Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

FSCO A06-001732 and A06-001689

BETWEEN:

SHUI XIAN LIN and YUE XIAN LIU

Applicants

and

ING INSURANCE COMPANY OF CANADA

Insurer

DECISION ON EXPENSES

Before: David Leitch

Heard: Written submissions completed on February 22, 2008

Appearances: Sahereh Baghbani for Ms. Lin and Ms. Liu
Heather Kawaguchi and Jennifer Griffiths for ING Insurance Company of Canada

Issues:

ING Insurance Company of Canada ("ING") consented to the withdrawal of these Applications for Arbitration at the pre-hearing but claimed its expenses under section 282(11) of the *Insurance Act*, R.S.O. 1990, Chapter I.8, and the Expense Regulation.[1] The Applicants, Shui Xian Lin and Yue Xian Liu, and their representatives deny they are liable to pay any of ING's expenses. The issues in this written hearing are, therefore:

1. Are Ms. Lin and Ms. Liu, or their representatives, required to pay ING's expenses and, if so, in what amounts?

[1] Ontario Regulation 664, R.R.O. 1990, made under the *Insurance Act*, as amended to O.Reg. 275/03.

Result:

1. Ms. Lin and Ms. Liu and their representatives are not required to pay ING's expenses in relation to these proceedings.

Introduction

While presented as claims for expenses, the underlying dispute in these cases involved the interaction between the *Schedule*[2] and the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A.

The Applicants were both passengers injured in a motor vehicle accident on October 24, 2005. ING took the position from the outset that they were in the course of their employment at the time of the accident and that they were, therefore, only entitled to claim benefits for their injuries from the Workplace Safety and Insurance Board under the *Workplace Safety and Insurance Act, 1997*. The Applicants initially took the position that they were not in the course of employment at the time of the accident and were, therefore, entitled to claim benefits under the *Schedule* from ING. However, their position appeared to change back and forth several times and they ultimately withdrew their Applications for Arbitration. Still, in her submission before me in relation to expenses, Ms. Baghbani did not concede that the Applicants were in the course of their employment at the time of the accident.

This is a case in which it is better to start with an explanation of the law than with a more detailed description of the facts. I begin by setting out the legislative provisions and jurisprudence governing the interaction between the *Schedule* and the *Workplace Safety and Insurance Act, 1997*. I will then describe what I consider to be the insurer's obligations to provide insured persons with information about that interaction and about how disputes related to it are to be resolved. Next, I will turn to the conduct and the arguments of the parties in this case. Finally, while criticizing the conduct of the Applicants' representatives, I will conclude that

[2] *The Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996, Ontario Regulation 403/96, as amended.* The two earlier *Schedules* will be referred to as *SABS-1990* and *SABS-1994*.

ING's conduct was incompatible with its obligations towards the Applicants and incompatible with an award of expenses in its favour.

Part 1: Disputes involving the interaction between the *Schedule* and the *Workplace Safety and Insurance Act, 1997* and how they are resolved

The law governing the interaction between the *Schedule* and the *Workplace Safety and Insurance Act, 1997* is found in several locations and covers several different kinds of potential disputes. The legislative provisions are found in section 59 of the *Schedule* and in sections 28 to 31 of the *Workplace Safety and Insurance Act, 1997*. The jurisprudence interpreting these provisions is found principally in decisions made by Arbitrators here at the Financial Services Commission of Ontario (FSCO) and by the Workplace Safety and Insurance Appeals Tribunal.[3]

Since the interaction between the *Schedule* and the *Workplace Safety and Insurance Act, 1997* generates several different kinds of potential disputes, the law governing that interaction is most usefully explained in the context of those disputes as outlined below. For each dispute, I will describe its nature, the procedure for its resolution and its implications for the insurer's obligation to pay benefits under the *Schedule*.

1.1 Disputes about whether the insured person is entitled to receive benefits under the *Workplace Safety and Insurance Act, 1997*

Section 59(1) of the *Schedule* states the general rule that an insured person cannot claim benefits under the *Schedule* if he/she is entitled to receive benefits under any workers' compensation scheme. The subsection reads as follows:

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

[3] Of course, jurisprudence might also be established by the courts through trials, appeals or applications for judicial review.

Unfortunately, the *Schedule* does not refer to the procedure for resolving a dispute about whether the insured person is entitled to receive benefits under the *Workplace Safety and Insurance Act, 1997*. The correct procedure is to apply to the Workplace Safety and Insurance Appeals Tribunal under sections 31(1)(c) and (2) of the *Workplace Safety and Insurance Act, 1997* which read as follows:

> 31. (1) A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act* may apply to the Appeals Tribunal to determine,
>
> (a) … (b)
>
> (c) whether the plaintiff is entitled to claim benefits under the insurance plan. [that is, under the *Workplace Safety and Insurance Act, 1997*]
>
> (2) The Appeals Tribunal [that is, the Workplace Safety and Insurance Appeals Tribunal] has *exclusive* jurisdiction to determine a matter described in subsection (1). [Emphasis added]

The use of the words "party to an action" and "plaintiff" initially created doubts about the scope of the Workplace Safety and Insurance Appeals Tribunal's jurisdiction. As explained below, one of the other disputes that can arise, under section 59(2) of the *Schedule*, relates to whether or not the insured person has a right of action in court as result of the accident. If such a right exists, the insured person might well become "a party to an action" or a "plaintiff." As a result, the use of these words in section 31 raised the following question: does the Workplace Safety and Insurance Appeals Tribunal have jurisdiction to determine whether an insured person is entitled to receive benefits under the *Workplace Safety and Insurance Act, 1997* only if that person is a "party to an action" or a "plaintiff"? Until October 10, 2006, the jurisprudence of the Workplace Safety and Insurance Appeals Tribunal established that its jurisdiction was so limited. However, by Decision No. 1362/06I of that date, Vice-Chair S. Martel of the Workplace Safety and Insurance Appeals Tribunal held that applications could also be made by insured persons who were neither plaintiffs nor parties to actions. She wrote:

> … I find that the use of the word "plaintiff" found in section 31(1)(c) of the WSIA includes a claimant under the Schedule [that is, the *SABS Schedule*] even in cases where no action has been commenced. While the plain meaning of the word "plaintiff" found in section 31(1)(c) of the WSIA might lead to the conclusion that it is limited to a person who commences an action, the modern principle of statutory interpretation requires that I interpret the word in the context of the provision, the WSIA and the intended interaction between the *Insurance Act* and the WSIA. In that context, I find that the word "plaintiff" includes a claimant under the Schedule and that Markel [the insurer] may bring its application to the Tribunal under section 31(1)(c) of the WSIA.[4]

Turning to the implications of this kind of dispute for an insurer's obligation to pay benefits, they are set out in subsection 59(5) of the *Schedule* which reads as follows:

> 59. (5) Despite subsection (1), if there is a dispute about whether subsection (1) applies to a person, the insurer shall pay full benefits to the person under this Regulation pending resolution of the dispute if,
>
> (a) the person makes an assignment to the insurer of any benefits under any workers' compensation law or plan to which he or she is or may become entitled as a result of the accident; and
>
> (b) the administrator or board responsible for the administration of the workers' compensation law or plan approves the assignment.

In other words, a dispute about whether an insured person is entitled to receive benefits under the *Workplace Safety and Insurance Act, 1997* gives rise to a dispute about whether section 59(1) applies. In that situation, section 59(5) stipulates that the insurer must pay benefits pending the resolution of the dispute so long as the insured person has made an approved assignment to the insurer of any workers' compensation benefits to which "he or she is or may become entitled."

For its part, FSCO jurisprudence has clarified that section 59(5) has nothing to do with disputes about the insured person's entitlement to receive a particular benefit provided, or not provided, under the *Workplace Safety and Insurance Act, 1997*. This was confirmed by Director's Delegate Draper in *Davis and Pafco Insurance Company Limited*. While he was actually referring to

[4] Neutral citation : 2006 ONWSIAT 2253.

section 76 of *SABS-1994*, sections 76(1) and (5) of that *Schedule* are identical to sections 59(1) and (5) of the *Schedule* applicable in this case. Director's Delegate Draper wrote:

> In my view, subsection 76(5) [section 59(5) of the *Schedule* applicable in this case] also has no application once workers' compensation coverage is established, subject perhaps to a later coverage dispute. Its purpose is to provide interim benefits until workers' compensation coverage is determined. It does [sic, it is clear from the context that the word "not" should have been inserted here] require automobile insurers to pay particular benefits not available under the *Workers' Compensation Act*, or that have been refused by the W.C.B.
>
> Mr. Davis clearly was entitled to receive workers' compensation benefits. He received them for seven months and did not contact Pafco until after they were cancelled. The reason for the cancellation was not related to any coverage dispute, but because the W.C.B. found that his accident-related injuries had resolved. Therefore, subsection 76(5) does not apply pending his claim for additional workers' compensation benefits.[5]

FSCO jurisprudence has also confirmed that section 59(5) requires the insurer to pay benefits under the *Schedule* pending the resolution of a dispute about coverage under the *Workplace Safety and Insurance Act, 1997*, regardless of whether or not there is also a dispute under section 59(2) of the *Schedule*. In *Basdeo and Citadel General Insurance Company*, Arbitrator Muir wrote:

> The Citadel submits that section 59(5) only applies where there is a dispute between a worker and the WSIB respecting the application of section 59(2) to the circumstances.
>
> I do not agree.
>
> If the Legislature intended it to be confined to disputes only about the exception provided for in 59(2), it would have been easy enough to make that clear. Section 59(5) makes no reference to section 59(2) at all, referring only to disputes with respect to entitlement to benefits under any workers' compensation law or plan. I find that the provisions of section 59(5) do apply in these circumstances and that The Citadel ought to have been dealing with Mr. Basdeo's claims pending the resolution of the dispute which, again, can only be resolved by the WSIB and/or the WSIAT.[6]

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[5] (OIC P97-00010, July 22, 1997) Appeal.
[6] (FSCO A04-001585, March 7, 2005).

Finally, a second decision in *Basdeo and Citadel General Insurance Company* held that the reference to "full benefits" in section 59(5) does not mean that the insurer must automatically pay any claim the insured person submits. Arbitrator Sampliner wrote: "An absolute obligation to pay all claims for any amount, whether properly documented or not, removes the balances between the parties' rights that are contemplated throughout the *Schedule*."[7] In other words, section 59(5) only requires the insurer to pay benefits under the *Schedule* if they are payable in accordance with the rules of eligibility established by the *Schedule*. The insurer can still dispute eligibility on that basis and the insured person can still dispute the insurer's refusal to pay benefits in accordance with the dispute resolution procedure under sections 279 to 283 of the *Insurance Act*.

I wish to make the following additional observations in relation to the role of the Workplace Safety and Insurance *Board* in resolving coverage disputes. While the Workplace Safety and Insurance Appeals Tribunal has exclusive jurisdiction over such disputes, the parties might, in a particular case, agree to resolve the dispute on the strength of a decision by the Workplace Safety and Insurance Board that the insured person is entitled to receive benefits under the *Workplace Safety and Insurance Act, 1997*. That would not usurp the Tribunal's exclusive jurisdiction; it would only be an agreement between the parties that a coverage dispute no longer exists and, hence, that the insurer is no longer obliged pay benefits under the *Schedule*. That, at least, is the limited meaning I would give to Arbitrator Muir's comment that such a dispute could "be resolved by the WSIB and/or the WSIAT."

However, I repeat the reserve noted by Director's Delegate Draper in *Davis*: "subsection 76(5) [section 59(5) of the *Schedule* applicable in this case] also has no application once workers' compensation coverage is established, *subject perhaps to a later coverage dispute*." (emphasis added) Section 59(5) does apply if a coverage dispute continues to exist or arises after a decision by the Workplace Safety and Insurance Board that the insured person is, or would be, entitled to receive benefits under the *Workplace Safety and Insurance Act, 1997*. Whatever significance the Board's decision may have, it cannot resolve a coverage dispute for purposes of section 59(1) of the *Schedule*. Sections 31(1)(c) and (2) of the *Workplace Safety and Insurance Act, 1997* give

[7](FSCO A04-001585, October 11, 2005).

exclusive jurisdiction over that kind of dispute to the Workplace Safety and Insurance Appeals Tribunal. Until such a dispute is resolved by a decision of that Tribunal or by agreement, section 59(5) requires the insurer to pay the insured person benefits under the *Schedule* so long as he/she has made an approved assignment to the insurer of any workers' compensation benefits to which "he or she is or may become entitled."

1.2 Disputes about whether the insured person is entitled to commence an action against a person in respect of his/her injuries

Section 59(2) of the *Schedule* creates a "right to sue" exception to the general rule set out in section 59(1). It allows an insured person who is involved in a motor vehicle accident during the course of his/her employment to claim benefits under the *Schedule* if four conditions are met: first, he/she must be entitled to claim benefits under the *Workplace Safety and Insurance Act, 1997*; second, he/she must have the right to sue someone for his/her injuries; third, his/her primary purpose in choosing to sue must not be to take advantage of the "right to sue" exception in order to gain access to benefits under the *Schedule*; and fourth, *in some situations*, he/she must complete an election confirming his/her decision to sue rather than claim compensation benefits. Section 59(2) reads as follows:

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

The origin of section 59(2) was explained by Director's Delegate Naylor in *Rocchetti and Royal Insurance Company of Canada*. She was actually writing about sections 20 and 21 of *SABS-1990* which, like sections 59(1) and (2), stipulated both a general rule - that entitlement to workers' compensation benefits was a bar to entitlement to benefits under the *Schedule* - and a "right to sue" exception.[8] Director's Delegate Naylor explained that the general rule reflected

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[8] The exception created by section 21 operated differently than the exception created by section 59(2). However, as explained by Director's Delegate Draper in *Davis*, *op. cit.* 5, that difference was particularly significant in relation to disputes about whether the insured person is entitled to "re-elect" to sue, and hence claim accident benefits, after having already received workers' compensation benefits. No such issue arises in the present case and, in my view, insurers should not be required to provide information in relation to those disputes until they arise.

"the Government['s intention] to ensure that the workers' compensation scheme remained responsible for the cost of the bulk of automobile accident cases [occurring during the course of employment], where there was no recovery in tort." However, she went on, the Government also wanted to ensure that workers involved in automobile accidents who did retain the right to sue "for threshold injuries[,] should have access to accident benefits to support them until their law suit ended, like anyone else injured in a non-work related accident. Hence, the legislative drafters created an exception, found at section 21, to the general rule against paying benefits where there is workers' compensation coverage."

Director's Delegate Naylor made a further observation about section 21 which is equally pertinent to the proper understanding of section 59(2); section 21, she noted, does "**not** confer a right on the insured to chose [sic] between statutory accident benefits and workers' compensation. The right of election is **within** the workers' compensation régime – the right to elect between claiming workers' compensation benefits or instituting an action in tort – a consequence of which may give rise to eligibility for accident benefits." (Emphases in the original).[9]

As indicated in section 59(2), it is now section 30 of the *Workplace Safety and Insurance Act, 1997* which creates the insured person's obligation to elect to either claim workers' compensation benefits or, if he/she has a right of action, to commence a lawsuit. The pertinent parts of section 30 read as follows:

> 30. (1) This section applies when a worker or a survivor of a deceased worker is entitled to benefits under the insurance plan [the *Workplace Safety and Insurance Act, 1997*] with respect to an injury or disease and is also entitled to commence an action against a person in respect of the injury or disease.
>
> (2) The worker or survivor shall elect whether to claim the benefits or to commence the action and shall notify the Board of the option elected.

This section confirms that the obligation to elect exists only if the insured person possesses both the right to benefits under the *Workplace Safety and Insurance Act, 1997* and the right to commence an action against a person. Accordingly, those are the first two conditions for the

[9] (OIC P96-00044, June 3, 1997) Appeal.

operation of section 59(2) and it must never be forgotten that section 59(2) only operates as an exception to the general rule stipulated in section 59(1). If that general rule does not apply, then there is no need to determine whether the exception to that general rule applies. In other words, if the insured person does not have the right to receive benefits under the *Workplace Safety and Insurance Act, 1997*, then section 59(2) is simply irrelevant. The insurer must pay benefits under the *Schedule*. Section 59(2) is only relevant if the insured person is entitled to receive benefits under the *Workplace Safety and Insurance Act, 1997* or if a dispute about that issue has yet to be resolved. In those situations, section 59(2) has the potential to generate three additional kinds of disputes. The second and third are dealt with under headings 1.3 and 1.4 of this decision.

The first is a dispute about whether the insured person is entitled to commence an action against a person in respect of his/her injuries. If he/she is not, then there is no right of election under section 30 of the *Workplace Safety and Insurance Act, 1997* and no possible exception under section 59(2) to the general rule enunciated by section 59(1). In that situation, the insurer is not required to pay benefits under the *Schedule*.

Once again, the *Schedule* does not indicate that the correct procedure for resolving this kind of dispute is to apply to the Workplace Safety and Insurance Appeals Tribunal under 31(1)(a) and (2) of the *Workplace Safety and Insurance Act, 1997*. The *Schedule* also does not indicate that section 28 of the *Workplace Safety and Insurance Act, 1997* takes away certain rights of action that would otherwise exist at common law. The pertinent parts of sections 28 and 31 read as follows:

> 28. (1) A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:
>
> 1. Any Schedule 1 employer.
>
> 2. A director, executive officer or worker employed by any Schedule 1 employer.
>
> (2) A worker employed by a Schedule 2 employer and the worker's survivors are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. The worker's Schedule 2 employer.

2. A director, executive officer or worker employed by the worker's Schedule 2 employer.

(3) If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury, subsection (1) applies only if the workers were acting in the course of their employment.

(4) Subsections (1) and (2) do not apply if any employer other than the worker's employer supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers to operate the motor vehicle, machinery or equipment.

31. (1) A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act* may apply to the Appeals Tribunal to determine,

(a) whether, because of this Act, the right to commence an action is taken away;

(b) … (c)

(2) The Appeals Tribunal [that is, the Workplace Safety and Insurance Appeals Tribunal] has *exclusive jurisdiction* to determine a matter described in subsection (1). (My emphasis)

As section 28 indicates, a dispute about whether the insured person is entitled to commence an action can potentially involve a dispute about one or more of the following questions. Was the insured person employed by a "Schedule 1" employer as defined by the *Workplace Safety and Insurance Act, 1997*, and, if so, was the alleged tortfeasor a Schedule 1 employer or a director, executive officer or worker of a Schedule 1 employer? Was the insured person employed by a "Schedule 2" employer as defined by the *Workplace Safety and Insurance Act, 1997*, and, if so, was the alleged tortfeasor the insured person's Schedule 2 employer or a director, executive officer or worker of the insured person's Schedule 2 employer? Were the workers of one or more employers involved in the circumstances in which the insured person sustained the injury and, if so, were those workers acting in the course of their employment?[10] Did any employer other than the insured person's employer supply a motor vehicle, machinery or equipment on a purchase or

[10] thus creating a potential overlap with a dispute about whether the insured person was entitled to workers' compensation benefits.

rental basis and, if so, did that employer also supply workers to operate the motor vehicle, machinery or equipment?

What are the implications of these kinds of disputes for an insurer's obligation to pay benefits? Section 59(5) applies in this situation for the following reason: a dispute about whether the insured person is entitled to commence an action gives rise to a dispute about whether section 59(2) applies; a dispute about whether section 59(2) applies gives rise to a dispute about whether section 59(1) applies. It follows that until the dispute is resolved by the Workplace Safety and Insurance Appeals Tribunal,[11] the insurer is required to pay benefits under the *Schedule* so long as the insured person has made an approved assignment to the insurer of any workers' compensation benefits to which he/she "is or may become entitled." Again, however, section 59(5) only requires the insurer to pay benefits under the *Schedule* if they are payable in accordance with the rules of eligibility established by the *Schedule*. The insurer can still dispute eligibility on that basis and the insured person can still dispute the insurer's refusal to pay benefits in accordance with the dispute resolution procedure under sections 279 to 283 of the *Insurance Act*.

1.3 Disputes about whether an insured person has elected to commence an action primarily for the purpose of claiming benefits under the *Schedule*

It is clear on its face that section 59(2) also has the potential to generate another kind of dispute: one about whether an insured person has elected to bring an action, rather than claim workers' compensation benefits, primarily for the purpose of claiming benefits under the *Schedule*.

FSCO jurisprudence confirms that Arbitrators regularly resolve disputes of this kind, thus determining whether or not the "right to sue" exception created by section 59(2) applies. A good way to explain the nature of this kind of dispute is to set out Director's Delegate Makepeace's summary of the FSCO jurisprudence, as found in her decision in *Mahadeo and Aviva Canada Inc.*:

[11] The resolution of these kinds of disputes by agreement is less likely because such disputes also involve the rights of alleged tortfeasors.

> The leading statement of the law is in *Gebru and Coseco Insurance Co.*, (FSCO P01-00043, January 7, 2002), conf'g (FSCO A00-000709, September 11, 2001). In that case, the insurer submitted that the claimant's action had no chance of success based on new evidence that she had run a red light. The arbitrator concluded that the claimant's purpose in making the election must be assessed with respect to the circumstances at the time of the election, because, amongst other things, "the strength and weakness of a case change over time. What might look like a promising case when a lawyer first interviews a client, may appear to have no merit after productions or discovery." It was only at the arbitration hearing that the liability evidence was led. The arbitrator conceded that subsequent events can be relevant in determining the claimant's purpose at the time.
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> On appeal, Director Draper rejected the insurer's argument that the arbitrator had made section 59 meaningless by applying a subjective standard:
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> > While arbitrators must consider "objective" factors in evaluating the insured person's motivation, including the strength of the court action, the steps taken to pursue the claim, and any advantages that might have led the insured person to prefer accident benefits over workers' compensation, it is difficult to see how the test itself can be "objective."
>
> After considering several other decisions on point, Director Draper returned to the point, stating:
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> > The strength of the action is a legitimate consideration, but only as it relates to the insured person's purpose in bringing it.

Turning then to the facts of the case before her, Director's Delegate Makepeace concluded as follows:

> Mr. Mahadeo submits that it is enough for him to show that he made the election to keep his tort options open. I reject this. Though the subjective element of the test in subsection 59(2) likely reflects the legislature's recognition that evolving prospects are a litigation reality, this must be understood in the context of the clear intent of subsection 59(1): there is no election between accident benefits and workers' compensation. Mr. Mahadeo's interpretation of subsection 59(2) is so weak that it would effectively allow an injured person to receive accident benefits, though workers' compensation benefits are available, by the mere expedient of making an election, without taking any further serious steps towards bringing an action. This cannot have been the intent of the legislature.[12]

[12] (FSCO P06-00015, March 22, 2007).

Unfortunately, FSCO jurisprudence also confirms that insurers are sometimes allowed to raise disputes about whether elections were made primarily for the purpose of claiming benefits under the *Schedule* by simply refusing to pay further benefits.[13] This way of raising such disputes is contrary to the link connecting disputes under section 59(2) to the pay-pending obligation imposed by section 59(5). This link was recognized by Director's Delegate Draper in *Davis* when he was analysing section 76 of *SABS-1994*. Again, I note that section 76(1) and (5) of that *Schedule* are identical to sections 59(1) and (5) of the *Schedule* applicable in this case. Section 76(2) is slightly different from section 59(2) but only as a result of changes in the number of the section of the workers' compensation legislation dealing with elections and in the title of that legislation. Director's Delegate Draper wrote:

> It [subsection 76(5) of *SABS-1994*] covers any "dispute about whether subsection (1) applies." Subsection 76(2) says that subsection (1) does not apply to an insured person who makes an election under section 10 of the *Workers' Compensation Act*, unless the election is made primarily for the purpose of claiming accident benefits. This means that if the insurer challenges the *bona fides* of the election, as Pafco does here, there is a dispute about whether subsection (1) applies, making subsection (5) applicable.[14]

Again, however, section 59(5) only requires the insurer to pay benefits under the *Schedule* if they are payable in accordance with the rules of eligibility established by the *Schedule*. The insurer can still dispute eligibility on that basis and the insured person can still dispute the insurer's refusal to pay benefits in accordance with the dispute resolution procedure under sections 279 to 283 of the *Insurance Act*.

1.4 Disputes about whether the insurer can refuse to pay benefits because the insured person has not completed an election

This kind of dispute can arise under either section 59(2), as the fourth condition for the operation of that section, or under section 59(3) which reads as follows:

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[13] The Arbitrator's decision in *Mahadeo* provides a recent example of this: (FSCO A04-001435, April 27, 2006), upheld on appeal (P06-00015, March 27, 2007).

[14] *op.cit.* 5.

> 59. (3) If a person is entitled to receive benefits under this Regulation as a result of an election made under section 30 of the *Workplace Safety and Insurance Act, 1997*, no income replacement, caregiver or non-earner benefit is payable to the person in respect of any period of time before the person makes the election.

As a practical matter, an insured person who seeks to establish his/her right to claim benefits under the *Schedule* may not hesitate to complete an election. Indeed, he/she may be asked to do so by both the insurer and the Workplace Safety and Insurance Board. As a result, the insured person may complete the election before it is agreed or determined by the Workplace Safety and Insurance Appeals Tribunal that he/she possesses both of the rights identified in section 30 of the *Workplace Safety and Insurance Act, 1997*, namely, the right to claim workers' compensation benefits and the right to sue the alleged tortfeasor.

In that situation, a question may arise to whether the completion of the election estops or prevents an insured person from later maintaining that he/she has the right to claim benefits under the *Schedule* on the ground that he/she does not have the right to claim workers' compensation benefits. An insurer might argue that if the insured person did not think he/she had the right to claim workers' compensation benefits, then he/she should not have completed an election. The converse question might also arise as to whether the insurer is estopped or prevented from denying its obligation to pay benefits on the ground that the insured person does not have the right to sue when it requested that he/she complete an election. An insured person might argue that if the insurer did not think he/she had the right to sue, it should not have requested that he/she complete an election.

In my view, it would undermine the dispute resolution process to hold that a completed election prevents or estops either party from later disputing the existence of the two rights which give rise to the insured person's obligation to elect. The election may have been completed well before those disputes arose and long before they could have been resolved. It must remain open to the parties to seek the resolution of those disputes by agreement or by decision of the Workplace Safety and Insurance Appeals Tribunal. Until they are so resolved, section 59(5) requires the insurer to continue paying benefits under the *Schedule*.

On the other hand, if an election has not yet been completed, the insurer cannot insist on its completion prior to paying benefits if there is a dispute about the obligation to elect. To repeat, an insured person only has an obligation to elect under section 30 of the *Workplace Safety and Insurance Act* if he/she possesses both the right to receive benefits under that *Act* and the right to commence an action against the alleged tortfeasor. Accordingly, a dispute about either the insured person's right to receive workers' compensation benefits or, if that right is agreed or determined, a dispute about whether he/she retains the right to sue, gives rise to a dispute about the obligation to elect. It follows that if the insured person has not completed an election when a dispute about his/her obligation to complete an election arises, the pay-pending procedure under section 59(5) requires the insurer to pay benefits pending the resolution of the underlying dispute(s). In these situations, the insurer can only refuse to pay benefits due to a dispute about eligibility or because the insured person has not made an approved assignment under section 59(5). It cannot refuse to pay benefits because the insured person has not completed an election.[15]

Conversely, if there is no dispute about the existence of the obligation to elect, the insurer can refuse to pay benefits under the *Schedule* until the insured person completes an election in accordance with the fourth condition for the operation of section 59(2). In this regard, it should be noted that, by itself, a dispute about whether the insured person has commenced an action primarily for the purpose of claiming benefits under the *Schedule* does not give rise to a dispute about the existence of the obligation to elect. Accordingly, in that situation, the insurer can refuse to pay benefits provided under the *Schedule* until the insured person completes both an approved assignment of the workers' compensation benefits in accordance with section 59(5) and an election in accordance with section 59(2).

Turning to section 59(3), it differs from section 59(5) and section 59(2) in an important respect. Whereas neither 59(5) nor section 59(2) prohibits claims for benefits in respect of the periods prior to the completion of the assignment or the election, section 59(3) relieves the insurer of the

[15] Of course, if the insured person's right to receive workers' compensation is agreed or determined, he/she may agree to complete an election since that would be consistent with his/her position that he/she also retains the right to sue. Still, so long as the insurer is disputing his/her right to sue, it is also disputing his/her *obligation* to elect.

obligation to pay income replacement, caregiver or non-earner benefits in respect of any period of time before the insured person makes an election. In other words, section 59(3) envisages a permanent loss of certain benefits payable under the *Schedule* if the insured person delays in making his/her election.[16]

As just explained, however, a dispute about the obligation to complete an election may arise. If the insured person has not completed an election when a dispute arises about the existence of his/her obligation to elect, the pay-pending procedure under section 59(5) governs and requires the insurer to pay all benefits, including those mentioned in section 59(3), pending the resolution of that dispute even if the insured person has not yet completed an election. In that situation, the insurer can only refuse to pay benefits due to a dispute about eligibility or because the insured person has not made an approved assignment under section 59(5).

The benefits mentioned in section 59(3) can, on the other hand, be permanently lost due to delay in completing an election if there is no dispute about the existence of the obligation to elect. As also just noted, a dispute about whether the insured person has commenced an action primarily for the purpose of claiming benefits under the *Schedule* does not, by itself, give rise to a dispute about the existence of the obligation to elect. In that situation, even if the person has made an assignment under section 59(5), section 59(3) still operates to relieve the insurer of the obligation to pay income replacement, caregiver or non-earner benefits in respect of any period of time before the insured person makes an election. In other words, section 59(3) creates an additional rule of eligibility which can diminish the insured person's right to "full benefits" under section 59(5).

1.5 Disputes about vocational rehabilitation programs

Section 59(4) contemplates the possibility of a dispute about whether an insurer is required to pay for a vocational rehabilitation program which the insured person was attending at the time of

[16] I note that section 31(4) of the *Workplace Safety and Insurance Act, 1997* appears to preserve the insured person's right to make a retroactive claim for workers' compensation benefits for six months following the decision of the Workplace Safety and Insurance Appeals Tribunal.

his/her election to sue rather than claim workers' compensation benefits and continues to attend. It states that the insurer will pay for the program pending resolution of the dispute. The section reads as follows:

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

The opening words confirm that the dispute will be resolved on the basis of the eligibility rules established by the *Schedule*, not on the basis of whether section 59(1) applies or whether the insured person has completed an assignment under section 59(5). In the same way, the reference to an election under section 30 of the *Workplace Safety and Insurance Act, 1997* must be read as referring to any *purported* election under that section. It would clearly frustrate the pay-pending procedure created by the section if it was interpreted as not applying until there is a definitive determination that the insured person possesses both the right to receive benefits under the *Workplace Safety and Insurance Act, 1997* and the right to commence an action.

Part 2: Insurers' obligations to provide insured persons with information about the interaction and about how disputes are to be resolved

2.1 Purpose of the pay-pending procedure imposed by section 59(5)

The pay-pending procedure imposed by section 59(5) resembles the pay-pending procedure imposed by section 2 of the *Priorities Regulation*,[17] that being the regulation that provides for the mandatory arbitration of disputes between insurers about which insurer is required to pay benefits under the *Schedule*. Section 2 stipulates:

> 2. The first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under s. 268 of the Act.

[17] *Disputes Between Insurers*, Ontario Regulation 283/95.

In *Kingsway General Insurance Co. v. Her Majesty the Queen in Right of Ontario (Minister of Finance)*, the Court of Appeal, per Justice Laskin, explained this provision as follows:

> Section 2 of Regulation 283 is critically important in the timely delivery of benefits to victims of car accidents. The principle that underlies s. 2 is that the first insurer to receive an application must pay now and dispute later. The rationale for this principle is obvious: persons injured in car accidents should receive statutorily mandated benefits promptly; they should not be prejudiced by being caught in the middle of a dispute between insurers over who should pay, or as in this case, by an insurer's claim that no policy of insurance existed at the time.[18]

Of course, section 2 of the *Priorities Regulation* relates to disputes between insurers about a single kind of "statutorily mandated benefits" whereas section 59(5) of the *Schedule* relates to disputes between insurers and insured persons about two different kinds of "statutorily mandated benefits." Nonetheless, until they are resolved, all such disputes have the potential to leave persons injured in car accidents with no "statutorily mandated benefits." The *Priorities Regulation* and section 59(5) of the *Schedule* are both aimed at eliminating that potential by imposing on certain insurers the obligation to pay benefits under the *Schedule* until the disputes are resolved while, at the same time, giving those insurers methods to recover benefits they should not have paid.

In *Vieira and Royal & SunAlliance Insurance Company of Canada et al.*, Director Draper made the following comments about the *Priorities Regulation* which, when adapted to the context of section 59(5), are equally instructive for present purposes:

> The correct approach, in my opinion, is to treat the *Priorities Regulation* as part of the claims process. It establishes procedures, not substantive entitlements. Insurers are required to participate in a scheme designed to ensure that injured persons will get a prompt determination of their entitlement to the accident benefits, even if they have chosen the wrong insurer. It is inherent in this scheme that an insurer may have to pay benefits that another insurer should be paying, but only on an interim basis.[19]

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[18] (2007) 84 O.R. (3d) 507 at paragraph 19.
[19] (FSCO P04-00016, February 15, 2005) Appeal.

2.2 The objective of consumer protection in relation to procedural matters

Since section 59(5) establishes procedures, not substantive entitlements, it has the potential to engage the objective of consumer protection articulated by the Supreme Court of Canada in *Smith v. Co-operators General Insurance Co.*[20] As I have noted in other decisions, *Smith* establishes that consumer protection is one of the main objectives of automobile insurance law, that this objective is of particular importance in cases involving an insurer's obligation to provide the insured person with information in relation to procedural matters and that the realization of this objective requires the insurer to provide the insured person with complete and correct information.[21]

Still, *Smith* did not impose upon insurers a common law duty of general application. On the contrary, the Court's decision was based on section 71 of *SABS-1994*, the "right to dispute" provision of that *Schedule*, which reads as follows:

> 71. If an insurer refuses to pay a benefit that a person has applied for under this Regulation or reduces the amount of a benefit that a person received under this Regulation, the insurer shall inform the person in writing of the procedure for resolving disputes relating to benefits under sections 279 to 283 of the *Insurance Act*.

The question, therefore, is whether the *Schedule* applicable in this case imposes a duty on insurers to inform insured persons about the interaction between the *Schedule* and the *Workplace Safety and Insurance Act, 1997* and about how disputes related to it are to be resolved. In my view, there are two provisions in the *Schedule* which impose such duties: section 32(2) and section 49.

2.3 section 32(2) of the *Schedule*: The Insurer's obligation to provide information about the interaction

Once the insured person has notified the insurer of his/her intention to apply for benefits, section 32(2) imposes the following obligations on the insurer:

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[20] [2002] 2 S.C.R. 129.

[21] See *Horvath and Allstate Insurance Company of Canada* (FSCO A02-000482, June 9, 2003) and *Antony and RBC General Insurance Company* (FSCO A02-000217, March 12, 2003), upheld at Appeal (P03-00023, July 22, 2004).

32. (2) The insurer shall promptly provide the person with,

    (a) the appropriate application forms;

    (b) a written explanation of the benefits available under this Regulation;

    (c) information to assist the person in applying for benefits; and

    (d) information on any possible elections relating to income replacement, non-earner and caregiver benefits.

Because it is governed by a pay-pending procedure, the interaction between the *Schedule* and the *Workplace Safety and Insurance Act, 1997* has the potential to create situations in which the insurer is required to pay benefits even though it denies the insured person's right to claim those benefits. For example, there is no question that an insurer can take the position that the general rule enunciated in section 59(1) applies to a particular case. However, as section 59(5) confirms, this does not necessarily mean that the insurer can refuse to pay the insured person benefits under the *Schedule*. Likewise, an insurer is free to take the position that the exception provided by section 59(2) does not apply because the insured person has no election under section 30 of the *Workplace Safety and Insurance Act, 1997* or because he/she has only chosen to make that election in order to gain access to benefits under the *Schedule*. Again, however, when sections 59(1), (2), and (5) are read together, they establish that these are all issues that can be disputed by the parties and that until those disputes are resolved, the insurer can only refuse to pay benefits under the *Schedule* because the insured person has not made an approved assignment under section 59(5) or due to a dispute about eligibility in accordance with the *Schedule*.

In short, there are several potential situations in which, despite its belief that the insured person is not entitled to the benefits claimed, the insurer is still required to provide the information required by section 32(2) so that the insured person can claim those benefits. In particular, the insured person still has the right to receive a "written explanation of the benefits available" under section 32(2)(b), to receive "information to assist [him/her] in applying for benefits" under section 32(2)(c), and to receive "information on any possible elections relating to income replacement, non-earner and caregiver benefits" under section 32(2)(d).

In my view, these consumer rights are best protected by requiring the insurer to provide the insured person with a correct and complete description of the interaction between the *Schedule* and the *Workplace Safety and Insurance Act, 1997*. Since it is impossible to know in advance which disputes a particular case may generate and since the disputes can be interrelated, in my view, the insurer must provide information about all of the disputes previously described. Moreover, since this information can be confusing, it must be provided to the insured person in writing even though only section 32(2)(a) specifically imposes that requirement. The information provided must include the following:

(a) A description of the general rule enunciated by section 59(1) underlining the fact that the insured person does not have the right to choose or "elect" between benefits under the *Schedule* and workers' compensation benefits and that if the insured person is not entitled to claim workers' compensation benefits, he/she is under no obligation to sue anyone in order to qualify for benefits under the *Schedule*;

(b) A description of the exception to the general rule created by section 59(2), pointing out that this exception only applies if four conditions are met: first, that he/she has the right to receive benefits under the *Workplace Safety and Insurance Act, 1997*; second, that he/she has the right to commence an action, noting that the *Workplace Safety and Insurance Act, 1997* takes away certain rights of action that would otherwise exist at common law; third, that he/she does not elect to commence an action primarily for the purpose of claiming benefits under the *Schedule*; and fourth, that he/she has completed an election indicating his/her intention to sue, rather than claim workers' compensation benefits, unless the obligation to elect is disputed.

(c) An explanation that in the event of a dispute about whether the general rule applies or about whether any of the conditions necessary for an exception to the general rule are met, the insurer will pay benefits under the *Schedule* in accordance with section 59(5) and the rules of eligibility established by the

Schedule until such disputes are resolved so long as the insured person makes an approved assignment to the insurer of any workers' compensation benefits to which he/she is or may become entitled; this explanation must underline that the completion of the assignment or the election by the insured person does not constitute an admission of his/her right to receive workers' compensation benefits.

(d) A warning that if the obligation to elect is not disputed, any delay in completing an election may result in the permanent loss of the income replacement, caregiver or non-earner benefits otherwise payable under the *Schedule* prior to the completion of the election form.

(e) A confirmation that in the event of a dispute about whether the insurer is required to pay for a vocational rehabilitation program which he/she was attending at the time of his/her purported election to sue rather than claim workers' compensation benefits and which he/she continues to attend, the insurer will pay for the program pending resolution of the dispute in accordance with the rules of eligibility established by the *Schedule*.

2.4 section 49 of the *Schedule*: the insurer's obligation to provide information about dispute resolution procedures

The "right to dispute" provision of the *Schedule* applicable in this case is found at section 49 and reads as follows:

> 49. If an insurer refuses to pay a benefit under this Regulation or reduces the amount of a benefit that a person is receiving under this Regulation, the insurer shall provide the person with a written notice concerning the person's right to dispute.

The first matter that must be addressed about this section is whether it applies at all in situations where the insurer is bound by a pay-pending procedure to continue paying benefits until the dispute is resolved. True, on a literal reading of the section, the insurer's duty to inform only

comes into effect "if an insurer refuses to pay a benefit … or reduces the amount of a benefit." However, the objective of consumer protection is better served if the section is read as coming into effect as soon as the insurer indicates its intention to dispute entitlement, even if the particular ground on which it intends to do so is governed by a pay-pending procedure. An insured person who is not informed of the correct way to dispute the issue may take some other course of action which may be prejudicial to his/her interests.

A second matter of importance in relation to this provision is that there is a difference between section 49 as it now reads and section 49 as it used to read prior to October 1, 2003.[22] The earlier version of section 49 was identical to section 71 of *SABS-1994*, the provision at issue in *Smith*, which is set out above. The difference is that the insurer's obligation to inform the insured person about his/her right to dispute is now no longer specifically linked to the dispute resolution procedure created under sections 279 to 283 of the *Insurance Act*.

This is significant for present purposes because, as we have seen, two of the disputes generated by the interaction between the *Schedule* and the *Workplace Safety and Insurance Act, 1997* fall within the *exclusive* jurisdiction of the Workplace Safety and Insurance Appeals Tribunal. It follows that in order to inform the insured person of his/her right to dispute the insurer's position with respect to either of those issues, the insurer must inform the insured person that the correct procedure is to apply to the Workplace Safety and Insurance Appeals Tribunal. The wording of section 49 is now broad enough to impose that obligation on the insurer.

But is this change also significant for disputes that *can* be resolved through the dispute resolution procedure created under sections 279 to 283 of the *Insurance Act*? More specifically, does the removal of the reference to that procedure mean that insurers are now allowed to provide less information than that required by the Supreme Court of Canada in *Smith*? No, according to the decision in *Finlayson and Allstate Insurance Company of Canada*. After observing that section 49 was "almost identical" to section 71 of *SABS-1994*, Arbitrator Nastasi applied "the guiding principles" established in *Smith* which, she said, "have not changed." She wrote:

[22] See: Ontario Regulation 281/03, ss. 23, 37.

> I find that Allstate has failed to comply with section 49 of the *Schedule* by failing to advise Ms. Finlayson about the entire dispute resolution process and that, as a consequence, the 2 year limitation period did not begin to run on March 14, 2002.[23]

I wish to draw attention to another decision in relation to the right to dispute. As the case of *Ablett and Dominion of Canada General Insurance Co.* illustrates, situations can arise where the insured person seeks a hearing at FSCO in order to dispute the insurer's denial of particular benefits under the *Schedule* at the same time as the insurer seeks a hearing at the Workplace Safety and Insurance Appeals Tribunal in order to dispute the insured person's right to claim *any* benefits under the *Schedule*. In that situation, a question may arise as to whether the FSCO hearing should be adjourned pending receipt of the decision of the Workplace Safety and Insurance Appeals Tribunal. I agree with Arbitrator Blackman who observed and ruled as follows:

> The parties agree that the WSIAT [the Workplace Safety and Insurance Appeals Tribunal] hearing is not likely to take place before July 2008. The parties further agree that if Dominion is unsuccessful in its WSIAT motion and the FSCO hearing is set after the release of the WSIAT decision, one is looking at a FSCO arbitration hearing sometime in 2009.
>
> Dominion submits that it would be prejudiced in having a FSCO hearing set before 2009 as it would incur unnecessary legal expenses should the WSIAT motion be decided in its favour. The Insurer, therefore, submitted that the FSCO arbitration hearing be set in 2009, or, in the alternative, that this pre-hearing discussion be resumed upon release of the WSIAT decision. Dominion was not prepared to propose or agree to any conditions being placed on putting this matter over more than a year.
>
> ...
>
> I am persuaded that the balance of prejudice favours the Applicant. This adjudicative system [at FSCO] is meant to achieve a fair, expeditious and cost efficient resolution of first party automobile disputes, as stated in Rule 1 of the *Code* [FSCO's *Dispute Resolution Practice Code*]. This automobile insurance system also has as an objective that first party insureds be paid on a timely basis, as evidenced by the time lines applicable to insurers set out in the *Schedule*. This system also has as a goal that first party insureds not be deprived of benefits where there are disputes as to which insurer or system of compensation has responsibility for payment.[24]

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[23](FSCO A04-002133, November 8, 2006).
[24] (FSCO A07-001355, November 16, 2007).

Based on the foregoing, in my view, section 49 requires the insurer to provide the insured person with the following information about how disputes about the interaction between the *Schedule* and the *Workplace Safety and Insurance Act, 1997* are to be resolved:

(a) A dispute under section 59(1) of the *Schedule* about whether the insured person is entitled to receive benefits under the *Workplace Safety and Insurance Act, 1997* can only be definitively resolved by application to the Workplace Safety and Insurance Appeals Tribunal under section 31(1)(c) of that *Act*; either the insurer or the insured party can apply to the Workplace Safety and Insurance Appeals Tribunal and the insured person does not have to be either a "plaintiff" or "a party to an action" to do so; the parties may agree to accept a decision of the Workplace Safety and Insurance *Board* on this issue but they are not obliged to do so;

(b) A dispute under section 59(2) about whether an insured person is entitled to commence an action as a result of the accident, or whether that right of action has been taken away by the *Workplace Safety and Insurance Act, 1997*, can only be resolved by application to the Workplace Safety and Insurance Appeals Tribunal under section 31(1)(a) of that *Act*;

(c) A dispute about whether an insured person has elected to bring an action under section 30 of the *Workplace Safety and Insurance Act, 1997* primarily for the purpose of claiming benefits under the *Schedule* can only be resolved in accordance with the dispute resolution procedure created under sections 279 to 283 of the *Insurance Act*;

(d) Pending resolution of disputes (a), (b) and (c), a dispute about the insured person's entitlement to benefits under the *Schedule* in accordance with the rules of eligibility established by the *Schedule* can only be resolved in accordance with the dispute resolution procedure created under sections 279 to 283 of the *Insurance Act*;

(e) A dispute under section 59(2) or 59(3) about whether the insurer can refuse to pay benefits because the insured person did not complete an election can only arise if there is no dispute about the insured person's obligation to elect and can only be resolved in accordance with the dispute resolution procedure created under sections 279 to 283 of the *Insurance Act*;

(f) A dispute under section 59(4) about whether the insurer is required to pay for a vocational rehabilitation program which the insured person was attending at the time of his/her election and which he/she continues to attend can only be ultimately resolved (in keeping with the pay-pending procedure) in accordance with the dispute resolution procedure created under sections 279 to 283 of the *Insurance Act*;

(g) If disputes (c), (d), (e) and (f) arise, the insurer must also describe the dispute resolution procedure created under sections 279 to 283 of the *Insurance Act* in accordance with the Supreme Court of Canada's decision in *Smith v. Co-operators General Insurance Co.* [2002] 2 S.C.R. 129.

Part 3: The conduct of the parties

The conduct of the parties was only slightly different in the two cases before me. The main text will, therefore, refer only to Ms. Lin's case. The footnotes will indicate where the relevant documents can be located in both sets of Affidavits and, as necessary, will explain how Ms. Liu's case was different from Ms. Lin's.

In her Application for Benefits, Ms. Lin stated that at the time of the accident, on October 24, 2005, she was unemployed and receiving Employment Insurance Benefits.[25] ING's first letter to her, sent by the adjusting firm of Shumka, Craig & Moore ("SCM"), dated December 2, 2005,

[25] Affidavit of Roxanne Hector, Tab C. Ms. Liu's Application for Benefits stated that she was employed at the time of the accident but said nothing about whether she was in the course of her employment at the time of the accident, see Affidavit of Roxanne Hector, Tab D.

contradicted this statement and provided the following information about the interaction between the *Schedule* and the *Workplace Safety and Insurance Act, 1997*:

> We understand that you were injured from a car accident while you were in the course of your employment. Section 59, subsection (1) of the Statutory Accident Benefits Schedule states, that we are not required to pay benefits to you if you are entitled to receive WSIB benefits. Section 59, subsection 2 states that subsection does not apply if you elect to bring an action as well if the election is not made for the purpose of claiming benefits under this regulation. If you decide to bring an action, then we would need proof such as a copy of a notice letter that has been sent to the responsible party by your lawyer.
>
> Attached, please also find a blank assignment of workplace safety and insurance benefits form that you are to complete and return if you elect to claim benefits under the Statutory Accident Benefits Schedule.[26]

ING was perfectly entitled to disagree with Ms. Lin about whether she was in the course of employment at the time of the accident and, therefore, to invoke section 59(1) of the *Schedule*. But it was also obliged to inform her how such a dispute could be resolved, to provide complete and correct information about the interaction between the *Schedule* and the *Workplace Safety and Insurance Act, 1997* and to explain how other potential disputes could be resolved. SCM's letter provided incomplete and misleading information.

First, and most importantly at this early stage, SCM's letter did not explain to Ms. Lin that the assignment of workers' compensation benefits form was required under section 59(5) pending the resolution of any disputes about whether section 59(1) or (2) applied and did not constitute an admission on her part that she was entitled to receive workers' compensation benefits.
I acknowledge that the Assignment form drafted by the Workplace Safety and Insurance Board, examined further below, did state that its completion by the insured person did not constitute an admission of entitlement to workers' compensation benefits. I further acknowledge that SCM's letter stated that it enclosed a blank copy of that form. However, this did not provide Ms. Lin with adequate information for two reasons, one factual, the other legal.

[26] Affidavit of Roxanne Hector, Tab D. Ms. Liu received the same letter, see Affidavit of Roxanne Hector, Tab E.

While the copies of SCM's letter entered into evidence included Explanation of Benefits Payable forms, they did not include blank Assignment forms. It follows that it was not established before me that Ms. Lin actually received a blank Assignment form with SCM's letter. Second, even if she did, insurers are not permitted to delegate to other agencies their own obligations to provide information to insured persons. This was confirmed at paragraph 19 of the Supreme Court decision in *Smith* where Justice Gonthier observed:

> ...the industry practice of using the form prescribed by the Commissioner [now the Superintendent] cannot somehow be a substitute for conformity with s. 71 of the *SABS*. Section 71 clearly states that it is the insurer who "shall inform the person in writing" of the dispute resolution procedure.[27]

In my view, the goal of consumer protection is best served by requiring insurers themselves to explain that the assignment of workers' compensation benefits form is only required under section 59(5) pending the resolution of any disputes about whether section 59(1), (2) or (3) applies and does not constitute an admission of entitlement to receive workers' compensation benefits. From the point of view of an insured person who believes that he/she is not entitled to workers' compensation benefits, the necessity to read and complete a form assigning such benefits to the insurer is not likely to be apparent without explanation *by the insurer*.

The information provided to Ms. Lin in this first letter was also incomplete and misleading in many other ways: it did not explain that if the dispute was only about whether she was entitled to receive workers' compensation benefits and that dispute was resolved in her favour, she would be under no obligation to prove that she had commenced an action in order to qualify for benefits under the *Schedule*; it did not indicate that such a dispute is within the exclusive jurisdiction of the Workplace Safety and Insurance Appeals Tribunal and that, at the time of writing, only the insurer could make an application to that tribunal to resolve the dispute; it did not indicate that the *Workplace Safety and Insurance Act, 1997* takes away certain rights of action and that a dispute about whether a right of action was taken away was also within the exclusive jurisdiction of the Workplace Safety and Insurance Appeals Tribunal and that either party[28] could apply to that Tribunal for its resolution; it did not indicate that if she retained the right to commence an

[27] [2002] 2 S.C.R. 129.
[28] assuming at the time of writing that the insured person was a plaintiff or a party to an action.

action, she would have to elect to exercise that right, rather than claim workers' compensation benefits, in order to qualify for benefits under the *Schedule* - simply quoting section 59(2) did not explain what the election under section 30 of the *Workplace Safety and Insurance Act, 1997* involved; it did not warn Ms. Lin that if she was obliged to elect, any delay in doing so could result in the permanent loss of certain benefits; while it referred to the fact that Ms. Lin's purpose in commencing any action could be important, it did not indicate that a dispute of that kind could be resolved in accordance with the dispute resolution procedure created under sections 279 to 283 of the *Insurance Act*; it implied that by making an assignment, Ms. Lin was electing to claim benefits under the *Schedule* rather than workers' compensation benefits when, in fact, she had no such right of election.

Over the next several months, SCM continued to refuse to pay Ms. Lin benefits[29] on the ground that she had not completed an assignment. However, the Explanation of Benefits forms and letters continued to provide misleading information, sometimes stating she should complete the assignment "if electing Statutory Accident benefits", when she did not have that choice, and sometimes requiring proof that she had commenced an action, even though her right to sue was not the issue in dispute at that time. These documents also made no reference to section 59(5) or to the dispute resolution procedure created by section 31 of the *Workplace Safety and Insurance Act, 1997*.[30]

For her part, Ms. Lin's representatives sent three separate letters in late 2005 and early 2006 in which they continued to maintain that she was not in the course of employment at the time of the accident.[31] On January 20, 2006, Ms. Lin made an Application for Mediation in relation to ING's refusals to pay medical benefits, the cost of examinations and housekeeping claims.[32]

The standoff appeared to end in April 2006, almost six months after the accident, when Ms. Lin's representatives forwarded to ING's adjusters two form documents. The first was entitled

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[29] In Ms. Lin's case, the Insurer did, apparently, pay an ambulance bill, see Affidavit of Rachel Yu, Tab 8.

[30] Affidavit of Roxanne Hector, Tabs F, H, J, L and M. In Ms. Liu's case, see Affidavit of Roxanne Hector, Tabs G, J, L and M.

[31] Affidavit of Roxanne Hector, Tabs E, G and K. In Ms. Liu's case, see Affidavit of Roxanne Hector, Tabs F, H and K.

[32] Affidavit of Roxanne Hector, Tab I. In Ms. Liu's case, see Affidavit of Roxanne Hector, Tab I. The Application in her case indicated that she was also claiming Attendant Care benefits.

"Assignment of Workplace Safety & Insurance Benefits" and was signed by Ms. Lin. The second was entitled "Information Required to Establish a WSIB Claim Number"; it identified the date of the accident and stated that Ms. Lin was a "General helper" for an employer called "Farm Work Service" in Bradford.[33]

The second document appeared to signal a reversal of Ms. Lin's previous statement that she was not employed at the time of the accident. However, the form did not contain an admission or acknowledgement that Ms. Lin was *in the course of her employment* at the time of the accident and, therefore, entitled to claim workers' compensation benefits. While her representatives sent copies of both forms to the Workplace Safety and Insurance Board, their covering letter, dated April 6, 2006, did not state that Ms. Lin was claiming workers' compensations benefits and, in response, the Workplace Safety and Insurance Board stated: "we were unable to locate a record of a claim."[34]

Nevertheless, if Ms. Lin was now acknowledging that she was entitled to receive workers' compensation benefits, her case provides an illustration of how insurers cannot know in advance which kinds of disputes a case may generate and why they must, therefore, be required to provide complete information about the interaction between the *Schedule* and the *Workplace Safety and Insurance Act, 1997*. In this case, the initial dispute was about whether Ms. Lin was entitled to benefits under the *Workplace Safety and Insurance Act, 1997*. Had it been agreed or determined that she was not, then she was entitled to claim benefits under the *Schedule* without providing any proof that she had commenced a lawsuit. However, if Ms. Lin was now agreeing with ING that she was entitled to benefits under the *Workplace Safety and Insurance Act, 1997*, that admission gave rise to a new set of potential disputes, namely, the other three conditions necessary for the operation of section 59(2) and the potential application of section 59(3).

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[33] Affidavit of Roxanne Hector, Tab N. In Ms. Liu's case, the standoff appeared to end on March 20, 2006, five months after the accident, see Affidavit of Roxanne Hector, Tab N and O.

[34] Affidavit of Rachel Yu, Tab 19. Ms. Liu had never denied that she was employed at the time of the accident but there was no evidence before that she ever admitted or acknowledged that she was in the course of her employment at the time of the accident. By letter dated December 20, 2006, she did ask the Workplace Safety and Insurance Board to "reopen my WSIB claim … due to ING my Auto Insurer's delay in informing of my entitlement." However, since this letter expressed uncertainty about the issue of entitlement, it cannot be read as an admission or acknowledgement that Ms. Liu was in the course of her employment at the time of the accident, see Affidavit of Roxanne Hector, Tab U.

The Assignment form itself purported to provide at least some information about the interaction between the *Schedule* and the *Workplace Safety and Insurance Act, 1997*. While it did not explain why the assignment was required under section 59(5) of the *Schedule*, it did state, as already noted, that the assignment was not an admission of entitlement to workers' compensation benefits. However, other information provided in the Assignment form was incomplete and misleading in several respects. The relevant parts of the Assignment form read as follows:

> 1. The Claimant has been in an accident involving a motor vehicle. He or she may have a right to benefits from a motor vehicle insurance company or from the Workplace Safety and Insurance Board.
>
> 2. Under the *Workplace Safety and Insurance Act, 1997*, the Claimant can either claim benefits under the Act or sue to recover damages for personal injuries from a motor vehicle accident.
>
> 3. The Claimant:
>
> - is deciding whether to make a claim to the Workplace Safety & Insurance Board (the "Board"), or
> - is waiting for a decision from the Board on whether he or she can get Workplace Safety & Insurance benefits, or
> - has already been denied Workplace Safety & Insurance benefits from the Board, or
> - has decided to sue, and there is a dispute with the automobile insurer over whether it has to pay benefits.
>
> 4. Until this is settled, the Claimant has applied to the insurance company for certain insurance benefits (No-fault Accident Benefits, or Statutory Accident Benefits, under the applicable Regulation of the Insurance Act).
>
> 5. In order to get the insurance benefits, the Claimant must agree to have any Workplace Safety & Insurance benefits sent to the Insurance Company that he or she might get because of this accident.[35]

There was obviously some attempt made to write this form in "plain English." There was no attempt made to provide a complete description of the interaction between the *Schedule* and the *Workplace Safety and Insurance Act, 1997* or an explanation of how disputes related to it are to be resolved. The form also provided misleading information. The first two paragraphs suggest that the insured person has two choices to make: first, whether to claim benefits from the insurer

[35] Affidavit of Roxanne Hector, Tab N.

or from the Workplace Safety and Insurance Board, and second, whether to claim benefits from the Workplace Safety and Insurance Board or to sue. In fact, the insured person never has the first choice and only has the second choice if he/she possesses both the right to claim benefits from the Workplace Safety and Insurance Board and the right to commence an action against an alleged tortfeasor. Paragraph three nevertheless envisages a situation where "the Claimant has already been denied Workplace Safety & Insurance benefits from the Board." In fact, if it is agreed or determined by the Workplace Safety and Insurance Appeals Tribunal that the insured person is not entitled to workers' compensation benefits, then he/she is entitled to claim benefits under the *Schedule* without making any decision about whether to sue. The form is also potentially misleading in that it does not explain that, in addition to providing workers' compensation benefits, the *Workplace Safety and Insurance Act, 1997* takes away certain rights of action. This means that, contrary to the impression left by paragraph 2, it is not every "Claimant" who "can either claim benefits under the Act or sue to recover damages for personal injuries from a motor vehicle accident."

Turning to ING's response to the Assignment, I refer first to the letter dated April 20, 2006 from SCM. It acknowledged receipt of the Assignment form, quoted sections 59(1) and (2) of the *Schedule* and then stated that Ms. Lin still had to provide "a copy of a letter of intent to Commence a Tort claim", failing which "we cannot respond to expenses that had been previously submitted, which are for housekeeping, prescription and medical benefits." This letter assumed that Ms. Lin was now acknowledging that she was entitled to receive workers' compensation benefits but did not provide complete information about the potential disputes under section 59(2) and no information about how such disputes could be resolved. It also failed to warn Ms. Lin about the potential application of section 59(3) even though she had not yet completed an election form.[36]

A few days later, Ms. Lin received another letter dated April 24, 2006, this one from the Nordic Insurance Company of Canada, the company to whom Ms. Lin had first presented her claim. This company was evidently taken over by ING at some immaterial point in time. This letter

[36] Affidavit of Roxanne Hector, Tab O. In Ms. Liu's case, SCM's letter of April 20, 2006 also failed to provide any of this information. It only acknowledged receipt of the Assignment and asked for the production of documents in relation to her claim for income replacement benefits, see Affidavit of Rachel Yu, Tab 20.

started by quoting sections 59(1) and (2) but then set out section 258.3(1) of the *Insurance Act*, drawing particular attention to subsection (b) of that provision which reads as follows:

> 258.3 (1) An action for loss or damage from bodily injury or death arises [sic] directly or indirectly from the use or operation of an automobile shall not be commenced unless,
>
> (a) …
>
> (b) the plaintiff served written notice of the intention to commence the action on the defendant within 120 days after the incident or within such longer period as a court in which the action may be commenced may authorize, on motion made before or after the expiry of the 120-day period;
>
> …

The letter went on:

> As more than 120 days have passed since the above noted accident occurred and you have not put any party involved in this accident on notice of your intention to commence an action, we will no longer consider any claims you may have for accident benefits, effective immediately.[37]

This letter implied that since Ms. Lin had not served a notice of intention to commence an action within 120 days of the accident, she had lost both the right to sue and the right to claim benefits under the *Schedule* through the operation of section 59(2). This implication was more than misleading; it was incorrect. Section 258.3(9) states:

> (9) Despite subsection (1), a person may commence an action without complying with subsection (1), but the court shall consider the non-compliance in awarding costs.

As was confirmed by the Court of Appeal in *McCombie v. Cadotte*,[38] the only sanction for non-compliance with 258.3(1) is an award of costs under section 258.3(9). It cannot result in the loss of the right to commence an action or the loss of the right to claim benefits under the *Schedule*.

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[37] Affidavit of Rachel Yu, Tab 20. Ms. Liu received the same letter, see Affidavit of Roxanne Hector, Tab Q.

[38] (2001) 53 O.R. (3d) 704.

April 24, 2006 was also the date of a FSCO Mediator's Report stating that Ms. Lin's claims for medical benefits, cost of examinations and housekeeping claims remain unresolved. The Report did not indicate why these issues remained unresolved or how they might be resolved.[39] I received no evidence about what, precisely, was discussed at the mediation.

The next development occurred on June 2, 2006 when Ms. Lin signed and submitted an Election form to the Workplace Safety and Insurance Board. The evidence before me does not explain what exactly prompted Ms. Lin to complete this Election. The relevant parts of the form read as follows:

1. My full name is Ms. SHUIXIAN LIN.
2. I was injured in a motor vehicle accident on 24 OCT 05.
3. Under the Workplace Safety and Insurance Act I may be able to claim benefits under the insurance plan OR I may be able to take legal action against a person or persons who may have been responsible for the accident.
4. If I take legal action on my own I may be able to collect statutory accident benefits.
5. I have not started a legal action, received any money from a settlement, or received any statutory accident benefits.
6. I choose to receive benefits under the Workplace Safety and Insurance plan.
7. I understand that by choosing to receive benefits under the insurance plan I transfer my right to any legal action to the Workplace Safety and Insurance Board and I cannot take any legal action on my own against anyone concerning this accident. I understand that the Workplace Safety and Insurance Board cannot bring any legal action on my behalf.
8. By signing this form I am informing the Ontario Workplace Safety and Insurance Board of my choice to claim benefits under the insurance plan for injuries resulting from this accident.

10. [sic, this paragraph was erroneously numbered paragraph 10] I am signing this form on Jun 2, 2006.[40]

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[39] Affidavit of Roxanne Hector, Tab P. In Ms. Liu's case, the Mediator's Report was not put in evidence but forms part of the FSCO file. It lists the same issues plus a claim for for Attendant care, but also fails to indicate why these issues remained unresolved.

[40] Affidavit of Roxanne Hector, Tab Q. In Ms. Liu's case, the Election form was signed on June 16, 2006, see Affidavit of Roxanne Hector, Tab R.

Like the Assignment form, the Election form made no attempt to provide a complete description of the interaction between the *Schedule* and the *Workplace Safety and Insurance Act, 1997* or an explanation of how disputes related to it are to be resolved. As confirmed by the repeated use of the word "may" in paragraphs 2 and 3, this form did not assume the existence of any prior agreements or determinations that Ms. Lin was either entitled to receive workers' compensation benefits or entitled to sue someone for her injuries. The statement in paragraph 4 that "If I take legal action on my own, I may be able to collect statutory accident benefits" was misleading. It did not explain that if it was determined that she was not entitled to receive workers' compensation benefits, she could qualify for benefits under the *Schedule* without commencing any action.

On the other hand, Ms. Lin's signature on the Election form appeared to confirm both that she accepted that she was entitled to "benefits under the Workplace Safety and Insurance plan" and that she had decided to claim those benefits rather than sue, assuming she even had the right to sue someone for her injuries. However, had that been the case, and had Ms. Lin properly understood the interaction between the *Schedule* and the *Workplace Safety and Insurance Act, 1997*, she would have then abandoned her claim for benefits under the *Schedule*. She did the opposite. On July 8, 2006, Ms. Lin applied for arbitration in relation to her claims for medical benefits, cost of examinations and housekeeping expenses.[41]

ING's Response to Ms. Lin's Application for Arbitration was completed on September 5, 2006 by Ms. Griffiths. She was obviously not made aware that Ms. Lin had previously completed both an Assignment of workers' compensation benefits to ING and an Election to claim workers' compensation benefits rather than sue. Schedule A to ING's Response denied Ms. Lin's claims on the ground that: "To date, no such assignment has been provided by the applicant. Likewise, the applicant has produced no evidence to indicate that she has made an election to pursue damages in tort pursuant to section 59(2) of the *Schedule*." For the first time, ING's Response referred to section 59(5) of the *Schedule* but it did not provide a complete description of the

[41] In both cases, see Affidavit of Roxanne Hector, Tab S. Ms. Liu also claimed Attendant Care.

interaction between the *Schedule* and the *Workplace Safety and Insurance Act, 1997* or an explanation of how disputes related to it are to be resolved.[42]

Meanwhile, there was another indication that Ms. Lin and her representatives misunderstood the interaction between the *Schedule* and the *Workplace Safety and Insurance Act, 1997.* By letter dated August 28, 2006, Ms. Lin told the Workplace Safety and Insurance Board: "I finally decide to claim my benefits through my Auto Insurance Company and terminate my claim with WSIB."[43] Ms. Lin's representatives then informed ING's adjusters of this apparent new reversal by letter dated September 12, 2006, stating that she "eventually decided to claim … benefits through motor vehicle insurance."[44] These letters suggest that Ms. Lin was labouring under the misapprehension that she could simply choose to claim benefits under the *Schedule* rather than benefits under the *Workplace Safety and Insurance Act, 1997.*

The next event of significance was a Pre-hearing discussion on January 22, 2007 attended by Ms. Lin and her representative, Ms. Baghbani, and by Ms. Roxanne Hector of ING and her representative, again Ms. Griffiths. As noted in Arbitrator Slotnick's Pre-hearing letter of the same date: "The parties agreed to adjourn the pre-hearing discussion in recognition that there are numerous other claimants who were involved in the same accident, and there may be common issues. The parties agreed to discuss how to proceed, and either party may contact the case administrator to resume the pre-hearing."[45] Again, there is no evidence before me as to what, precisely, the parties discussed but the affidavit evidence confirms that "WSIB issues" were involved.[46]

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[42] Affidavit of Roxanne Hector, Tab T. In Ms. Liu's case, ING's Response to the Application for Arbitration was not put in evidence but forms part of the FSCO file. It acknowledges ING's receipt of the Assignment form of March 20, 2006 but stated that Ms. Liu "has yet to produce any evidence pursuant to section 59(2) of an election to pursue damages in tort." Again, Ms. Griffiths was apparently not aware that Ms. Liu had signed an Election form on June 16, 2006.

[43] Affidavit of Roxanne Hector, Tab V. The same letter was written in Ms. Liu's case, see Affidavit of Roxanne Hector, Tab XYZ, note that there are two tabs bearing these letters.

[44] Affidavit of Roxanne Hector, Tab U. A similar letter appears to have been sent to in Ms. Liu's case, see Affidavit of Roxanne Hector, Tab T. Moreover, as previously noted, Ms. Liu then purported to change her mind again by letter dated December 20, 2006 to the Workplace Safety and Insurance Board in which she asked the Board to "reopen my WSIB claim … due to ING my Auto Insurer's delay in informing of my entitlement", see Affidavit of Roxanne Hector, Tab U.

[45] In both cases, see Affidavit of Rachel Yu, Tab 30.

[46] Affidavit of Roxanne Hector, paragraph 30, Affidavit of Rachel Yu, paragraph 40.

In February and early March, 2007, ING's new adjusters, Pinnacle Adjusters Group Inc. ("PAG"), wrote three letters to Ms. Lin and her representatives requesting the disclosure of certain information. One of the pieces of information requested was "an update on the status of your clients [sic] tort claim", thus confirming that PAG itself was well aware that Ms. Lin could not simply choose to claim either workers' compensation benefits or benefits under the *Schedule*. Still, none of these letters attempted to correct Ms. Lin's apparent misapprehension in that regard or to provide information about the interaction between the *Schedule* and the *Workplace Safety and Insurance Act, 1997* or about how disputes related to the interaction could be resolved.[47] In the latter regard, I note that since these letters were all written after October 10, 2006, they failed to inform Ms. Lin that, as a result of Decision No. 1362/06I of the Workplace Safety and Insurance Board, she too could apply to that Tribunal to resolve disputes about her right to claim workers' compensation benefits or her right to sue.

PAG's approach to Ms. Lin's claims changed significantly on March 9, 2007. That was the date it received a letter from a Claims Adjudicator at the Workplace Safety and Insurance Board stating that certain workers "would have coverage and entitlement to Workplace Safety and Insurance (WSIB) under the Workplace Safety Insurance Act [sic] should they decide to claim WSIB benefits for their work injury [sic] of October 25 [sic], 2005 while injured during the course of their employment." This letter listed seven claim numbers, one of which was the claim number previously assigned to Ms. Lin's claim.[48]

PAG explained its new approach to Ms. Lin and her representatives in a letter dated March 13, 2007. That letter enclosed a copy of the letter dated March 9, 2007 from the Workplace Safety and Insurance Board and took the following position on ING's behalf:

> Please be advised that WSIB has confirmed coverage and entitlement for your client under the Workplace Safety & Insurance Act. As such, effective immediately, any further claim that your client intends to submit with respect to the above noted motor vehicle accident, must be submitted directly to WSIB at the following address: [omitted]

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[47] In both cases, see Affidavit of Rachel Yu, Tabs 32, 33 and 34.

[48] Affidavit of Roxanne Hector, Tab W. In Ms. Liu's case, see Affidavit of Roxanne Hector, Tab XYZ, note that there are two tabs bearing these letters.

> We remind you that pursuant to section 28(1) of the Workplace Safety and Insurance Act, a worker employed by a schedule 1 employer is not entitled to commence an action against any Schedule 1 employer. As there is no tort claim in respect of this loss, your client is unable to elect Statutory Accident Benefits and opt out of the WSIB plan.
>
> Based on this information, Nordic Insurance will proceed to close your client's accident benefits file. No additional claim will be processed at this time. Please contact your clients [sic] treating facilities and advise them accordingly.[49]

Apparently anxious to eliminate any possible doubt, on March 26, 2007 PAG sent Ms. Lin and her representatives a copy of its correspondence dated March 21, 2007 to the Workplace Safety and Insurance Board. This correspondence reiterated that the "WSIB will assume further handling" of Ms. Lin's claims. The PAG Adjuster even somehow persuaded the Claims Adjudicator at the Workplace Safety and Insurance Board to sign this letter, written on PAG's letterhead, thus implying that he agreed with these statements.[50]

Once again, PAG was perfectly entitled to take the position on ING's behalf that Ms. Lin had the right to receive workers' compensation benefits as a result of the accident and that section 28 of the *Workplace Safety and Insurance Act, 1997* took away her right to sue the alleged tortfeasor. But PAG was also obliged to inform Ms. Lin that it was the Workplace Safety and Insurance Appeals Tribunal, not the Workplace Safety and Insurance Board, that had exclusive jurisdiction to resolve any disputes between ING and Ms. Lin about either her right to claim workers' compensation benefits or her right to sue. Like its previous letters, PAG's letters of March 13 and March 26, 2007 failed to provide Ms. Lin with information about how such disputes could be resolved, much less with the more recent information that she too could now apply to the Appeals Tribunal. On the contrary, PAG's letters were clearly intended to leave Ms. Lin with the impression that all possible disputes had now been resolved and that she was no longer entitled to benefits under the *Schedule*.

PAG's letters certainly appeared to have the desired effect on Ms. Lin. On August 5, 2007, she acceded to PAG's request to complete another Election form so that the Workplace Safety and

[49] In both cases, see Affidavit of Rachel Yu, Tab 35.
[50] In both cases, see Affidavit of Rachel Yu, Tab 36.

Insurance Board would reopen her claim for workers' compensation benefits.[51] Then, at the resumption of the Pre-hearing before Arbitrator Feldman on August 30, 2007, Ms. Lin agreed to withdraw her Application for Arbitration, subject to ING's claim for expenses.

Part 4: The parties' arguments

With few exceptions, as noted, the parties' arguments were the same in both cases. I will, therefore, again refer only to the arguments made in Ms. Lin's case.

ING's first set of written arguments were submitted by Ms. Kawaguchi. She set out the criteria identified by the Expense Regulation, relying in particular on the fourth and fifth criteria which require me to consider:

> 4. The conduct of a party or a party's representative that tended to prolong, obstruct or hinder the proceeding, including a failure to comply with undertakings and orders.
>
> 5. Whether any aspect of the proceeding was improper, vexatious or unnecessary.

Paragraph 8 of Ms. Kawaguchi's written argument started with the following observations:

> The insurer submits that the claimant and/or her representative knew or ought to have known from the outset that there was no reasonable expectation that Ms. Lin's claim for accident benefits could ever succeed (and therefore no reasonable expectation that this arbitration proceeding could succeed). The claimant was in the course of her employment at the time, and was a passenger in a vehicle which driven by another employee. The motor vehicle accident only involved one vehicle. As such, the claimant would have no one to sue for bodily injury except the driver of the one vehicle. As they were both Schedule 1 employees, she would be prohibited from suing anyone, and therefore could not have a bone fide intention to commence a claim for bodily injury. As such, it is the insurer's submission that the arbitration is frivolous and vexatious and an abuse of process.

[51] Affidavit of Rachel Yu, Tabs 37 and 38. In Ms. Liu's case, see Affidavit of Rachel Yu, Tabs 40 and 41.

Ms. Kawaguchi's submission then set out section 59 of the *Schedule* and section 30 of the *Workplace Safety and Insurance Act, 1997*. I note that the submission did not set out or refer to section 31 of that *Act*. Ms. Kawaguchi then went on at paragraph 11:

> The proceeding has been prolonged, obstructed or hindered by Ms. Lin and/or her representatives by:
>
> 1. applying for mediation at the Financial Services Commission of Ontario prior to executing the Assignment of Workplace Safety and Insurance Benefits form, when she would not be entitled to statutory accident benefits in accordance with section 59(5) of the *Schedule*.
>
> 2. applying for arbitration at the Financial Services Commission of Ontario despite having elected to receive WSIB benefits.
>
> 3. in the interim between the insurer delivering its Response to Arbitration and the first pre-hearing of January 22, 2007, the claim [sic] withdrew her election from WSIB and then reinstated her claim with WSIB.
>
> 4. requiring the insurer and its counsel to prepare for and attend at two pre-hearing, despite what appears to be the intention of the claimant and her representative to withdraw the arbitration.

The submission contained a "Costs Outline" in relation to ING's expenses. Ms. Kawaguchi maintained that half of those expenses should be attributed to the Lin matter, half to the Liu matter, and that all expenses should be paid by Ms. Lin's representatives personally in accordance with section 282(11.2) of the *Insurance Act* which reads as follows:

> (11.2) An arbitrator may make an order requiring a person representing an insured person or an insurer for compensation in an arbitration proceeding to personally pay all or part of any expenses awarded against a party if the arbitrator is satisfied that,
>
> (a) in respect of a representative of an insured person, the representative commenced or conducted the proceeding without authority from the insured person or did not advise the insured person that he or she could be liable to pay all or part of the expenses of the proceeding;
>
> (b) in respect of a representative of an insured person, the representative caused expenses to be incurred without reasonable cause by advancing a frivolous or vexatious claim on behalf of the insured person; or

> (c) the representative caused expenses to be incurred without reasonable cause or to be wasted by unreasonable delay or other default.

Ms. Lin's written response was submitted by Ms. Baghbani. For the first time, at least in terms of the evidence placed before me, Ms. Baghbani explained Ms. Lin's circumstances at the time of the accident. At paragraph 9, she stated that Ms. Lin was returning from a workplace at the time of the accident but asserted that "she was not an employee as she had been on the farm only for the purpose of an interview and was only hired as an employee for the next work day." Ms. Baghbani further alleged that the other passengers in the vehicle, including Ms. Liu who was already an employee, paid the driver for transportation to and from the workplace. She submitted that it was not clear that this arrangement was "under the control and supervision of the employer." She maintained that, in these circumstances, it was up to the Workplace Safety and Insurance Appeals Tribunal, exercising its jurisdiction under section 31 of the *Workplace Safety and Insurance Act, 1997* which she quoted, to determine whether Ms. Lin was entitled to workers' compensation benefits. Ms. Baghbani then explained, at paragraph 7, the method by which she understood this "clearly contentious" issue should be placed before the Tribunal:

> …In accordance with the insurer's obligation at all times in the process of the claim for accident benefits by the applicant to act in utmost good faith, there is a [sic] explicit duty on the insurer to appeal the decision of WSIB on the issue of coverage when its insured takes the position that she is entitled to payment of accident benefits under the SABS rather than WSIB payments.

In other words, Ms. Baghbani apparently thought that in order to place the issue before the Tribunal, Ms. Lin first had to apply to the Workplace Safety and Insurance *Board* for workers' compensation benefits and ING then had to appeal to the Workplace Safety and Insurance Appeals Tribunal any decision by the Board that she was entitled to such benefits as such a decision would not reflect Ms. Lin's position. Ms. Baghbani's argument appeared to be that while Ms. Lin had done her part by applying to the Workplace Safety and Insurance Board for workers' compensation benefits, ING had failed to do its part by appealing the Board's acceptance of her entitlement to the Workplace Safety and Insurance Appeals Tribunal.

However, in the next paragraph, paragraph 8, Ms. Baghbani appeared to recognize the possibility of a direct application to the Tribunal by the insurer. She wrote:

> Therefore, the question of whether the Applicant is entitled to WSIA benefits is properly answerable by the Appeals Tribunal. The question should have been the subject of an application to the Appeals Tribunal by the insurer if it seriously wanted to assert the ground that "the applicants are entitled to WSIB" in opposition to the application for accident benefits having been submitted by this applicant.

At paragraphs 24 and 29, Ms. Baghbani claimed that neither Ms. Lin nor her representatives, whom she described as only "SABS Representatives", had any knowledge of the "WSIB claim process." As a result, she asserted, Ms. Lin was simply following "the instructions" she received from ING's representatives "to make an election [and] execute a WSIB assignment form." At paragraph 23, Ms. Baghbani submitted that by failing to pay benefits under the *Schedule* while the "WSIB process" unfolded, in accordance with section 59(5) which she also quoted, ING had left Ms. Lin with no choice but to apply for mediation and arbitration. At paragraph 22 of her submission, Ms. Baghbani offered the following explanation for why Ms. Lin eventually withdrew her Application for Arbitration:

> The insurer's representative threatened to seek costs against the Applicant if the Arbitration proceeding was not withdrawn as a weapon which intimidated the applicant to provide instructions to her representative to withdraw the arbitration although there was still a reasonable likelihood that the applicant may be successful in an eventual arbitration hearing.

At paragraph 2 of her written reply to Ms. Baghbani's submission, Ms. Kawaguchi made this observation: "The issue of whether the applicant was in the course of her employment at the time of the motor vehicle accident is wholly immaterial and irrelevant to the issue of expenses." She went on at paragraphs 3, 4 and 5:

> The relevant and material issue is the claimant's failure to complete and submit the necessary forms for WSIB, as required by the *Schedule*, as requested on several occasions by the insurer (as indicated in the Insurer's original submissions), regardless of whether the claimant may have had a remote possibility of not being subject to the WSIB. The applicant's failure to do so is a

> significant cause of the delay in the proceedings, and as such, is the subject of the claim for expenses.
>
> The insurer had requested the claimant to submit an Assignment of Workplace Safety and Insurance Board Benefits Form on several occasions. The insurer provided clear and detailed instructions as to the forms the applicant was required to complete and submit. The insurer advised the applicant that in accordance with the provisions of the *Workers' Safety and Insurance Board Act* [sic], as well as the *Statutory Accident Benefits Schedule* prior to any payment of statutory accident benefits, an executed Assignment of Workplace Safety and Insurance Benefits Form must be executed. These requests went unanswered for a period of several months, and as such, effected substantial delay.
>
> In addition, after electing to receive benefits pursuant to the Workers Safety and Insurance Plan, the applicant requested closure of her WSIB claim for injuries sustained in her work related motor vehicle accident. The applicant again changed her mind and requested the WSIB to re-open her claim, and as such, effected substantial delay.

At paragraph 6 of her submission, Ms. Kawaguchi vigorously denied Ms. Baghbani's allegation of intimidation, stating that "the withdrawal of the claim was not a negotiated one – the applicant's representative simply advised the pre-hearing Arbitrator and the insurer at the beginning of the pre-hearing that the arbitration was being withdrawn." Ms. Kawaguchi also referred to her letter dated October 18, 2007 which, in addition to denying Ms. Baghbani's earlier allegation of intimidation, stated: "…the claimants have been represented from the inception of these accident benefit claims and, therefore, any misunderstanding has been between Ms. Lin and her own representatives and does not involve the insurer."

After reviewing the parties' affidavits and submissions, I wrote to them on January 10, 2008, drawing their attention to three of the cases referred to in Part 1 of this decision: Decision No. 1362/06I of the Workplace Safety and Insurance Appeals Tribunal and the two FSCO decisions in *Basdeo and Citadel General Assurance Company*. My concern was that since these were all fairly recent decisions, the parties might not have been aware of them. My letter invited the parties to make further submissions in relation to the relevance of these decisions or of "any other authorities you think should be brought to my attention."

ING's submission was made by Ms. Griffiths. She acknowledged that these decisions "provide guidance regarding the interaction between section 50 [sic] of the *Schedule*, section 31 of the *Workplace Safety and Insurance Act*, as well as the relative jurisdiction of both the Financial Services Commission and the Workplace Safety and Insurance Appeals Tribunal." However, she maintained that the decisions were of "limited relevance" given that Ms. Lin's Application for Arbitration had been withdrawn and that ING was now emphasizing the "conduct of the Applicant and her representative" as set out in ING's previous submissions.

Still, for the first time in all of ING's evidence and submissions up to that point, Ms. Griffiths acknowledged the existence of section 31 of the *Workplace Safety and Insurance Act, 1997*, though only partially. Her submission recognized that that section permits "an *insurer* from whom statutory accident benefits are claimed to apply to the Appeals Tribunal to determine whether the plaintiff is entitled to claim benefits under the insurance plan", that is, workers' compensation benefits (my emphasis). Ms. Griffiths did not acknowledge or address the fact that the Appeals Tribunal's jurisdiction under section 31 is exclusive or that, since October 2006, claimants can also apply to the Appeals Tribunal, whether plaintiffs or parties to actions or not. As to whether ING should have applied to the Appeals Tribunal in this case, Ms. Griffiths argued:

> It is submitted that an insurer should not be required to go to the very considerable time and expense of pursuing a full hearing under 31 of the *Workplace Safety and Insurance Act*, unless and until the insured person has complied with section 59 of the *Schedule*, and at a minimum, clarified whether WSIB benefits are or are not being pursued. In the present case, the insured person failed or refused to complete a WSIB Assignment and Election within a timely fashion, and in fact elected to receive WSIB benefits as of June 2, 2006, before almost immediately thereafter initiating this Arbitration. As such, it is submitted that her Application for Arbitration was "improper, vexatious and unnecessary."

The final round of submissions contained the following exchange which effectively summarized the dispute between the parties as they presented it to me. In her response to Ms. Griffiths' submission, Ms. Baghbani observed:

> It has always [been] clear to the Insurer from the very inception of the proceedings that the Applicant was always reluctant in claiming under the *Workplace Safety and Insurance Act*. In various letters and verbal communications with the Insurer it has been conveyed to the Insurer that the Applicant and representative does not believe that a valid claim lies under the said Act.
> …
> The Insurer should have approached the W.S.I.A.T. for a decision on the issue of entitlement. It was within the knowledge of the Insurer at a very early stage that the fact whether the Applicant was in the course of employment at the time of the accident was being disputed. An early clarification from W.S.I.A.T. would have saved both sides a lot of time and expenses. The Insurer with its team of lawyers was well resourced to appeal to the W.S.I.A.T. as opposed to The Applicant who is being represented by a SABS representative.

Ms. Griffiths' final reply contained these responses to those observations:

> … the Insurer acknowledges that the Insured has been "reluctant" to claim workers' compensation benefits. However, that submission overlooks the fact that, in the Insurer's respectful submission, she never had the option to claim benefits elsewhere. As acknowledged in the Affidavit of Ms. Yu, she [Ms. Lin] knew from at least March of 2007 that WSIB had accepted her claim, and had previously opened a claim file for her following her election on June 16, 2006 [June 2, 2006]

> … the Insurer does not accept that the insurer should have sought "early clarification" from WSIAT on this subject. In the circumstances of this case, a full section 31 hearing would have been a last resort rather than a first step for the insurer to take… There … appeared to be no issue as to whether the "plaintiff" was entitled to claim benefits under the Workplace Safety and Insurance Board, as the claim had already been accepted by WSIB…. a … lengthy administrative hearing on an issue that had already been decided in the affirmative at the adjudication level (by the acceptance of the Applicant's WSIB claim) was not a reasonable course for the Insurer to pursue in the absence of evidence to the effect that the insured was seeking to make a *bona fide* tort claim, as described in section 59(2) of the *Schedule*.

Part 5: Analysis and Conclusion

The parties would no doubt agree that the Applicants did not successfully navigate the waters separating the grounds of entitlement under the *Schedule* from the grounds of entitlement under the *Workplace Safety and Insurance Act, 1997*. As argued, their disagreement was largely about

who was captaining the ill-fated ship. ING pointed to the Applicants' own representatives, deploring first their failure to have their clients submit Assignments of workers' compensation benefits as requested, followed by whatever advice they gave the Applicants that led them to flip-flop incoherently as to whether or not they were claiming those benefits and then to ultimately abandon their claims for benefits under the *Schedule* altogether. The Applicants' representatives, on the other hand, shamelessly relied upon their own ignorance of the "WSIB process" - even though their after-the-fact submissions demonstrated at least a partial grasp of that process - in an attempt to persuade me that the Applicants were just playing the roles assigned to them by ING while ING itself refused to play its own role by championing their, rather than its own, interests at the Workplace Safety and Insurance Appeals Tribunal.

In my view, both ING and the Applicants' representatives failed miserably to discharge their obligations towards the Applicants.

I reject completely Ms. Baghbani's suggestion that a "SABS representative" is under no obligation to know about the "WSIB process." Section 59 of the *Schedule* makes some knowledge of that process an absolutely essential qualification for any person representing "SABS" claimants, whether that person be a "SABS representative", a paralegal or a lawyer licensed by the Law Society. It was also, of course, completely wrong-headed for Ms. Baghbani to suggest that ING could ever be called upon to advocate the Applicants', rather than its own, interests before the Workplace Safety and Insurance Appeals Tribunal.

At the same time, the ignorance or incompetence of the Applicants' representatives cannot be allowed to deflect attention away from, or excuse, ING's multiple failures to provide the Applicants with complete and correct information about the interaction between the *Schedule* and the *Workplace Safety and Insurance Act, 1997* and about how disputes related to it are to be resolved. As Director's Delegate Makepeace observed in *RBC General Insurance Company and Antony*, the Supreme Court of Canada implicitly rejected this type of reasoning in *Smith*. She wrote:

> … RBC submits that the missing information should have been available to Ms. Antony from other sources, including her husband and the paralegal they briefly retained on the day of the accident. In *Smith v. Co-operators*, Gonthier J.

did not accept that the reference to the limitation period in the Report of Mediator satisfied the insurer's obligation under s. 71 [he wrote]:

> As I have mentioned above, insurance law is, in many respects, geared towards protection of the consumer. This approach obliges the courts to impose bright-line boundaries between the permissible and the impermissible without undue solicitude for particular circumstances that might operate against claimants in certain cases.

I read this as saying that the availability of other information sources does not reduce an insurer's notice obligations. This is consistent with FSCO decisions holding that "actual notice" is no answer to an insurer's non-compliance with the notice requirements in the SABS.[52]

To the same effect, I note the following comments by Arbitrator Nastasi in *Finlayson and Allstate*:

> The issue in *Smith* is not what the applicant knew about the process but about the positive obligation placed on an insurer to advise applicants of the process. I do not accept that the particular understanding of an applicant is relevant as it would lead to the conclusion that an insurer's obligation to provide information would vary depending on their assessment of the applicant's level of understanding of the dispute resolution process.[53]

I further observe there was no onus on the Applicants to establish that they would, in fact, have conducted themselves any differently had they been provided with complete and correct information. In *Antony and RBC General Insurance Company*, I had occasion to comment on a pre-*Smith* decision in which the existence of such an onus was accepted. I said:

> In my view, this type of reasoning would now be contrary to the "bright-line boundaries" approach endorsed by the Supreme Court. As I understand it, this approach encourages the judge or arbitrator to focus on the primary question of whether or not the insurer met its obligation to inform the insured person. If satisfied that the insurer did not meet its obligation to inform the insured person, the "bright-line boundaries" approach then discourages the judge or arbitrator from going beyond this finding to entertain arguments based on "undue solicitude for particular circumstances that might operate against claimants in certain cases." In my opinion, the ruling that Ms. Olivito was required to prove that she would have elected differently had she been properly informed should now be

[52] (FSCO P03-00023, July 22, 2004) Appeal.
[53] (FSCO A04-002133, November 8, 2006).

> regarded as demonstrating "undue solicitude for particular circumstances" operating against the claimant.[54]

I also noted in *Antony* that trying to figure out what a particular claimant might have done had he/she been provided with complete and correct information is, in any event, an inherently speculative enquiry. In this case, it is true that the Applicants delayed in completing the Assignment form but they may not have done so had its purpose been better explained. Likewise, had they been better informed by ING about the interaction between the *Schedule* and the *Workplace Safety and Insurance Act, 1997*, they might not have completed the Election form claiming workers' compensation benefits in June 2006, applied for Arbitration in July 2006 and then, in August 2006, decided that they wanted to "claim my benefits through my Auto Insurance Company and terminate my claim with WSIB." Of course, their behaviour may have been exactly the same regardless of the information ING provided. Still, in my view, ING was not entitled to recover the expenses it incurred as a result of the Applicants' behaviour unless it had first done that which it was required to do by section 32(2) of the *Schedule*: provided them with complete and correct information about the interaction between the *Schedule* and the *Workplace Safety and Insurance Act, 1997*, as previously outlined.

Perhaps more importantly, I am not prepared to speculate about what may have happened had the Applicants been informed by ING that the dispute about their entitlement to workers' compensation benefits could be resolved, and could only be definitively resolved by direct applications to the Workplace Safety and Insurance Appeals Tribunal, whether by ING or, after October 2006, by themselves. The disputes might then have been resolved prior to ING's incurring any expenses in relation to the Applicants' eventual Applications for Arbitration. Again, that may not have happened but, in view of ING's failure to inform the Applicants of the correct dispute resolution procedure in accordance with section 49 of the *Schedule*, any doubt about what may have happened must be resolved in their favour.

Finally, I do not see this as a case in which ING's overall conduct entitles it to an award of expenses. ING has apparently always been confident that the Applicants were entitled to workers' compensation benefits. Yet, it declined to put this position to the test in the governing

[54] (FSCO A02-000217, March 12, 2003).

forum, the Workplace Safety and Insurance Appeals Tribunal. I note that in the early stages of the claim, ING alone had access to that forum and that it was entitled to apply for the relief it was apparently sure to obtain as soon as it received the Applicants' claims for benefits under the *Schedule*. Yet, it preferred to simply maintain its position throughout, even after receiving Assignments of workers' compensation benefits, all the while failing to tell the Applicants how the dispute could be definitively resolved, including, ultimately, through their own applications to the Workplace Safety and Insurance Appeals Tribunal.

Then, in seeking to recover its expenses, ING's lawyers continued to ignore section 31 of the *Workplace Safety and Insurance Act, 1997*. When it was brought to their attention, they only partially recognized its significance, purporting to rely on a decision of the Workplace Safety and Insurance *Board* that could not definitively resolve the dispute or bind the parties. They attempted to justify ING's failure to apply to the Workplace Safety and Insurance Appeals Tribunal for "early clarification" of the Applicants' entitlement to workers' compensation benefits by referring to "very considerable time and expense of pursuing a full hearing under section 31 of the *Workplace Safety and Insurance Act*."

ING's conduct may well have achieved these cost savings but it also tended to prolong the central and, I accept, genuine dispute underlying this proceeding and hence, the proceeding itself.

For these reasons, I conclude that Ms. Lin and Ms. Liu and their representatives are not required to pay ING's expenses in relation to these proceedings.

May 2, 2008

David Leitch
Arbitrator

Date

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

FSCO A06-001732 and A06-001689

BETWEEN:

SHUI XIAN LIN and YUE XIAN LIU

Applicants

and

ING INSURANCE COMPANY OF CANADA

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Ms. Lin and Ms. Liu and their representatives are not required to pay ING's expenses in relation to these proceedings.

May 2, 2008

David Leitch
Arbitrator

Date