CITATION: State Farm Mutual Insurance Company v. Economical Mutual Insurance Company, 2018 ONSC 3496
COURT FILE NO.: CV-17-574028
DATE: 20180505

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N :	)	
	)	
STATE FARM MUTUAL INSURANCE COMPANY	)	*Jason Frost* and *Stanislav Bodrov* for the Appellant
	)	
Respondent	)	
	)	
– and –	)	
	)	
ECONOMICAL MUTUAL INSURANCE COMPANY	)	*Tim Crljenica* for the Respondent
	)	
Appellant	)	
	)	**HEARD:** January 10, 2018

FAVREAU J.:

Overview

[1] This appeal from an arbitration decision turns primarily on the issue of whether the arbitrator erred in finding that Richard Newman, who was a taxi driver, was involved in an "accident" when he developed severe back problems after sitting in a collapsed driver's seat for six shifts between May 20 and 29, 2014.

[2] After he was injured, Mr. Newman made a claim for Statutory Accident Benefits ("SABs") against the insurer of his personal vehicle, State Farm Mutual Automobile Insurance Company ("State Farm"). State Farm accepted the claim, and then initiated a priority dispute against the insurer of the taxi, Economical Mutual Insurance Company ("Economical").

[3] The dispute went to arbitration, where Economical took the position that it had no obligation to pay accident benefits because Mr. Newman's injuries were not caused by an "accident" and because Mr. Newman was not an "occupant" of the taxi when the injuries occurred.

[4] The arbitrator found that Mr. Newman's claim arose from an accident, and that Economical was the priority insurer because it was the owner of the vehicle occupied by Mr. Newman at the time of the accident. Economical appeals from the arbitrator's award.

[5] For the reasons set out below, I find that the arbitrator's decision was reasonable, and the appeal is therefore dismissed.

Facts relevant to the appeal

[6] The arbitration proceeded on the basis of an agreed statement of facts, which includes a number of facts on which the arbitrator based his decision. There was additional evidence before the arbitrator, including a number of medical reports and records.

[7] In May 2014, Mr. Newman was 66 years old, and he had been a taxi driver for approximately 40 years.

[8] At that time, Mr. Newman worked as a taxi driver for Citywide Taxi in Oshawa, where he had worked since 2009. Starting in 2010, the taxi Mr. Newman drove was a 2003 Buick Century owned by John Wright, who was one of the partners of Citywide taxi. The taxi was insured by Economical.

[9] For his personal use, Mr. Newman owned a 2005 Dodge SX, which was insured by State Farm.

[10] When working as a taxi driver, Mr. Newman typically drove three to four twelve hour shifts per week.

[11] On May 20, 2014, before starting his shift, Mr. Newman noticed that the feet on the left side of the driver's seat in the taxi had collapsed.

[12] Mr. Newman claims that he reported the collapsed seat to Mr. Wright and to a manager at Citywide Taxi, but that nothing was done. He drove the taxi despite the collapsed seat.

[13] Mr. Newman usually drove with his left arm out of the window or leaning on the armrest, and the collapsed seat put him at an awkward angle.

[14] Mr. Newman drove the taxi with the collapsed seat for six shifts between May 20 and 29, 2014. He began experiencing pain after the first three shifts. On May 26, 2014, he saw his family doctor, Dr. Charlene Lockner, about the back pain, and she noted that his "back pain has increased". He drove three more shifts, but his back pain got worse.

[15] After his shift on May 29, 2014, Mr. Newman reported to the manager at Citywide that he was unable to continue working and that he planned to take six to eight weeks off. Mr. Newman never returned to work.

[16] After he stopped working, Mr. Newman saw Dr. Lockner on June 18, 2014, and she noted that he had back pain triggered by driving in an abnormal car seat. Dr. Lockner sent Mr. Newman for x-ray imaging, which revealed that he had disc space narrowing in two areas of his lower back and grade 3 spondylolisthesis in the same area. Dr. Lockner then referred Mr. Newman to Dr. Mason, a physical and rehabilitation specialist who indicated in an October 1, 2014 report that Mr. Newman's spondylolisthesis pre-existed the June 2014 back symptoms, and that this condition was likely rendered symptomatic as a result of the "unusual stressors that occurred earlier in the spring".

[17] In December 2014, Mr. Newman applied to State Farm for payment of SABs. State Farm approved the claim in January 2015.

[18] State Farm arranged for Mr. Newman to be examined by an orthopedic surgeon, Dr. J. Hummel. Dr. Hummel prepared a number of reports between May 12, 2015 and September 30, 2016. Generally, Dr. Hummel's reports state that Mr. Newman's injury was caused by a pre-existing condition and not by driving in the collapsed seat. There is some controversy, addressed further below, between the parties as to whether Dr. Hummel's reports provide any support to finding that Mr. Newman's back condition was caused by the collapsed seat.

[19] Mr. Newman saw another orthopaedic surgeon, Dr. Ken Fern, who prepared a report dated August 2016. Dr. Fern's opinion is that it was likely that Mr. Newman's back injury was caused by the defective seat.

Arbitration between the parties

[20] In December 2014, State Farm gave notice to Economical of its position that Economical was the priority insurer. Economical did not agree that it had any obligation to pay benefits to Mr. Newman, and State Farm initiated the arbitration on March 2015.

[21] In a decision released March 24, 2017, Arbitrator Fred Sampliner found that Economical was responsible for paying Mr. Newman's statutory accident benefits.

[22] In reaching this conclusion, the arbitrator found that, while Mr. Newman did have pre-existing health conditions, the cause of his back injury was the defective seat in the taxi which he accepted constituted an "accident" for the purposes of the *Insurance Act*, R.S.O. 1990, c. I.8.

[23] He also found that Mr. Newman was an occupant of the taxi at the time of the accident, rejecting Economical's argument that Mr. Newman's injury was caused by the long term effects of driving the taxi and his own car.

Standard of Review

[24] The arbitration agreement between the parties expressly reserves the rights of the parties to appeal directly to the Superior Court, without leave, on questions of law, fact or mixed law and fact.

[25] State Farm argues that the standard of review applicable to an appeal from an arbitration decision is reasonableness. Economical agrees that the standard of review is generally reasonableness, but argues that in this case what is at issue is the interpretation of a standard form contract, and that the Supreme Court of Canada recently held in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, that correctness applies in such circumstances.

[26] I agree with State Farm that the standard of review is reasonableness and that it has not been altered by the Supreme Court's decision in *Ledcor*.

[27] In *Intact Insurance Co. v. Allstate Insurance Co.*, 2016 ONCA 609 (C.A.), the Court of Appeal confirmed that the standard of review applicable to appeals from arbitration decisions is generally reasonableness.

[28] In doing so, the Court noted that, for the purpose of reviewing arbitration awards, the administrative law framework set out in the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, is more suitable than the standard of appellate review applicable to lower court decisions as set out in *Housen v. Nikolaisen*, 2002 SCC 33. The Court of Appeal's rationale, as explained at paras. 29 to 31, was that the role of insurance arbitrators is akin to that of specialized administrative tribunals:

> 29 Insurance arbitrations are not court proceedings. Rather, as a result of the Regulation, priority disputes like this one are adjudicated by arbitrators with relevant expertise: *Oxford Mutual Insurance Co. v. Co-operators General Insurance Co.* (2006), 83 O.R. (3d) 591 (C.A.), at para. 23; *Chisholm v. Liberty Mutual Group* (2002), 60 O.R. (3d) 776 (C.A.), at para. 21.
>
> 30 In addition, the Regulation has put in place a distinct regime that efficiently resolves priority disputes between insurers while ensuring that beneficiaries receive their benefits promptly: *Lombard Canada Ltd. v. Royal & SunAlliance Insurance Co.* (2008), 94 O.R. (3d) 62 (S.C.), at para. 39.
>
> 31 The limited rights of appeal that presumptively apply in arbitrations are similar to a privative clause. More broadly, arbitrations governed by *the Arbitration Act, 1991* occur against the background of a tightly defined regime under which judicial intervention is generally unwarranted: *Ottawa (City) v. Coliseum Inc.*, 2016 ONCA 363, 85 C.P.C. (7th) 213, at paras. 32-34.

[29] Based on the principles in *Dunsmuir*, the Court went on to confirm, at para. 53, that the standard of review applicable to arbitration awards is reasonableness except in very limited circumstances:

> 53 In general, an appeal to the Superior Court from an insurance arbitration regarding a priority dispute will engage questions of mixed fact and law that must be reviewed for reasonableness. Even if the appeal involves an extricable question of law regarding SABS, a reasonableness standard of review will still generally

> apply. In the unlikely scenario that the issue before the insurance arbitrator is an "exceptional" question (one of jurisdiction, a constitutional question, or a general question of law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area or expertise), a correctness standard of review may be applicable.

[30] Economical argues that, in this case, the standard of review should be correctness because SABs are governed by a standard form contract and, in *Ledcor*, at para. 24, the Supreme Court of Canada held that the interpretation of standard form contracts is a question of law reviewable on a standard of correctness.

[31] In my view, this principle has no application to the circumstances of this case. *Ledcor* did not involve an appeal from an arbitration decision. To the extent that this case engages issues of law, they are questions of statutory interpretation rather than matters of contractual interpretation. In addition, as held in *Intact Insurance Company*, at para. 53, on an appeal from an arbitration award, even a question of law is to be decided on a standard of reasonableness unless it is a "general question of law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area or expertise".

[32] This issue has already been considered by Akbarali J. in *Belairdirect Insurance v. Dominion of Canada Insurance Company*, 2017 ONSC 267 (Sup. Ct.), at paras. 15 to 22, where she concluded that the standard of review is reasonableness in circumstances similar to this case:

> 19 *Ledcor* was released about a month after the Court of Appeal's decision in *Intact Insurance Company*. It is noteworthy that prior to the release of the Supreme Court of Canada's decision in Ledcor, a number of provincial appellate courts had already departed from the holding in *Sattva* to find that the interpretation of standard form contracts is subject to a correctness standard of review. The Court of Appeal for Ontario was among them: see *McDonald v. Chicago Title Insurance Company of Canada*, 2015 ONCA 842 (CanLII) at para. 41.
>
> 20 Notwithstanding its conclusion in *Chicago Title*, the Court of Appeal, after lengthy analysis in *Intact Insurance Company*, found that an arbitrator's decision in the type of priority dispute that is before me is reviewable on a reasonableness standard. I cannot depart from this clear guidance.
>
> 21 In any event, as is apparent below, this appeal involves more than the interpretation of a standard form contract; it involves the interpretation of provisions of the SABS and the *Insurance Act*. This appeal asks how the policy of insurance interacts with the legislative framework. *Intact Insurance Company* clearly finds that even extricable questions of law relating to the legislative framework are reviewed for reasonableness.
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> 22 The standard of review is therefore reasonableness…

[33] In this case, the issues raised by the appellant are not issues of law of central importance to the legal system outside of the arbitrator's expertise. While the issue of whether an "accident" can encompass the circumstances leading to Mr. Newman's injury may have implications beyond this case, this does not make it an issue of central importance to the legal system. In fact, the meaning of the word "accident" for the purpose of determining the availability of accident benefits is precisely the type of issue that is squarely within the expertise of an arbitrator conducting an arbitration under the SABs regulations. As for the other issues raised on appeal, in my view they are issues of mixed fact and law or of fact alone. For example, the question of whether Mr. Newman's injury was caused by the defective seat in the taxi depends on a review of the expert evidence. The issue of whether Mr. Newman was an "occupant" of the taxi at the time he was injured goes back to the question of what caused the injury.

[34] What, then, is reasonableness? In *Dunsmuir*, the Supreme Court described reasonableness as follows:

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Relevant legislative provisions

[35] *The Insurance Act* sets out a scheme for determining which insurer is responsible for paying statutory accident benefits to people who may have access to SABs from more than one insurer.

[36] Section 268(2) of the *Insurance Act*, sets out the priority for paying statutory accident benefits as between insurers. A person involved in a motor vehicle accident first has recourse against his or her own insurer, and, only where there is no such insurer does the person have recourse against the insurer of the vehicle he or she occupied:

> (2) The following rules apply for determining who is liable to pay statutory accident benefits:
>
> 1. In respect of an occupant of an automobile,
>
> i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,

> ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant…

[37] Section 3(7) of the *Statutory Accident Benefits Schedule*, Ontario Regulation 34/10 (the "SABS Regulation"), deems an individual as a "named insured" when the vehicle is being made available for regular use by a corporation or other similar entity and the person is an occupant of that vehicle at the time of the accident:

> (f) an individual who is living and ordinarily present in Ontario is deemed to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,
>
> (i) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity…

[38] Accordingly, if the taxi was made available to Mr. Newman by his employer "at the time of the accident", then he is a deemed insured under the Economical policy. Under these circumstances, he could make a claim against State Farm or Economical subject to the provisions reviewed below.

[39] In cases where there may be two insurers that appear to be in equal priority, section 268(4) of the *Insurance Act* provides that the insured person can choose against which insurer to make a claim:

> (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.

[40] Nevertheless, in combination, subsections 268(5), 268(5.1) and 268(5.2), provide that an insured cannot make an election where the person is the named insured of the vehicle occupied at the time of the incident. In such circumstances, the claim is to be made to the insurer of the vehicle occupied at the time of the incident:

> (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).
>
> (5.1) Subject to subsection (5.2), if there is more than one insurer against which a person may claim benefits under subsection (5), the person, in his or her discretion, may decide the insurer from which he or she will claim the benefits. 1993, c. 10, s. 26 (2).

> (5.2) If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant. 1993, c. 10, s. 26 (2); 1999, c. 6, s. 31 (10); 2005, c. 5, s. 35 (14).

[41] Ontario Regulation 283/95 deals with disputes between insurers, and section 2.1(6) provides that the first insurer that receives a claim is to pay the benefits until the dispute between insurers is resolved.

[42] The regulation also provides that disputes between insurers are to be resolved by arbitration.

Issues and analysis

[43] Economical raises the following issues:

a. Whether the arbitrator erred in finding that an "accident" can include an injury caused over time;

b. Whether the arbitrator erred in finding that Mr. Newman's injuries were caused by the defective seat;

c. Whether the arbitrator erred in finding that Mr. Newman was an occupant of the taxi at the time of the accident;

d. Whether the arbitrator erred in finding that Mr. Newman had regular use of the taxi at the time of the accident; and

e. Whether the arbitrator erred in finding that Mr. Newman had a right to elect the insurer against which he would make a claim.

[44] While each of these issues is framed as a discrete issue, in my view, the starting point for the analysis must be whether the arbitrator's determination that the collapsed seat caused Mr. Newman's injuries was reasonable. If the arbitrator erred in his assessment of causation, then the rest of the decision falls apart because there clearly was no accident and Mr. Newman was therefore not an occupant of the taxi at the time of the accident nor did he have regular use of the taxi at the time of the accident. However, if the collapsed car seat caused Mr. Newman's injuries, the next key issue is whether the arbitrator's finding that Mr. Newman's injury was caused by an "accident" was reasonable. The answers to the subsequent issues flow from there.

[45] Accordingly, I start my analysis with the issue of whether the arbitrator's finding of causation was reasonable.

Was the arbitrator's finding that the collapsed seat caused Mr. Newman's injury reasonable?

[46] Economical argues that the arbitrator made an error in finding that the collapsed seat caused Mr. Newman's injury. Economical claims that this was a legal error because there was no evidence on which the arbitrator could reach this conclusion. Economical argues the arbitrator misapprehended the evidence, and that Mr. Newman's injury was caused by longstanding health issues and the wear and tear on his body of driving both his own car and the taxi.

[47] As the issue of whether the collapsed seat caused Mr. Newman's injury is a question of fact, significant deference is owed to the arbitrator's decision as was recently explained by Kristjanson J. in *Aviva Insurance Co. of Canada v. Security National Insurance Co.*, 2017 ONSC 4924 (Sup. Ct.), at paras. 65 and 66:

> 65 The standard of review of reasonableness requires deference to the Arbitrator's findings of fact and inferences from fact unless "the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact", a standard that "precludes curial re-weighing of evidence, or rejecting the inferences drawn by the fact-finder from that evidence, or substituting the reviewing court's preferred inferences for those drawn by the fact-finder:" *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25 (CanLII), [2016] 1 SCR 587, at para. 30 per Brown, J. for the majority).
>
> 66 Disputes concerning inferences or weight are questions of fact. This court on appeal is not to re-weigh or re-evaluate the evidence, or the sufficiency of evidence that has some probative value. The issue on appeal is whether there is some evidence upon which the Arbitrator could have relied to make the disputed findings of fact, and whether the decision was reasonable.

[48] In reaching his conclusion on the issue of causation, the arbitrator weighed the evidence before him, preferring the evidence of Dr. Fern and Dr. Lockner over the evidence of Dr. Hummel.

[49] With respect to Dr. Hummel's evidence, the arbitrator gave his evidence little weight, finding that it was inconsistent on the issue of whether the collapsed seat was the cause of Mr. Newman's injuries:

> … State Farm retained Dr. J. Hummel, an orthopaedic specialist, who in April 2015 examined Mr. Newman, reviewed his records and reported on the origin and extent of his back problem. He was provided with the radiology imaging reports and nerve studies that allowed him to understand Mr. Newman's pre-existing health. Dr. Hummel knew that Mr. Newman had pre-existing spondylolisthesis L5 S1 with associated nerve injury, and opined that although he incurred no additional physical damage to his back from driving in the collapsed seat, the degeneration was exacerbated by the driving. He initially said the back pain became spontaneously symptomatic from driving the taxi and that Mr. Newman was consequently unable to operate the vehicle for his taxi work.

> Dr. Hummel examined Mr. Newman again on December 2, 2015, and changed his view on causation:
>
> > You will recall that this accident occurred over a period of time. It is my opinion that it is very difficult to determine what was the specific cause of this injury. However, from the description of the actual events, it is unlikely that there was a single precipitating cause since this occurred over a time period and was also evidence of a pre-existing condition.
>
> And further on states that:
>
> > …it is my opinion that although he has a significant problem at this present time, it is most likely not precipitated by what Mr. Newman describes as a broken seat in his taxi cab. It is likely due to a pre-existing condition that is slowly worsening.
>
> It is significant that Dr. Hummel does not cite any new information or plausible reason to support reversing his opinion on causation, and I ascribe little weight to his later opinion.

[50] Economical argues that the arbitrator made an error in his assessment of Dr. Hummel's evidence, taking the position that, contrary to the arbitrator's finding, Dr. Hummel was consistent in his view that the collapsed car seat did not cause Mr. Newman's injury. Economical points to many passages in Dr. Hummel's reports throughout the period of assessment which it says show that he was consistent in his view that the injury was due to a pre-existing condition and not caused by the collapsed seat.

[51] In my view, there is no basis for interfering with the arbitrator's decision on causation. As pointed out by State Farm, while Dr. Hummel may not have gone so far as reversing his position, there was some acknowledgement on more than one occasion that the collapsed seat could have worsened Mr. Newman's condition. For example, in his report of May 12, 2015, unsolicited, Dr. Hummel provided the opinion that "[t]here was no accident" but acknowledged that Mr. Newman's pain appeared in the two week period during which Mr. Newman drove with the defective taxi seat. As another example, in his report dated September 30, 2016, Dr. Hummel commented on Dr. Fern's report:

> The findings noted by Dr. Fern and I correlate but we differ on causation. It is my opinion that this back pain is related to the pre-existing condition. This could have possibly been worsened by the accident; however, as noted in my Independent Orthopaedic Assessment dated December 2, 2015, it is my opinion that this condition could have occurred if Mr. Newman had not been driving.

[52] Based on his view that there was some equivocation in Dr. Hummel's reports, the arbitrator chose to prefer Dr. Fern's expert evidence and Dr. Locker's evidence, and reached the conclusion that in combination their evidence provided a logical explanation for the significant change in Mr. Newman's condition. For example, he relied on the explanation in Dr. Fern's report that "in his professional experience as an orthopaedic surgeon and spinal surgeon it is not

uncommon for a patient with documented chronic back changes, such as Mr. Newman's, to be completely asymptomatic until an actual insult to that area occurs…" He also relies on Dr. Lockner's notes which he says "show [Mr. Newman] experienced occasional back pain beforehand, but in June 2014 those notes indicate chronic and severe pain. I draw the reasonable conclusion that Mr. Newman could not have been regularly driving 12 hour shifts 3-4 days a week for months before the accident if his back pain had been chronic and severe before May 20, 2014".

[53] Ultimately, the arbitrator concluded as follows:

> Dr. Lockner's June 2014 notes of severe back pain following Mr. Newman's work departure, the radiology reports, together with Dr. Fern's opinion persuade me that Mr. Newman's severe chronic back pain was a direct result of his driving the Buick taxi with the unrepaired seat.

[54] Economical is essentially inviting this Court to reweigh the competing evidence on the cause of Mr. Newman's injury. As held in *Aviva*, para. 66, this is not the proper role of the Court when reviewing an arbitration decision. I am satisfied that there was evidence upon which the arbitrator could make the determination that Mr. Newman's back was injured by the collapsed seat, and that his decision on this point was reasonable.

Was the arbitrator' finding that Mr. Newman's injuries were caused by an "accident" reasonable?

[55] Economical takes the position that the Arbitrator erred in his interpretation of the word "accident", arguing that an accident must be an "incident" that occurs at a specific point in time. Economical argues that, given that the arbitrator did not identify the point in time when Mr. Newman was injured, it was an error to find that his injuries resulted from an accident.

[56] "Accident" is defined in section 3(1) of the SABS Regulation as follows:

> "accident" means an incident in which the use or operation of an automobile directly causes an impairment or directly causes damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device

[57] "Incident" is not defined in the regulation or in the *Insurance Act*.

[58] "Impairment" is defined as follows:

> "impairment" means a loss or abnormality of a psychological, physiological or anatomical structure or function.

[59] The arbitrator considered and rejected Economical's argument that it was necessary to pinpoint a moment in time when the accident occurred:

> There are no explicit words in the SABS definition of an "accident" or the dictionary definition of "incident" that lead me to accept Economical's submission

> that multiple minor injuries are excluded from the definition of "incident". The *Legislation Act 2006* also indicates the word should be "…interpreted as being remedial and given such fair, large and liberal interpretation as best suits the attainment of its objects", which is consumer protection…
>
> Economical's position on the term "incident" leads it to propose that State Farm must produce an expert report identifying the exact place and time of the accident injury. I can reasonably infer that accepting such an argument would tend to encourage more insurers to dispute the accident injury time and mechanism in priority disputes, establish an additional burden to obtain expert evidence and thereby increase costs, complexity and undermine the efficiency of the priority scheme. This is an absurd result to be assiduously avoided. I reject Economical's position that an "incident" is necessarily limited to a single specific moment in time, and instead focus my attention on the causation issue.

[60] The arbitrator then went on to make the finding referred to above that the collapsed seat was the cause of Mr. Newman's impairment.

[61] While the arbitrator did not engage in a careful analysis of how the circumstances in this case amounted to an "incident", it is implicit in his decision that the "incident" that caused the injury was the collapse of the taxi seat and its impact on Mr. Newman when he drove the taxi for six shifts. Up to May 20, 2014, Mr. Newman's taxi did not have a collapsed seat nor did his back condition prevent him from working. It was the collapse of the seat around that date that caused Mr. Newman's impairment.

[62] Notably, neither Economical nor State Farm was able to identify a case in which the issue of what constitutes an "incident" has been considered. The cases dealing with the definition of "accident" tend to focus on the issue of whether the use or operation of the vehicle was the direct cause of the impairment.

[63] For example, in *Chisolm v. Liberty Mutual Group*, [2002] O.J. No. 3135 (C.A.), the Court of Appeal for Ontario found that a person who was shot multiple times while driving a car was not in an "accident" because the use or operation of the car was not the direct cause of his injuries.

[64] Similarly, in *Greenlagh v. ING Halifax Insurance Co.*, [2004] O.J. No. 3485 (C.A.), the Court of Appeal found that there was no accident for the purposes of the *Insurance Act* in circumstances where a driver was injured after her vehicle broke down and she developed frostbite from walking to seek assistance. In reaching this conclusion, the Court of Appeal described the test developed in *Chisolm* as follows:

> 36. While I will look at each of these in turn, in my opinion, the *Chisholm* test, as it applies to this case, can best be set out in the form of two questions:
>
> 1. Was the use or operation of the vehicle a cause of the injuries?

> 2. If the use or operation of a vehicle was a cause of the injuries, was there an intervening act or intervening acts that resulted in the injuries that cannot be said to be part of the "ordinary course of things"? In that sense, can it be said that the use or operation of the vehicle was a "direct cause" of the injuries?

[65] In *Greenlagh*, the Court's finding that the driver was not involved in an accident included a finding that the operation of the vehicle and the direct cause of the injuries were not temporally connected:

> 44 Here, as in Hanlon, *Alchimowicz* and *Mahadan*, the use of the car had ended without injury being suffered, the insured had physically left the car; no automobile contributed physically to the insured's injuries; and there was temporal distance between the end of the use of the car and the injuries. As in *Hanlon*, the problem with the car could be said to have led to the injuries, but one could not say that it caused the injuries. As in *Mahadan*, the factor that physically caused the injuries, in the present case the weather, was unrelated to the use or operation of the automobile.

[66] More recently, in *Martin v. 2064324 Ontario Inc.*, 2013 ONCA 19 (C.A.), the Court of Appeal applied the *Chisolm* test and found that a man who was assaulted by two people robbing him and trying to steal his vehicle was not involved in an accident. The Court held that the assaults were distinct acts that were not the direct cause of his injuries.

[67] In this case, with the arbitrator's finding that the factual cause of Mr. Newman's impairment is his use and operation of the taxi with the defective seat for six shifts, there is no question that the use or operation of a vehicle was the direct cause of Mr. Newman's impairment. The use of the vehicle caused the injury and there was no intervening event that caused the injury. The only issue is whether what occurred was an "incident".

[68] In my view, the arbitrator's conclusion that the word "incident" does not require the identification of a specific moment in time when the accident occurred is reasonable. The word "incident" certainly connotes the occurrence of a discrete event, but there is no basis for finding that the consequences of the event must be immediate or occur instantaneously. The arbitrator's decision is not based on a finding that Mr. Newman's back condition was caused by the ongoing wear and tear of driving, but rather by the awkward position in which he had to sit due to the collapsed seat. The collapsed seat is a discrete event that directly caused Mr. Newman's impairment; in other words, the collapsing of the seat is the incident and the consequences of this incident developed over the next few days.

[69] In fact, there are any number of circumstances in which someone may be injured due to a defect in a car. For example, a defective wheel or tire could cause a drive to lose control or a defective exhaust system could cause the occupants of a car to become ill. There is no principled reason for differentiating between circumstances in which the defect leads to a sudden injury and circumstances in which the injury is caused over a period of time.

[70] Economical makes a floodgates argument, arguing that allowing the arbitration will mean that anyone who develops any kind of repetitive injury due to the use of a motor vehicle could make a claim for accident benefits. The flaw in Economical's argument is that the basis for the arbitrator's decision was that Mr. Newman's impairment was caused by the collapsed seat, and not by the ongoing strain caused to his body by driving generally. In this respect, it is noteworthy that Economical's battle is with State Farm and not with Mr. Newman. It is evident that, while State Farm takes the position that Economical is the priority insurer, it initially accepted Mr. Newman's claim and accepted that Mr. Newman's impairment was caused by an accident.

[71] While a different arbitrator may have reached a different conclusion, the arbitrator's decision that Mr. Newman was involved in an accident falls within "a range of possible, acceptable outcomes" given the facts and the law. Accordingly, in my view, the arbitrator's finding that Mr. Newman's impairment was caused by an accident is reasonable.

Whether the arbitrator erred in finding that Mr. Newman was an occupant of the taxi at the time of the incident?

[72] As indicated above, section 268(5.2) of the *Insurance Act* provides that where there is more than one insurer against which an insured can make a claim for SABs, the claim is to be made against the insurer of the vehicle occupied by the person making the claim "at the time of the incident".

[73] Economical argues that the arbitrator's finding that Mr. Newman was an occupant of the taxi at the time of the incident was not reasonable because his impairment was not caused by the collapsed seat. While it goes to the issue of priority as between Economical and State Farm, this argument turns on the issue of causation and the interpretation of the word "incident" which I addressed above.

[74] I see no merit to Economical's argument given my finding that the arbitrator's determination on these issues was reasonable. Accordingly, there is no basis for finding that the arbitrator's determination that Mr. Newman was an occupant of the taxi at the time of the incident was unreasonable.

Whether the arbitrator erred in finding that Mr. Newman had regular use of the taxi at the time of the accident

[75] As reviewed above, section 3(7) of the SABS Regulation deems an individual a "named insured" when a vehicle is being made available for regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity at the "time of the accident".

[76] Again, Economical's argument turns on the issues of whether the collapsed seat in the taxi was the cause of Mr. Newman's impairment and whether he was involved in an accident. Given my findings above, there is no basis for disrupting the arbitrator's finding that Mr. Newman was deemed to be insured by Economical.

Whether the arbitrator erred in finding that Mr. Newman had a right to elect the insurer against which he would make a claim

[77] Economical argues that, given that Mr. Newman drove the taxi and his own vehicle during the time frame when he developed the severe back pain, Economical and State Farm are in equal priority and Mr. Newman's choice of State Farm should be respected.

[78] However, given the finding that the incident that caused Mr. Newman's injury occurred while he was an occupant of the taxi, as referred to above, section 268(5.2) of the *Insurance Act* applies and it is not open to Mr. Newman to choose his insurer.

[79] As provided for by the regulatory scheme, once Mr. Newman made a claim against State Farm, it had an obligation to pay. However, it was open to State Farm to then use the dispute resolution mechanism provided for in the regulation to determine the priority insurer, which the arbitrator found was Economical.

Conclusion

[80] For the reasons above, the appeal is dismissed.

[81] Following the argument of the motion, I received a letter from counsel advising that the parties had reached an agreement that the successful party was to receive $6500 in costs, inclusive of HST. Accordingly, State Farm is entitled to costs in the amount of $6500 all inclusive.

FAVREAU J.

RELEASED: June 5, 2018

CITATION: State Farm Mutual Insurance Company v. Economical Mutual Insurance Company, 2018 ONSC 3496
COURT FILE NO.: CV-17-574028
DATE: 20180505

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N :

STATE FARM MUTUAL INSURANCE COMPANY

Respondent

– and –

ECONOMICAL MUTUAL INSURANCE COMPANY

Appellant

REASONS FOR JUDGMENT

FAVREAU J.

RELEASED: June 5, 2018