IN THE MATTER of the *Insurance Act,* R.S.O. 1990,
c.I.8, s. 275 (as amended) and Regulation R.R.O, 1990, Reg. 668;

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

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

AVIVA INSURANCE COMPANY

Applicant

- and –

ZURICH INSURANCE COMPANY

Respondent

AWARD

Counsel:

Nathalie V. Rosenthal / Nathan M. Fabiano
Counsel for the Applicant, Aviva Insurance Company ("Aviva")

Anthony Trichilo
Counsel for the Respondent, Zurich Insurance Company ("Zurich")

ISSUES:

Aviva seeks indemnification by way of loss transfer dispute in relation to statutory accident benefits that it paid to its insured, Angela R-C ("Angela") arising from a motor vehicle accident that occurred on July 4, 2013. There are relatively few facts in dispute. It is agreed that Aviva

has the right to recover 100% of substantially all of the benefits which Aviva paid to its insured. The dispute before me centers on the calculation of what is popularly known as "post-65" income replacement benefits. Indeed, the amount in dispute before me amounts to $31,605.49 and relates to income replacement benefits paid to Angela as part of a lump sum, full and final settlement achieved on November 14, 2017. The total amount paid by Aviva came to $393,335.90, net of the $2,000 deductible. Zurich has paid $358,486.

Procedurally, it was agreed that this hearing would be conducted entirely in writing. I received submissions on behalf of Aviva on April 1, 2022. I received submissions on behalf of Zurich on April 22, 2022. I received reply submissions from Aviva on May 6, 2022. While this matter was under reserve, Vice Chair Maedel of the Licence Appeal Tribunal ("LAT") released a decision on July 29, 2022, known as *Schuknecht v. Economical*. Counsel for the parties to this proceeding requested an opportunity to deliver supplementary submissions and I agreed with the request. As a result, supplementary submissions were made on behalf of Aviva on August 15, 2022, and on behalf of Zurich on Aug 31, 2022. I have reviewed and considered all of these submissions and all attachments in coming to this decision.

The issues in dispute have been framed as:

1. What is the standard for a second party insurer to dispute payments made to or on behalf of an insured party by the first party insurer? Did Aviva breach this standard?

2. What is the formula to calculate income replacement benefits post-65 when an insured is receiving collateral benefits on their 65th birthday?

There is no dispute between the parties in relation to the standard of review. Counsel for Zurich referred me to the decision of Arbitrator Samworth in Commercial Union Assurance v. Boreal Property & Casualty (December 21, 1998). This decision and others which have followed it stand for the proposition that in order for a second party insurer to withhold payment for indemnification, it must prove that the benefits in dispute must fall in one of the following three categories:

a. the insurer acted in bad faith when making the payments;
b. the insurer made payments that were not available under the SABS; or

c. the first party insurer's actions in paying the disputed payments amounted to gross negligence or gross mishandling of the claim.

Zurich does not allege Aviva to have acted in bad faith. However, Zurich does submit that Aviva made payments that were not available under the SABS. In the alternative, Zurich submits that by using an incorrect formula, Aviva's actions amounted to gross negligence or gross mishandling of the claim.

Angela was born on October 19, 1958. She will turn 65 years old on October 19, 2023.

Aviva retained a well-regarded forensic accounting firm to assist in the calculation of the quantum of income replacement benefits payable to Angela. They determined 70% of her gross weekly pre accident income from employment to be $1034.49. This would entail a maximum income replacement benefit payment of $400 per week, before consideration of long-term disability benefits.

It should be noted, and I do not believe it is in dispute, that long term disability benefits are deducted from the 70% of gross weekly income calculation whereas post-accident income is deducted from the income replacement benefit that would otherwise be payable.

The net result of the foregoing is that the forensic accounting firm determined that in the absence of the lump sum settlement and assuming Angela's ongoing entitlement to receive both income replacement benefits and long-term disability benefits, the net weekly income replacement benefit which would have been payable on the day before she reached age 65 was $168.64 per week or $186.64 per week. This discrepancy in the written submissions is likely due to a typographical error or a transposition of numbers and will be addressed by me to the extent that the quantum of indemnification in relation to the amount in dispute becomes necessary.

The dispute arises in relation to the interpretation and application of Section 8 of the SABS which provides as follows:

8. (1) If a person is receiving an income replacement benefit immediately before his or her 65th birthday, the weekly amount of the benefit is adjusted, on the later of the day of

the person's 65th birthday and the second anniversary of the day the person began receiving the benefit, to the amount determined in accordance with the following formula:

C × 0.02 × D

in which,

"C" is **the weekly amount of the income replacement benefit that the person was entitled to receive immediately before the adjustment** (emphasis added by the writer), before any deductions permitted by subsection 7 (3),

"D" is the lesser of,

(a) 35, and

(b) the number of years during which the person qualified for the income replacement benefit before the adjustment is made.

(2) Despite section 6, an income replacement benefit that has been adjusted under subsection (1) is payable, without any deductions under clause 7 (3) (a) or (b), until the person dies.

Counsel for Aviva references the long-term disability policy provisions of a comprehensive policy of group benefits available to Angela as an employee of a large municipality in the GTA. Counsel relies on a section entitled "when coverage ends" and which provides that long term disability coverage will end on the day you reach age 65 less the elimination period of 26 weeks or the day you retire, whichever is earlier. Counsel submits that the coverage would end on April 20, 2023, and, as a result, the calculation required under Section 8, above, would exclude long term disability payments. I reject this argument as this section of the policy addresses coverage rather than payments. In other words, if the accident occurred within 26 weeks of Angela reaching age 65, there would be no coverage by reason of the elimination period.

The policy provides, in a section entitled "when payments end", that long term disability payments end on the earlier of the following dates:

- the date you are no longer disabled
- the last day of the month in which you reach age 65
- the last day of the month in which you retire with a pension or are eligible to retire with a full pension or a full pension equivalent
- the last day of the month in which you die

Thus, it is clear that Angela's entitlement to receive long term disability benefits began after the 26-week elimination period which followed the accident of July 4, 2013. Long term disability benefits were continuing at the time of the lump sum settlement in November 2017 as were income replacement benefits at the reduced amount by reason of Angela's receipt of long-term disability benefits. it can reasonably be inferred by me that Angela's impairments would continue, and she would continue to be entitled to receive both long term disability benefits and income replacement benefits to age 65 and beyond.

Counsel for the parties agree that until the very recent LAT decision, there was no law from the LAT, arbitrators or the courts to interpret the phrase *"C" is the weekly amount of the income replacement benefit that the person was entitled to receive immediately before the adjustment*. Unlike a decision from the courts, which I am obliged to follow, I have considered and will comment on the decision from the LAT but it is really a matter of first impression for me as arbitrator.

Very simply, I find that Angela was not **entitled** to receive long term disability benefits upon reaching age 65. Her entitlement arose by reason of injuries and impairments which began at the time of the accident of July 4, 2013, and which continued through the elimination period and which were ongoing at the time of the settlement in November 2017. When the settlement was reached, Aviva assumed, on all of the evidence then available, that her injuries and impairments would continue indefinitely into the future. Aviva assumed, on all of the evidence, that she would live to age 65 and beyond and made accounting and actuarial calculations accordingly. It is not disputed that the forensic accountants assumed, for the purposes of their calculations, that long term disability payments would continue to and end on the last day of the month in which Angela reached age 65, being October 31, 2023.

I find that there is a meaningful, material, and significant difference between her **entitlement** to receive long term disability benefits as compared to the cessation of the payment of the benefit. Angela was not entitled to long term disability benefits at or after age 65. Rather, the entitlement which began at the time of the accident and which entitlement continued through the elimination period and which was continuing at the time of the settlement in November 2017 culminated with the last payment which was calculated to and on the last day of the month in which Angela reached age 65. She was not entitled to benefits at or after age 65 but, under the provisions of the long-term disability policy, the payment was calculated and would end after she reached age 65.

Entitlement is defined in the Merriam Webster online dictionary as a: the state or condition of being entitled: RIGHT, b: a right to benefits specified especially by law or contract.

It cannot be said that the claimant had an entitlement to receive long term disability benefits from and after reaching the age of 65. Rather, there was simply a continuation of a benefit under the terms of the policy of insurance until the end of the month within which she reached age 65. She had no right or entitlement to receive a long-term disability benefit at age 65.

I appreciate that some may view this reasoning as mental or linguistic gymnastics. However, my view is that this interpretation is reasonable and consistent with the objects of the SABS. Section 7 (1) of the SABS defines the amount payable as a weekly income replacement benefit. As mentioned above, there is a calculation for 70% of gross weekly employment income and a reduction from this amount for all other income replacement assistance. Long term disability benefits are taken into account in this fashion. This eliminates the potential for double recovery or excessive compensation to the victims of automobile accidents otherwise entitled to benefits under the SABS.

The SABS provides for income replacement benefits to be paid to a claimant after the age of 65. Presumably, this recognizes the potential for many to work beyond age 65 and provides some compensation for that loss through the SABS. The claimant is not entitled to disability benefits after the age of 65. Rather, the payment ends at the end of the month within which the claimant reaches age 65. There is no double recovery or excessive compensation.

To accede to the submissions made on behalf of Zurich, the opposite would be true and claimants such as Angela would be undercompensated. An example will demonstrate this point. If Angela had the same earnings as described above but did not have the benefit of an extensive policy of group insurance through her employment including, among other things, long term disability coverage, she would have been entitled to a maximum income replacement benefit of $400 per week. This would have continued to age 65. The calculation of her post 65 income replacement benefit in simple terms would be calculated as follows:

$C \times 0.02 \times D$

$C = \$400$

D= 10.25 years (July 2013 through October 2023)

This gives rise to a payment of $82 per week from and after Angela reaching age 65.

According to the submissions of Zurich, the calculation would be made as follows:

$C \times 0.02 \times D$

$C = \$168.64$

D= 10.25 years (July 2013 through October 2023)

This gives rise to a payment of $34.57 per week from and after Angela reaching age 65.

It does not seem appropriate to me to penalize an automobile accident claimant who, through their own foresight and care, purchases long term disability coverage or who has the ability to secure employment which carries with such employment the benefit of collateral coverage including long term disability coverage. The accident benefit carrier quite properly can and should consider the claimant's receipt of long-term disability benefits when calculating income replacement benefits payable. In certain cases of very high-income earners, the income replacement benefit will continue to be $400 per week. In other cases, the income replacement benefit will be payable at less than $400 per week. In some cases, the income replacement

benefit will be payable at nil dollars for so long as the automobile accident claimant is entitled to receive other income replacement assistance. This would include long term disability benefits and CPP disability benefits. For the reasons I have indicated, the entitlement to such income replacement assistance ends when the automobile accident claimant turns age 65.

Zurich makes an excellent point in their supplementary submissions in relation to the calculation of post 65 Income replacement benefits. Zurich points to the 1993 version of the SABS which explicitly references an exclusion for deductions under what was then section 75. Section 75 addressed payments under the laws of any jurisdiction or under any income continuation plan.

By comparison, the current version of the SABS, which has its beginnings in November 1996, only references post-accident income [subsection 6(2) of the 1996 SABS and currently subsection 7 (3) of the version of the SABS applicable to this particular case. However, the answer is revealed in subsection 7 (1). As referenced earlier, the weekly base amount is determined under subsection 7 (2) but then reduced by the total of all other income replacement assistance. This phrase is defined extensively in subsection 4 (1) of the SABS and includes the amount of any gross weekly payment for loss of income that is received … under any income continuation benefit plan.

If I were to apply the SABS as rigorously as urged upon me by Zurich, I would not deduct any long-term disability benefits as they are payable monthly rather than as a **gross weekly payment.** This would be an absurd outcome. There is a well-established practice to take monthly long term disability benefits, divide by 4.33 so as to produce the weekly long term disability benefit to be applied against and deducted from the calculation of an income replacement benefit under the SABS.

I am not required to follow the decision of an adjudicator at the LAT. I have considered the decision of Vice Chair Maedel in *Schuknecht v. Economical.* He notes that there was no law to support the interpretation urged upon him by Economical which is the same interpretation urged upon me by Zurich. Vice Chair Maedel found the interpretation to be contrary to the consumer protection mandate of the SABS. He found it would lead to an absurdity by penalising a claimant who would have the foresight to obtain or apply for collateral benefits. This would leave the claimant in a worse position after age 65 than if she had not obtained any collateral coverage. I have come to the same conclusion but for what maybe perceived to be somewhat

different reasons. I do not think one has to resort to any concept of consumer protection to deal with the matter.

Finally and perhaps most importantly, I return to the submissions of Zurich in relation to the standard of review. In essence, the submission is that the post 65 benefit as calculated by Aviva was "not available under the SABS" and by paying a benefit as calculated by Aviva, this constituted "gross negligence or gross mishandling of the claim".

Aviva accepted that Angela would continue to be entitled to income replacement benefits to the age of 65 and beyond. Aviva accepted that Angela would continue to be entitled to long term disability benefits to the age of 65 (payable to the end of the month within which Angela turn 65).

I find that Angela was likely to be entitled to income replacement benefits to and beyond age 65. Aviva retained a reputable forensic accountant who made calculations. Both Aviva and the forensic accountant acted in good faith when making these calculations. Given the absence of law governing these calculations when made in the earlier part of 2017 and continuing when settlement discussions produced the lump sum, full and final settlement in November 2017, it cannot be said that Aviva's payments constituted gross negligence or gross mishandling of the claim. There was no law or established precedent to assist Aviva and its forensic accountant in the methodology, approach and calculation in relation to a post 65 income replacement benefit. Consequently, it seems inappropriate to characterize this behavior as gross negligence or gross mishandling of the claim.

For the reasons that I have provided, the calculation was correct. If my reasoning is incorrect, the reasoning in *Schuknecht v. Economical* would seem to excuse Aviva and find their evaluation, analysis, adjustment and negotiations not to be gross negligence or gross mishandling of the claim.

If both my reasoning and the reasoning of Vice Chair Maedel in *Schuknecht v. Economical* are incorrect, I make a further finding. Given the paucity of any authority to govern Aviva's negotiations and decision-making in November 2017, the decision was reasonably available to Aviva as an interpretation of the SABS and did not constitute gross negligence or gross mishandling of the claim. In theory, Aviva could have required Angela to pursue a determination

at the LAT. They could have terminated settlement discussions. This would not have been in the best interests of the claimant or Aviva. Zurich, as the second party insurer, should not be allowed to second guess or readjust the good faith decision making of Aviva. I appreciate that Zurich explicitly makes this submission that they are not attempting to do this but this is the net effect of the position taken.

For the reasons that I have indicated, Aviva is entitled to indemnification in relation to the post 65 income replacement benefits which it paid to Angela as an incident of the lump sum, full and final settlement reached in November 2017. As I have indicated above, there seems to be some possible disagreement in relation to the weekly amount though I suspect this is likely a typographical error or transposition or exchange of two digits in the weekly benefit calculation. If the parties are satisfied that the amount of $31,605.49 is correct, then I find that this amount is payable by Zurich to Aviva. If there is some disagreement in relation to this amount, I remain seized of the matter to determine the correct amount for which indemnification is going.

If there are other issues outstanding, such as costs or otherwise, I remain seized of the matter and I am prepared to deal with such issues accordingly and in a timely fashion. I apologize to counsel and to the parties for my delay in preparing and providing this decision / award. it was unfortunate but it did allow for me to consider the LAT decision and to receive and consider the supplementary submissions of counsel.

Finally, I am most appreciative of the efforts, expertise, and ability of counsel for their courtesy and cooperation extended to me and to each other from the inception of the arbitration through to its conclusion. This matter preceded efficiently from the time of the first pre arbitration teleconference through to its hearing through written submissions. I wish to thank counsel for their thoughtful, comprehensive and intelligent written submissions.

Dated at Toronto this 7th day of October, 2022.

Vance Cooper, Arbitrator