute pursuant to s.268 of the *Insurance Act*, R.S.O. 1990, c. I.8, the issue before me is to determine which of the insurers herein stands in priority to pay statutory accident benefits to the claimant Sheraz Hussain, as a result of personal injuries sustained by him in a motor vehicle accident which occurred on August 9, 2013.

The priority determination involves the issue of whether the claimant, an occupant of the vehicle insured by ACE INA, was an individual “specified in the policy as driver of an

automobile" insured by Economical. If so demonstrated, Economical would stand in priority and be responsible for payment of accident benefits paid to or on behalf of the claimant Hussain.

### PROCEEDINGS

The arbitration hearing proceeded on March 31, 2017 on the basis of oral evidence adduced, Agreed Statement of Facts, Document Briefs, Examination Under Oath transcripts, Books of Authority and Oral Submissions.

### APPLICABLE LEGISLATION

A priority dispute arises when there are multiple motor vehicle liability policies which might respond to a statutory accident benefits claim made by an individual involved in a motor vehicle accident. Section 268 (2) of the *Insurance Act* sets out the priority rules or priority hierarchy to be applied to determine which insurer is liable to pay statutory accident benefits.

As the claimant was an occupant of a vehicle at the time of the accident, the following rules with respect to priority of payment apply:

- (i) *The occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured;*
- (ii) *If recovery is unavailable under (1), the occupant has recourse against the insurer of the automobile in which he or she was an occupant;*
- (iii) *If recovery is unavailable under (1) or (2), the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose;*
- (iv) *If recovery is unavailable under (1), (2) or (3), the occupant has recourse against the Motor Vehicle Accident Claims Fund.(emphasis mine)*

#### *Choice of insurer*

*(4) If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits,*

*the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits. R.S.O. 1990, c. 1.8, s. 268 (4); 1993, c. 10, s. 1.*

*Same*

*(5) Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant, as defined in the Statutory Accident Benefits Schedule, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy. 1993, c. 10, s. 26 (2); 1999, c. 6, s. 31 (9); 2005, c. 5, s. 35 (13).*

For the purposes of SABS Ontario Regulation 34/10, and this priority dispute, an “insured person” is defined by regulation as:

*3(1) In this Regulation, “insured person” means, in respect of a particular motor vehicle liability policy,*

*(a) the named insured, any person specified in the policy as a driver of the insured automobile and, if the named insured is an individual, the spouse of the named insured and a dependant of the named insured or of his or her spouse. (emphasis mine)*

### **AGREED FACTS**

The Tab references in the agreed facts below are references to the Tab numbers in the Joint Document Brief marked as an exhibit in this proceeding.

1. On August 9, 2013, the claimant Sheraz Hussain [Hussain] rented a motor vehicle from Enterprise Rent A Car [ERAC] (Tab 10).
2. The ERAC vehicle was insured by the Applicant, ACE INA [ACE].
3. Hussain was not a named insured on the ACE policy.
4. Hussain has recourse to SABS coverage from ACE as an occupant of an insured vehicle, pursuant to s.268(2)(1)(ii) of the *Insurance Act*.
5. On August 12, 2013, while in New York State driving the ERAC vehicle, Hussain suffered serious injury (Tab 3).
6. Hussain applied to ACE for Statutory Accident Benefits [SABS] (Tab 1).
7. ACE adjusted Hussain's claim and settled it on a full and final basis on or about June 28, 2016, shortly after the commencement of the first day of the FSCO Arbitration Hearing between ACE and Hussain.

8. Hussain's OCF-1 indicated that he was employed and working as a taxi driver at "to obtain" at the time of the accident, with employment dates of January 1, 2013 through August 12, 2013 (Tab 1).
9. During January - April, 2013 Hussain worked as a full-time taxi driver with a taxi fleet operated by 2073328 Ontario Inc., located at 1355 Gerrard Street East, Toronto (Tab 22).
10. 2073328 Ontario Inc. operated as Virk Auto. The Co-op Cabs website indicates that vehicles from Virk Auto were dispatched under the Co-Op Cabs brand and dispatch system (Tab 34).
11. In November 2012, Virk Auto insured 34 of the vehicles under its control with the respondent, Economical Mutual Insurance Company [Economical]. These 34 vehicles were identified as the Ghummian Fleet, under the control of Arshan Mohammad Ghummian. Ghummian appears to be a controlling mind of Virk Auto (Tab 19).
12. The Ghummian Fleet was insured between November 2012 and November 2013 under Economical policy M000000-04 1245 [the Policy] (Tabs 12, 13 and 14).
13. A foreign insurance company, AmTrust, which was not licensed to issue motor vehicle liability policies in Ontario, was a reinsurer for the Policy.
14. AmTrust, not Economical, established procedures and underwriting criteria for the Policy.
15. Prior to November 15, 2012, the Ghummian Fleet had in place a similar policy issued by another insurer, Arch (Tab 28).
16. As of September 16, 2013, the registered insurance agent and broker for the Policy was the Precept Group [Precept] (Tab 28).
17. Prior to Precept's involvement the registered agent and broker was Stoneridge (Tabs 12, 13 and 14).
18. Stoneridge solicited the Policy on behalf of Economical and arranged for the City of Toronto Certificate of Insurance for cab no.2242 (Tab no.12), insuring the owner of the cab, Shemuel Bitterman, and the lessee of the cab, Ghummian.
19. Apollo Fleet Management [AFM] is the named insured under the Policy. AFM coordinated communications with respect to the status of vehicles and drivers between Ghummian, Stoneridge, Precept, and AmTrust at the initiation of and during the term of the Policy.
20. In 2013, there were approximately 2,000 taxis, limousines and wheelchair accessible vans, and 6,000 drivers in the Apollo program. There were approximately 34 vehicles

in the Ghummian fleet (Tabs 19 and 33).

21. The named insured AFM dealt directly with Stoneridge and Precept. From time to time, AmTrust would seek clarification from AFM directly. AFM did not communicate with Economical. AmTrust determined insurability and premiums, according to the information collected by AFM and provided via Stoneridge or Precept.
22. New drivers added to the Apollo program were required to provide their Ontario Provincial license, their cab license, an abstract, experience letters for their previous insurance, and fill out an application. That information was then provided to Stoneridge and then AmTrust to confirm insurability and to calculate the overall premium.
23. New drivers could not work until they were approved.
24. Included in the AFM application for new drivers and for renewing drivers, was an Optional Accident Benefits form [the AB form]. The AB form purported to allow the driver to choose between basic coverage under the Policy or an additional premium for optional SABS benefits (Tabs 20 and 21).
25. AmTrust, Stoneridge and AFM required that every driver be assigned to a specific vehicle (Tabs 20, 21 and 33).
26. Driver information was filed in AFM physical paper files by vehicle number (Tabs 20, 21 and 33).
27. AFM also held an electronic file for each driver, which included personal information including home address (Tab 30).
28. Hussain had an electronic AFM file including an address (the version at Tab 30 was printed in 2016 or 2017).
29. Ghummian was contractually required to advise AFM whenever drivers changed vehicles. AFM would then complete and file a change form with Stoneridge.
30. Ghummian was contractually required to advise AFM whenever drivers no longer operated a vehicle. If a driver quit or was fired, AFM would use a deletion of driver form.
31. AFM, in turn, would notify Stoneridge or Precept that a vehicle's status had changed, and an updated monthly Bordereaux would be provided to AmTrust in order to calculate an accurate premium for the term.
32. AFM required Ghummian to provide a complete list of drivers on an annual basis upon renewal in November.
33. AFM relied upon Ghummian to provide accurate and timely information in respect of

driver additions, changes, and deletions.

34. Premiums were determined per vehicle based on the number of drivers assigned to each vehicle.
35. The contract between AFM and Ghummian stipulated that written approval from AFM was required before drivers were eligible to drive. Sometimes AFM provided verbal approvals instead. Usually a follow-up e-mail or letter was sent if the approval was provided orally.
36. Economical produced a certificate of automobile showing described automobiles "as per schedule". No schedule was attached to the Policy. No schedule has been produced.
37. Economical produced an OPCF21B Blanket Fleet form. Coverage is shown "as known to company".
38. Hussain's OCF-1 does not identify an employer ("to obtain").
39. Hussain's OCF-2 indicates he was a self-employed taxi driver, with employment dates of January 3, 2013 through April 26, 2013. The OCF-2 also identified his employer as Zaso Prestige Auto Sales Inc. at 1355 Gerrard Street East, Toronto. The Contact Person was "Jahan".
40. In the OCF-2, Jahan refers to Jahan Afzal, a manager of Ghummian.
41. Hussain did not work for Zaso Prestige Auto Sales, a defunct company owned by Jahan.
42. The advice from Co-Op Cabs is that someone logged on to vehicle 2242 using Hussain's log in information from June 25, 2013 to August 2, 2013.
43. In the course of his IRB claim with ACE, Hussain denied working from June 25, 2013 to August 2, 2013: "I have not worked as a taxi driver since April 2013" (Tab 5).
44. Hussain's first child was born in August 2013 (Tab 5).
45. Eid al-Fitr, a Muslim holiday, occurred August 9, 2013, in North America.
46. On Friday, August 9, 2013, Hussain traveled to New York State to celebrate Eid and to go shopping for the baby. The subject loss occurred three days later on his return trip. (Tab 5).
47. The June 28, 2013 Bordereaux indicates a request to add Hussain on cab no. 3376 (Tab 31).
48. Hussain received a City of Toronto Bylaw Ticket on April 26, 2013 for failure to provide proof of insurance (Tab 26). The trial for that charge was scheduled for October 11, 2013.

- 49.** On September 9, 2013, Hussain went to AFM to ask for an Experience Letter to confirm proof of insurance. He indicated he was a full-time driver from November 15, 2011 to present (Tab 30).
- 50.** Precept issued to Hussain an Experience Letter [the Letter], dated September 16, 2013 (Tab 28).
- 51.** AFM produced a copy of the paper files in respect of taxis 2242 and 3376.
- 52.** Hussain's statement contains his self-report that he provided personal documents, including driver's license and abstract, to Ghummian in January 2013 when he commenced employment. Jahan Afzal's evidence was that he believed Hussain was added as an approved driver in January 2013.
- 53.** Bastas' evidence is that Ghummian did not provide AFM with any application for Hussain at any material time and Hussain was not added in January 2013.
- 54.** The AFM paper files in respect of taxi 2242 indicate that between January and April of 2013 three drivers were assigned to taxi 2242 as follows:

Driver	Start date	End Date
Khawaja Rehman	2012-11-28	2013-09-24
Aroon Bahal	2012-10-31	2013-06-28
Yenework Behongne	2012-11-07	N/A

- 55.** The driver logs produced by Ghummian show that Hussain operated taxi 2242 in the period of January 3, 2013 through April 25, 2013, and not the drivers provided by Ghummian to AFM. Despite vehicle 2242 having three approved drivers, only one driver is identified each day for vehicle 2242.
- 56.** If Hussain was a driver specified in the Policy, within the meaning of s.268(2) (1)(i) of the Act, Economical was required to provide notice of termination of coverage pursuant to the statutory conditions.
- 57.** Economical did not provide Hussain with notice of termination of coverage pursuant to the statutory conditions.
- 58.** The AFM contract with Ghummian has penalties for failing to notify AFM of requested driver changes.

59. AmTrust has produced three screen print Bordereaux entries in respect of Hussain. The most relevant data is excerpted here:

Plate	Entered date	Effective date	Renewal	Transaction Type	Premium
Metro 3376	6/28/2013	28-Jun-2013	11/15/2013	Addition	3303
Metro 3376	11/14/2013	15-Nov-2013	11/15/2014	ADDITION	3303
Metro 3376	28-Jun-2013	28-Jun-2013	11/15/2013	CORRECTION	-300

Reference: Bordereaux screenshots, Document brief Tab 31, page 1

60. The initial entry shows a request to add vehicle 3376 with Hussain as an approved driver on June 28, 2013. A premium of \$3,303 was indicated for the vehicle. The second entry shows that coverage for vehicle 3376 was renewed on November 14, 2013 for an additional year, and a further premium of \$3,303.00. AFM's evidence is that Hussain was inadvertently and mistakenly included as the driver for 3376.
61. The third entry is contentious. AFM's evidence is that the request to add Hussain was rejected by the broker.
62. The Bordereaux was not used exclusively for annual premium calculations. Adding or removing drivers in the middle of a policy term would affect premiums. A taxi with two drivers had a different premium than a taxi with one driver.

### **ANALYSIS AND FINDINGS**

The Applicant ACE INA takes the position that on the date of loss, the claimant Hussain was "a person specified in the Economical policy as a driver of an insured vehicle" and would stand in priority as "an insured" pursuant to s.268(2)(i) of the priority hierarchy rather than simply being "an occupant" pursuant to the lower ranking s.268(2)(ii).

The evidence indicates that the claimant Sheraz Hussain was involved in an accident in New York State on August 12, 2013, while operating a vehicle rented from Enterprise Rent-A-Car ["ERAC"] and insured with the Applicant ACE INA.

Hussain was an Ontario resident who rented the vehicle from ERAC in Ontario, and drove it to New York State while on vacation. The ERAC contract specifies he was an approved



operator of the vehicle and he purchased extra insurance in the form of the optional damage waiver.

The Respondent Economical insured a fleet of taxi cabs operating within the Apollo Fleet Management program ["Apollo Program"]. The Apollo Program co-ordinated the provision of information (vehicles and operators) to Stoneridge Insurance Brokers, who in turn placed the insurance with the fronting insurer, Economical. AmTrust, an insurer based in Bermuda, determined the underwriting criteria and assessed the premium paid by Apollo.

Economical became the insurer effective November 15, 2012. The previous insurer was Arch. The Certificate of Insurance showed Apollo Fleet Management Services Inc. as the named insured and did not identify drivers nor was a list of drivers attached. The pink slips provided made no reference to drivers.

The Apollo Program included many smaller fleets who co-ordinated their fleet insurance coverage through the Apollo Program under the Economical fleet policy.

I am satisfied on the evidence that Hussain worked as a cab driver under the Apollo Program, operating a vehicle controlled by Arshad Mohammad Ghummian through a business entity called Virk Auto [the "Ghummian Fleet"]. There is some question as to the dates he operated vehicles under the Apollo Program and whether Hussain was ever shown in the records of Apollo as a driver.

The Apollo Program was one of several operating under the "Co-Op Cab" brand. The Economical policy only insured the Co-Op vehicles within the Apollo Program.

The Apollo Program included 6,000 drivers and 2,000 vehicles in August 2013. Individual fleet operators were required to provide the vehicle details and names of drivers to Apollo, who in turn supplied that information to AmTrust for risk evaluation and underwriting purposes. This information was recorded in what has been referred to in the industry as a "Bordereaux Report" on the initiation and renewal of the policy in November 2012 and November 2013. A monthly Bordereaux report was also generated for vehicles whose status changed during the term of the policy. This would reflect vehicles and drivers added and deleted with respect to the insured vehicles. Ms. Bastas, Director of Operations at Apollo, testified that the Bordereaux were an underwriting tool used to assess risk and correctly

calculate the premium. The AmTrust premium was calculated based upon the number of drivers in each vehicle and not the individual driving history of the drivers. The calculation was based upon whether the vehicle was a single, dual or multi Cab (in other words had 1, 2 or 3 drivers). Each vehicle could have a maximum of 3 drivers. I accept the evidence of Ms. Bastas in this regard. On the evidence before me, I am satisfied that the specific name and history of an individual driver was not relevant to determining premium. There is no evidence that Economical was ever provided with copies of the Bordereaux.

The evidence is clear from the dispatch records of Virk Auto, the OCF-2 executed by Jahan Afzal as manager for the Virk taxi fleet, the taxicab operator log for taxi 2242 and the claimant's own statement dated April 17, 2014, that Hussain operated cab no. 2242 under the Co-Op brand dispatch from January 2013 until April 2013. It appears that during this period, Apollo and AmTrust did not know he was operating cab no. 2242 according to the evidence of the Apollo representative. In his statement dated April 17, 2014, Hussain indicates that he worked as a taxi driver until April 2013 at which time they told him they did not have a taxi available for him but that he would be called if they found a taxi. Hussain applied for EI in April 2013 and was approved in September or October 2013. According to his deposed evidence, he was paid retroactively to April 2013. The manager of the Virk taxi fleet indicated that he advised Apollo in January 2013 that Hussain would be driving cab no. 2242 but no written record of such notification was provided by the manager on behalf of Virk. The fleet agreement between the fleet owner and Apollo required the fleet owner to submit an application, together with documentary support when adding a driver and that only when drivers were approved, could they operate an insured vehicle. Ms. Bastas, on behalf of Apollo, testified that Apollo has no record of a driver application from Hussain or record of him ever operating taxi no. 2242. I find on the balance of probabilities, Jahan Afzal, as manager of Virk, simply overlooked doing the necessary paperwork. Nevertheless, as I have indicated, I do find that Hussain operated taxi no. 2242 between January and April 2013. There are numerous documents that so demonstrate.

There is conflicting evidence as to whether Hussain also worked under the Co-Op brand from June 25, 2013 to August 2, 2013, driving cab no. 2242. An e-mail dated July 25, 2016, contains information from an individual from Co-Op by the name of Dan, confirming that someone was logging into vehicle 2242 using Hussain's identification number from June 25, 2013 to August 2, 2013. Dan was never called to provide oral testimony. The claimant denied

working as a taxi driver during this period. Unlike the January to April 2013 period, there were no vehicle logs to support such contention. I am not satisfied on the evidence before me that the claimant worked as a taxi driver during this period.

There was also a document produced said to be the monthly Bordereaux of June 2013, which might be interpreted to suggest that Hussain operated taxi no. 3376, owned by an individual by the name of Stathopolous, as Hussain's name appears on the document as a driver to the new vehicle being added by Stathopolous. Contemporaneous with the vehicle addition, was the movement of a driver by the name of Zameer Abbas to taxi no. 3376. Ms. Bastas testified that the owner may have made a mistake showing Hussain as the new driver as opposed to Abbas. Again, on the evidence before me, I am not satisfied that Hussain operated a taxi beyond April 2013. He deposed that he only worked as a taxi driver until the end of April 2013 and the driver log records produced confirm this. No driving logs were introduced showing Hussain operating in the Apollo fleet beyond April 2013. His wife was pregnant. He planned on attending religious ceremonies and travel to New York in August and he had applied for EI.

ACE INA has taken issue with the fact that a Bordereaux report for Hussain in Cab no. 2242 between January 2013 to April 2013 has not been produced. Economical has responded that this is so because there is no such document showing the name of the claimant on any Bordereaux and the undertaking only provided for copies of Bordereaux where the name Hussain appeared. It should be noted that the Bordereaux reports as contained in the Joint Document Brief do not contain the addresses of any drivers.

On September 9, 2013, Hussain requested a letter of experience from Apollo. Such document would indicate the periods when working as a driver, the insurance provided for the period and his claims experience. The evidence would indicate Hussain approached Apollo on September 9, 2013 for such letter. There may be an explanation with respect to the delivery of the experience letter ultimately provided and dated September 16, 2013. The claimant was charged on April 26, 2013 with operating a taxi without proof of insurance. This occurred during a period that the claimant admits he was working as a cab driver. The Notice of Trial indicates that the trial was to proceed on October 11, 2013. Ms. Bastas testified that the claimant approached her staff at Apollo requesting a "Letter of Experience" on

September 9, 2013. According to Ms. Bastas, the experience letter was requested by Apollo from the broker based on Hussain's self-report of his experience driving with fleets using Apollo as a broker. The request by Apollo to the broker was done by a new employee by the name of Eran who, according to the evidence of Ms. Bastas, did not complete a record search to confirm the information provided by Hussain. A record search would have indicated that Hussain was deactivated as a driver in November 2012. As indicated earlier, there is no documentary record at Apollo to show that he was later added as a driver and no record from Virk showing that a driver application to Apollo was ever made. All we have is the claimant's evidence and the Virk driving logs confirming that he drove taxi no. 2242 between January and April 2013. The Experience Letter was issued showing him as a driver from November 15, 2012 until September 9, 2013. According to Apollo, the Experience Letter appears to have been issued inadvertently and in error. On the totality of evidence before me, I find that this was probably the case. In all likelihood, Hussain simply went to Apollo indicating that he needed a letter confirming that there was insurance on the vehicles that he operated for Virk to use in the upcoming October 11, 2013 trial. to use as evidence that he was not operating a taxi without insurance. The Experience Letter merely confirmed insurance coverage for the two previous policy periods showing Arch as insurer of the fleet between November 15, 2011 and November 15, 2012, then Economical as insurer of the fleet between November 15, 2012 to the date the request for the letter was made on September 9, 2013.

As indicated all along, Hussain's own evidence is that he was not employed as a taxi driver at the time of the loss and had not worked since April 2013.

The issue to be determined is whether the claimant Hussain was an "individual specified in the policy as a driver of an insured vehicle " at the time of the accident of August 9, 2013.

The Applicant ACE INA takes the position that on the date of loss, the claimant Hussain was an individual "specified in the policy as a driver of an insured vehicle". They claim that the list drivers maintained by Apollo and provided to the broker constitutes the list of drivers "specified in the policy". I do not accept this proposition. It must be kept in mind that this was a fleet policy. I am satisfied that premium was calculated on the basis of the number of vehicles and the number of drivers per vehicle, rather than the claims record and experience of the various drivers. I find that the list of drivers as contained in the Bordereaux does not form part of the policy and in the present circumstances, merely an underwriting tool used to

assess risk and calculate premiums. I am of the view that those "specified in the policy" are only those shown on the face of the Certificate of Insurance and pink slips, neither of which make any reference to individual drivers.

The Applicant ACE INA further takes the position that the "Experience Letter" dated September 16, 2017, authored by the broker, confirms that Hussain was covered under the Economical policy with this being evidence that he was specified as a driver during the policy period indicated. Firstly, I accept the fact that the information contained therein was based on Hussain's self-report in an attempt to obtain evidence to use in defence of the charges of driving without insurance, rather than the inexperienced customer service representative first completing a record search which would have shown that Hussain was deactivated as a driver in November 2012. Secondly, even if the coverage dates were accurate, it would not be proof of being specified on the policy as a driver. Again, I find that it is the Certificate of Insurance and the pink slips that would indicate specified drivers and those here did not contain the names of drivers, nor was a list of drivers attached to the Certificate.

The Applicant ACE INA further submitted that the insurer must have treated the drivers as those "specified in the policy as a driver", because the evidence of Ms. Bastas indicated that each driver was offered optional accident benefits coverage. s.28(1) of the *Statutory Accident Benefits Schedule* requires an insurer to offer optional benefits but s.28(2) indicates that optional benefits are only available to:

- a) the named insured;
- b) the spouse of the named insured;
- c) the dependents of the named insured and of the named insured's spouse; and
- d) the persons specified in the policy as drivers of the insured automobile.

Clearly the drivers were not named insureds, spouses of named insureds or dependents of the named insured, or the named insured's spouse. ACE INA poses the question why the drivers were offered optional benefits, unless thought by Apollo, on behalf of the insurer, to be "persons specified in the policy as drivers of the insured automobile". No reasonable explanation was provided by Ms. Bastas as to why she was told to offer such benefits or what would have happened if a driver elected to purchase such benefits. She testified that none of the 6,000 or so drivers had ever purchased the optional benefits. I am not satisfied

that this evidence is sufficient to qualify those offered the benefits as being “persons specified in the policy as drivers of the insured automobile”. As fleet insurance manager, as opposed to licensed insurance broker, Apollo could not technically offer the product. Ms. Bastas was Director of Operations of Apollo Fleet Management Services Inc. and not a licenced insurance broker at that time. The forms used to purportedly offer the product were clearly standard forms used for each driver’s renewal application which was required on an annual basis. I can only suspect that these standard fill in the blank forms were used both on fleet policies without an attached list of drivers and fleet policies with an attached list of specified drivers. There are fleet policies where the Certificate of Insurance has attached a list of specified drivers, as was the case in *The Personal Insurance Company v. Kingsway General Insurance* (Arbitrator Bialkowski - June 16, 2009), discussed below. In any event, the Document Brief contained eight such forms with respect to the drivers at the time of the Economical policy issuance in November of 2012. Three of the forms indicated that the optional benefits were “not applicable”, perhaps indicative that they were not available to drivers on a fleet policy where a list of scheduled drivers was not attached to the Certificate of Insurance. Two simply were blank with respect to optional benefits, again perhaps indicative that the optional benefits were not offered. One simply had a line through the optional benefits area on the page, again perhaps indicative that they were not offered. Two had initialed “declines”. At best, I find the evidence equivocal. It is impossible to say from the documents as to why the benefits may have been offered to some and not others. There appears to be some confusion. Simply stated, the evidence is insufficient for me to conclude that the actions of the fleet insurance manager in offering optional benefits to some would make them “individuals specified in the policy as drivers of the insured vehicle”. Most importantly, it should be noted that there is no documentary evidence that optional benefits were ever offered to Hussain. As I have found, I am not satisfied that a driver application was ever forwarded by Virk to Apollo with respect to Hussain.

In support of its position, ACE INA relies on the decision in *The Personal Insurance Company v. Kingsway General Insurance* (Arbitrator Bialkowski - June 16, 2009), where it was found that a driver of a vehicle in a fleet policy was a person “specified in the policy” and therefore an “insured person” under that policy for the determination of priority. I am of the view that the facts of that case are factually distinguishable from the facts before me. In *Personal*, there was a list of 47 drivers attached to the issued policy. The claimant was on

that list. Neither the issued Economical policy or the pink slip here contained any list of drivers or references to them.

The jurisprudence most similar to the present facts includes the decision of *Dominion v. Lombard* (Arbitrator Bialkowski - September 11, 2013), where it was determined that a list maintained by the broker for underwriting purposes did not form a part of the policy and did not make an employee a person specified in the policy as a driver. In that case, it was Lombard's policy to obtain a list of drivers each year in order to do a sampling of motor vehicle searches as a risk management tool. This was the same purpose that the Apollo/AmTrust Bordereaux served according to the evidence of Apollo. The arbitrator was asked to determine whether, in a fleet policy situation, those listed as potential drivers for the purposes of risk assessment as part of the underwriting process were specified drivers. In that case, as in the case before me, the policy of insurance itself did not contain the names of any of the drivers. The arbitrator accepted on the strength of the underwriter providing oral testimony that this was a fleet policy insuring vehicles and not individuals. On this basis, he found that the claimant was not a specified driver. This is the exact same situation found in this case. Apollo would provide the names of drivers to AmTrust as part of the risk management portion of the underwriting process. Further, the evidence is clear that the premium was calculated by AmTrust based upon the number of drivers in each vehicle, not the individual characteristics of each driver. While the approved operators and vehicles were tracked by Apollo and AmTrust, this was for underwriting purposes and not with the intention of making each of the 6,000 drivers a listed driver under the policy. I am satisfied that there can be no factual finding that this Bordereaux list was part of the policy. It was merely information collected by AFM and provided to the broker to calculate premiums as the premium charged was dependent on the number of drivers assigned to each of the vehicles in the fleet.

Similarly in *Allianz v. Lombard* (Arbitrator Jones - June 23, 2009), as affirmed on appeal by Patillo J, April 15, 2010, it was found that a list of drivers maintained internally for the determination of premium would not be considered individuals "specified in the policy". Arbitrator Jones wrote:

"...essentially documents prepared to determine a premium and not intended to be considered "listed drivers" under the policy. To extend the purpose of that list to make them listed drivers and therefore require notice of termination of coverage under the policy would be contrary to the intent of the parties. It would also create commercial chaos if written notice were required each time an employee left the company."

In considering the issue before me, commercial reality must be considered. It would clearly be an administrative nightmare if in a fleet policy of the size here, involving some 6,000 drivers, that formal notice of termination of coverage in accordance with the Statutory Conditions would be required each time a driver left the company. It is clear on the documentation before me that drivers come and go on a regular basis. Fleet policies without a scheduled list of drivers would significantly ease the administrative burden.

I find for the very same reasons as set out in *Dominion* and *Allianz*, that the claimant Hussain was not an individual "specified in the policy issued by Economical as a driver of the insured vehicle". It is the Certificate of Insurance and pink slip that would indicate those specified as drivers and in the present case, no such drivers were specified.

### ORDER

On the basis of the findings herein I hereby order:

1. That ACE INA is the priority insurer.
2. That ACE INA pay the arbitration costs of Economical on a partial indemnity basis.
3. That ACE INA pay the arbitrator's costs.

DATED at TORONTO this 12<sup>th</sup> )  
 day of April, 2017. )

  
 \_\_\_\_\_  
 KENNETH J. BIALKOWSKI  
 Arbitrator