

**IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.1.8, as amended**

**AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c.17, as amended**

**AND IN THE MATTER OF an Arbitration**

**B E T W E E N:**

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO  
AS REPRESENTED BY THE MINISTR OF FINANCE  
(THE MOTOR VEHICLE ACCIDENT CLAIMS FUND)

Applicant

- and -

JEVCO INSURANCE COMPANY

Respondent

**AWARD**

**Scott W. Densem – Arbitrator**

**Heard: July 12, 2010**

Counsel:

Robert W. Kerkmann for the Applicant

Mark S. Wilson for the Respondent

**Introduction**

The parties appointed me pursuant to the *Arbitration Act, 1991*, and Regulation 283/95 of the *Insurance Act*, to arbitrate a dispute as to which of the applicant and the respondent have the higher priority obligation to pay Statutory Accident Benefits to Inna Shur.

The arbitration was conducted pursuant to the terms of a written arbitration agreement signed by the respondent on June 2, 2010 and by the applicant on June 7, 2010. The arbitration was also conducted pursuant to a May 27, 2010 letter from Densem ADR Solutions Inc. to counsel for the parties.

## **Factual Background to the issues**

MVACF alleges that Inna Shur was injured in an automobile accident occurring December 17, 2008. She applied to MVACF for SABS. MVACF paid Ms. Shur SABS. MVACF put Jevco on notice of the priority dispute by serving a Notice of Dispute Between Insurers. There is no issue concerning the timeliness of the Notice.

## **The Issues**

1. Which of MVACF and Jevco has the higher priority pursuant to Section 268 of the *Insurance Act* for the payment of SABS to Inna Shur?
2. If MVACF is found to be entitled to reimbursement from Jevco for the payment of SABS to Inna Shur, what is the proper amount of reimbursement? Is MVACF entitled to interest? If so, what is the proper amount?

We conducted an arbitration hearing on July 12, 2010, restricted to issue 1. *Viva voce*, and documentary evidence was tendered by the parties. Counsel made oral and written submissions on issue 1.

My decision on issue 1 will affect issue 2. Should it be necessary for me to deal with issue 2 counsel agreed that suitable arrangements would be made to do so subsequent to my award on issue 1.

Therefore, this decision will, subject to the appeal rights of the parties, determine arbitration issue 1, with the parties reserving the right to tender further evidence and make further submissions, if necessary, before issue 2 is determined.

## **Evidence and Analysis**

The following documentary evidence was admitted at the hearing:

Exhibit 1: Ontario Motor Vehicle Plate Search on Plate AMNP 309;

Exhibit 2: Business Card of Curtis Mabee bearing handwritten telephone number and street reference, and license plate number AMNP 309

Exhibit A for identification: Google aerial photograph showing the parking lot of the Dufferin Mall

Exhibit B for identification: Second Google aerial photograph of parking lot in Dufferin Mall depicting vehicle parking position and vehicle travel direction

Exhibit C for identification: Third Google aerial photograph showing parking lot of Dufferin Mall, location of No Frills Store and vehicle movement direction

The following witnesses testified at the hearing:

Curtis Mabee

Bruce Cunningham

Inna Shur

Handel Palmer

Determining which of the parties has the higher SABS payment priority hinges on the answer to two questions. First, on December 17, 2008 was Inna Shur involved in an accident within the meaning of the SABS regulation?<sup>1</sup>

In the terms of the Regulation, it must be demonstrated that Inna Shur suffered impairments directly caused by the use or operation of an automobile.

Second, if the first question is answered positively, for Jevco to be required to assume responsibility for the payment of SABS to Ms. Shur it must be proved that the automobile involved in the accident was owned and operated by Handel Palmer (which vehicle was insured by Jevco).

The position of the applicant MVACF is that the evidence establishes on a balance of probabilities that Inna Shur was struck by Mr. Handel's automobile on December 17, 2008 and therefore Jevco has the higher priority for the payment of SABS.

Jevco's position is that Ms. Shur did not suffer any impairments as a direct result of the use or operation of an automobile on December 17, 2008. Jevco submits that this fact is not established by the evidence. Jevco argues that the better interpretation of the evidence is that if Ms. Shur sustained any impairment on December 17, 2008, this was caused as a result of her slipping and falling, as opposed to being struck by an automobile.

Jevco's further argues that even if it is found that the evidence establishes Ms. Shur sustained an impairment as a result of being struck by an automobile on December 17, 2008, it was not Jevco's insured automobile owned by Handel Palmer that struck Ms. Shur.

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<sup>1</sup> Ontario Regulation 403 /96, as amended

To resolve these questions a careful examination of the testimony and documentary evidence is required. The first witness, Curtis Mabee, was called by MVACF. At the time of the accident he was a 49 year old painter who resided in Mississauga. He confirmed that he witnessed an accident involving an automobile and a pedestrian at the Dufferin Mall. He was not certain as to the exact date, but he was reasonably confident that it occurred in mid December, 2008, during the day. He was at the mall that day to get a haircut. He attended with the second witness, Bruce Cunningham. Mr. Cunningham was also a painter and resided with Mr. Mabee in Mississauga.

Mr. Mabee and Mr. Cunningham had parked in the parking area to the north and east of the front entrance to the Dufferin mall. This parking area is shown in Exhibit "A". They started walking southwest towards the front entrance to the mall.

Mr. Mabee testified that he observed a vehicle travelling south along a road in the mall that ran immediately adjacent to the mall, past the front entrance, and then it continued towards the south end of the mall.

He said that he observed the SABS claimant, Inna Shur, exiting the front doors to the mall and walking eastward towards the road on which the vehicle was approaching southbound. He noted that there was a stop sign on the road approximately opposite the front doors to the mall which required vehicles travelling on the road to stop for pedestrians crossing the road in the area of the front doors to the mall.

He testified that as he was observing the movements of the vehicle and Ms. Shur he remarked to Mr. Cunningham to the effect of, "*that vehicle is not going to stop.*"

In direct examination he testified that he saw Ms. Shur begin crossing the road as the vehicle continued southbound and that he saw the vehicle hit Ms. Shur. He recalls, yelling "*...hey there is a stop sign there*".

After this Mr. Mabee and Mr. Cunningham moved quickly to the location of the accident. The vehicle that had struck Ms. Shur was stopped. Mr. Mabee and Mr. Cunningham stood behind the vehicle. It remained stationary long enough for both of them to observe the number of the rear license plate of the vehicle.

On direct examination Mr. Mabee described the vehicle as a mid-sized car with four doors. He could not recall the colour. With respect to the driver of the vehicle, he was able to say only that the driver was a male and that he was not Caucasian. He did not recall the driver getting out of the car. Shortly, after he and Mr. Cunningham made the observation of the license plate the car drove away.

He observed Ms. Shur run back into the Dufferin Mall through the entrance which she had exited.

Mr. Mabee testified that there was a third male at the scene of the accident. This person identified himself as "Lawrence". Mr. Mabee first observed Lawrence in front of the vehicle while he and Mr. Cunningham were behind the vehicle. Mr. Mabee then described how he, Mr. Cunningham, and Lawrence met together to discuss the identification of the vehicle. Lawrence had a pen but nothing on which to write. Mr. Mabee had a business card. He gave his business card to Lawrence.

Mr. Mabee was not exactly certain how the license plate number that was written on Mr. Mabee's business card was decided amongst the three of them to be the number of the vehicle involved in the incident. He commented that the accident had occurred "*almost two years ago*". He believed that the three of them had agreed on the plate number and that Lawrence had written the plate number that they had agreed upon on Mr. Mabee's business card.

Mr. Mabee was shown a business card. He identified this business card as one of his own and as the card that he had given Lawrence on the day of the accident so that Lawrence could record the plate number. The business card is Exhibit 2. Mr. Mabee was asked if he could recall whether the plate number recorded on the business card was the same as the plate number he had observed on the vehicle that had struck Ms. Shur the day of the accident. He conceded that he had no independent recollection of the plate number. He did say however, that he knows the three of them were "100% sure" that they had correctly identified the plate number on the day of the accident.

In cross-examination counsel for Jevco put to Mr. Mabee that he had previously identified the vehicle involved in the accident as a taxi. He was examined on a statement that he had given to an independent adjuster for MVACF. Mr. Mabee conceded that when he spoke to the investigator he had said that he believed the vehicle to be a taxi. The basis for this belief is that he thought he had observed some type of sign on the side of the vehicle. He went on to say however he did not recall the vehicle looking like a "typical taxi" such as a "Beck" or a "Yellow taxi". He also did not recall any type of signage on the roof of the vehicle. He testified that he came to the conclusion that the vehicle could have been a taxi because he believed he saw some type of sign on the side of the vehicle that he described, "like magnet (sic)". This was not pursued further so it is not clear exactly what Mr. Mabee may have meant by the "magnet" comment.

Jevco's counsel also challenged Mr. Mabee's conclusion that Ms. Shur had been struck by the vehicle for which he, Mr. Cunningham, and Lawrence obtained the license plate number. Mr. Mabee conceded that as Ms. Shur walked in front of the vehicle his

view was obstructed. He could not see her from the waist down. He concluded that the vehicle did strike Ms. Shur because she was walking immediately in front of the vehicle, it was moving forward, and then she fell to the ground.

Under strong cross-examination by counsel for Jevco Mr. Mabee remained steadfast in his evidence that he, Mr. Cunningham, and Mr. Lawrence were certain that they had correctly observed and recorded the license plate number of the vehicle he believed to have struck Ms. Shur. He did admit that Lawrence did the writing on the business card and that he did not see the business card after Lawrence had recorded the number that they had discussed.

Mr. Mabee was also clear in his evidence that Ms. Shur was the only pedestrian, and the vehicle for which they recorded the license plate number was the only vehicle on the road in that area when the incident occurred.

In response to questioning by Jevco's counsel about his description of the driver he again described the driver as "not Asian" and as having "darker skin". He did confirm however that he did not have recollection of the driver getting out of the vehicle.

In response to cross-examination by Jevco's counsel Mr. Mabee testified that he and Mr. Cunningham were "right behind" the vehicle "about four feet" away when they viewed the license plate number.

Mr. Mabee testified both in direct examination and in cross-examination that following the events outside the mall they entered the mall to try to locate Ms. Shur and to advise security about the incident. They were able to locate Ms. Shur and they gave her the business card which is Exhibit "2".

Bruce Cunningham was the second witness called by MVACF. His evidence was similar in all important respects to that of the witness Curtis Mabee.

As they were walking towards the front entrance to the mall he recalled that Mr. Mabee had remarked to the effect, "... that cab is going to hit that girl".

He made the same observations of the vehicle and Ms. Shur as did Mr. Mabee.

He saw Ms. Shur exit the front doors to the mall and walk towards the road on which the vehicle was travelling southbound. He saw her cross directly in front of the vehicle just as it reached her. He saw her fall to the ground directly in front of the vehicle. He described as what he observed as "slush" or dirt on her coat marking the point where she made contact with the ground.

After the incident he noticed the person, later identified as Lawrence near the front of the cab. Both he and Mr. Mabee talked to Lawrence and they all looked at the vehicle.

Mr. Cunningham's description of how they arrived at the license plate number that was written on Exhibit 2 is slightly different than Mr. Mabee's testimony.

Mr. Cunningham said "*it seemed amongst the three of us that we each recalled a portion*" (of the license plate number)".

He agreed with Mr. Mabee that Lawrence wrote the plate number down on the business card as they were all remembering what they had observed of the plate.

Mr. Cunningham described the vehicle as, "*a non-descript, four door car like a Chevrolet Impala.*"

He admitted that he did not observe it to be a taxi cab like Mr. Mabee did. He also said that he did not pay a great deal of attention to the vehicle apart from trying to get the license plate number.

He did not recall making any specific observations of the driver.

Under cross examination Mr. Cunningham admitted that he did not know what portion of the plate number that he, Mr. Mabee, and Lawrence contributed. When pressed further he stated that he had all seven characters of the plate firmly in his mind at the time after he observed them. He testified that he believes that it was probably he who told Lawrence what to write on the card for the plate number because he "*remembers things like that*". He could not say for certain that he dictated the plate number to Lawrence but he assumed that he probably did.

Like Mr. Mabee, Mr. Cunningham conceded that he was not shown the card by Lawrence after Lawrence recorded the license plate number for the purposes of checking whether the number recorded was the same as their observations.

One other difference in Mr. Cunningham's testimony from that of Mr. Mabee is that Mr. Cunningham said that the car he believed struck Ms. Shur did not stop. He recalls seeing it continue on after she fell to the ground and they made the observations of the plate number as the vehicle continued southbound on the road.

Mr. Cunningham had no specific recollection of talking to Ms. Shur but he believes that Mr. Mabee did speak with her.

The third witness, also called by MVACF was the SABS claimant, Inna Shur. Ms. Shur testified under direct examination that she arrived at the mall around noon. She

spent about an hour in the mall and then left through the main doors that faced Dufferin Street. It is clear from Exhibits "A", "B" and "C" that these doors face East.

Ms. Shur had not been to this mall before nor has she been there since.

As she exited the front doors to the mall and began walking towards the road she saw a car stopped about 25 feet north of where she intended to cross the road. As she approached the edge of the road she noticed the car started up from a stop position and seemed to approach her quickly. As she saw that the car was not going to stop she tried to turn around but *"it hit me and I fell"*.

She believes that she either lost consciousness or was stunned for about 15 seconds.

She recalled two men helping her up. She remembered the driver getting out of the car and saying something to the effect of *"oh sorry dear, honey I didn't see you"*.

She got to her feet. She was feeling shaken up and decided to return to the mall to go to the washroom.

She described the vehicle as a small car, not a van or a truck. She could not recall the colour but then said *"it could have been silver, but just as easily black"*.

After returning to the mall she entered the washroom. She noticed that her beige coat was black on the side and back from where she had contacted the ground. She had a *"big headache"* and was feeling unwell.

When she exited the washroom she was met by two men. They handed her a business card which is Exhibit "2" and suggested that she call the police or go to the hospital. In her evidence she clearly identified Exhibit "2" as the card that was handed to her by the men who met her outside the washroom. She noted that the license plate number of the vehicle was written on the business card.

Under cross-examinations by Jevco's counsel Ms. Shur denied that she had slipped and fallen to the ground. She was consistent in her evidence that she had been struck on the leg by the car as she was walking east across the road. She stated that there was a bruise on the front of her thigh where she was struck by the car.

Under detailed cross-examination she related that the driver did get out of the car but it seemed to take him a long time. She yelled at him and seemed embarrassed in her testimony because she had used profanity. She did say again that he made some remark to the effect of *"oh I'm so sorry"*.

She was confused about the amount of time taken by her exchange with the driver. She originally estimated it to be about 45 seconds but then revised her estimate

to say that the exchange lasted only about 10 seconds with the whole episode lasting about 45 seconds.

She recalled the two men whom she met outside the washroom being present immediately after the incident. One of them remarked to the driver "*didn't you see her, you have to be more careful*". She was already on her way back into the mall when she heard this comment.

She described the driver of the car that struck her as being black and in his mid to late 50's. When asked to describe his height she said that he was not very tall. He was of average height. And then she said that he may have been about 5'9" tall. She did not recall hair on the drivers face or on his head.

With respect to whether the vehicle was a taxi, she said that she did not think it was a taxi because she did not see a sign on the top.

For its case, Jevco called the owner of its insured vehicle, Handel Palmer, as a witness. Mr. Palmer is 64 years old. He is 5'2" tall. He said that he weighs 155 pounds. It was his evidence that he looked approximately the same in December 2008 as he did on the day of the arbitration hearing.

At the time this incident occurred Mr. Palmer was a volunteer driver for the Children's Aid Society. He drove his own car for this purpose.

He described the vehicle he owned at that time as an Oldsmobile Alero. It had four doors and it was silver in colour. It did not have any signage either on the top or the sides. There was no lettering on the vehicle.

Mr Palmer could not remember the license plate number on his car at the time of the accident. In 2010 he had given his car to his mechanic and got a new car. He did not however, transfer the plate so it remained on the Alero.

To perform his volunteer work Mr. Palmer would attend at the Catholic Children's Aid offices in the Dufferin Mall. These offices were at the south end of the mall, some distance past the main doors to the mall in front of which this incident occurred. Mr. Palmer testified that in December, 2008, the frequency of his attendances at the Children's Aid offices varied. Sometimes he was there weekly. He would pick up or drop off children at the Children's Aid offices in the mall.

He would generally park in the East parking area across from the no Frills Store. Mr. Palmer located on Exhibit "C" the No Frills Store. It is south of the main entry doors to the mall approximately east of where this incident occurred.

In direct examination Mr. Palmer was asked whether in December, 2008 he had been involved in an accident or incident at the Dufferin Mall where he had struck a woman with his car. Mr. Palmer first responded that he was "*not aware of any such thing happening*". Some further questions were asked, and then Mr. Palmer recalled there was an occasion at the mall that while driving southbound on the road next to the mall buildings he observed lady walking briskly across the road in front of him. He stopped. The lady fell down on the road. He got out of his car and asked if she was okay.

On further questioning Mr. Palmer could not recall when this occurred, in what season it occurred, or even the year it occurred. He was adamant however, that he had "*never hit anyone*".

He was asked to describe the lady involved in the incident he was describing. He said that she was a white lady. He could not say if she was young or old. He said again that no one suggested to him at the time that he had struck the lady. On cross-examination Mr. Palmer admitted that license plate AMNP 309 was the license plate attached to his Oldsmobile Alero on December 17, 2008.

I asked some questions of Mr. Palmer to clarify his testimony regarding the incident he had described involving the lady falling down in the vicinity of his car.

Mr. Palmer described that the incident occurred almost opposite the Toys R Us Store in the mall. The lady was approximately 5 feet in front of his car when she fell. He was moving slowly. He stopped, and got out of his vehicle after she had fallen. He said that he asked her if she was okay. She replied "yes" and then they went their separate ways. He confirmed that she was directly in front of his car when she fell.

In my view the result in this case turns on the *viva voce* evidence of the witnesses. Therefore, I am obliged to make findings with respect to the credibility of those witnesses and the amount of weight I give to their testimony.

First, I will comment on the testimony of the SABS claimant, Inna Shur. Although Ms. Shur has an interest in a finding that she was struck by an automobile, she has no specific interest in a finding that the owner and operator of the vehicle was Handel Palmer. She is currently receiving SABS from MVACF. Whatever be the result of this arbitration Ms. Shur will continue to receive SABS from either MVACF or Jevco in accordance with her proven entitlement. Putting things in that perspective her evidence on the issue of the driver's identity is not influenced with any bias. Overall, I find Ms. Shur's evidence to be straight forward and truthful. It did not seem to me that she attempted to embellish any part of her evidence. She did not attempt to exaggerate her evidence in a way that would implicate Mr. Palmer. She admitted that she did not see the license plate on the vehicle that struck her. I thought that she did her best with

respect to giving a description of both the driver of the vehicle and the vehicle itself considering that these events happened quickly and she had been injured.

Her evidence is internally consistent and is very similar to the evidence given by both of the independent witnesses, Curtis Mabee, and Bruce Cunningham. The most important aspect of Ms. Shur's evidence is that she was clear she was struck by a vehicle as she exited the Dufferin Mall and crossed the road adjacent to the mall.

I find that another important aspect of her evidence is the description that she gave of the driver of the vehicle. Considering that these events happened quickly, and the fact that she had been injured, I find that her description of the driver is strikingly similar to Mr. Palmer. She described the driver as black. Mr. Palmer is black. She thought the driver to be in his mid to late 50's. At the time of the accident Mr. Palmer was 63. Having observed Mr. Palmer at the arbitration I find that Ms. Shur's estimate of the driver's age, given the circumstances under which she made her observations, could certainly be considered a reasonable estimate of Mr. Palmer's age. The one aspect of Ms. Shur's identification of the driver that is arguably inconsistent with Mr. Palmer's stature is her description of height. Ms. Shur appeared to be trying to estimate the driver's height in comparison to her own. She testified that she is 5'7" tall. She finally placed the driver's height at about 5'9" tall. Mr. Palmer is only 5'2" inches tall. I do note as well however that Ms. Shur was not certain of her estimate and she also used the word "average" to describe the driver's height. On any reasonable estimation however, Mr. Palmer would probably be considered short rather than of average height for a male.

Nevertheless, I am satisfied that Ms. Shur's description of the driver is sufficiently similar to Mr. Palmer's appearance that, when taken together with the evidence of the independent witnesses, I find that she was describing Mr. Palmer and that it was Mr. Palmer that struck Ms. Shur with his vehicle.

As just indicated, the evidence of the independent witnesses supports the evidence of Inna Shur in two important respects: The identification of the vehicle that struck Ms. Shur and the fact that Ms. Shur was struck by a vehicle.

Neither Mr. Mabee nor Mr. Cunningham had any interest in these proceedings. Neither had anything to gain or to lose as a result of their testimony. I find their evidence to be balanced, consistent, and I find that they were being truthful. I saw no indication in their evidence that they were attempting to favour Ms. Shur or that they had any animus towards Mr. Palmer, apart from the obvious fact that they were concerned that Mr. Palmer had struck Ms. Shur with his vehicle. I do not believe that they had an ulterior motive to identify Mr. Palmer as the driver of this vehicle. They had no way of knowing Mr. Palmer was the owner of the vehicle when they, with the witness,

“Lawrence’s” assistance, recorded the plate number of the vehicle they believed to have struck Ms. Shur. They gave Ms. Shur the card upon which the license plate number was written and a plate search confirming that this vehicle was owned by Mr. Palmer was conducted much later.

The evidence of Mr. Mabee and Mr. Cunningham is essentially the same with respect to the event of Ms. Shur being struck by the vehicle. They fairly conceded on cross-examination that from their vantage point behind and slightly to the northeast of the vehicle they did not actually see the front of the vehicle strike Ms. Shur. They were both clear in their evidence however that Ms. Shur’s walking path and the vehicle’s driving path crossed in such close proximity that when Ms. Shur went down in front of the vehicle while the vehicle was still moving it was a reasonable conclusion to draw that she had been struck by the vehicle. I agree, especially in light of Ms. Shur’s evidence.

I also accept the evidence of Mr. Mabee and Mr. Cunningham regarding their observations of the license plate and that it was accurately recorded as the license plate belonging to the vehicle owned by Mr. Palmer.

Counsel for Jevco noted that neither Mr. Mabee nor Mr. Cunningham actually wrote the license plate number on the business card which is Exhibit 2. This was done by the other witness on the scene, “Lawrence”. Lawrence was not located and did not testify. Counsel for Jevco submitted that there is no direct evidence the licence plate number recorded on Exhibit 2 is the same as the witnesses Mabee, Cunningham, and Lawrence observed on the vehicle involved in the incident. In the absence of testimony from Lawrence, Exhibit 2 is therefore hearsay evidence only.

Although I agree that this is an accurate submission, I find that Exhibit 2 satisfies both the common law test for admissibility of hearsay evidence, and certainly the evidence admissibility requirements of the *Arbitration Act*. With respect to the common law test, hearsay evidence is admissible if it is reliable and necessary.<sup>2</sup> Reliability is determined by the circumstances. Relevant factors vary from case to case, but the key question is whether the evidence sought to be adduced derives from circumstances that substantially negate the possibility it comes from an untruthful or mistaken source.<sup>3</sup> With respect to the “necessary” requirement, the evidence sought to be introduced does not have to be the only evidence available to prove the case. The test is flexible and may be met where evidence of the same value cannot be expected from another source.<sup>4</sup>

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<sup>2</sup> R. v. Smith, (1992), 75 C.C.C. (3d) 257 (S.C.C.)

<sup>3</sup> *Supra*, at p. 270.

<sup>4</sup> *Supra*, note 2.

I am satisfied on the totality of the evidence that the license plate number recorded on the business card which is Exhibit 2 was accurately recorded as the license plate number of the vehicle belonging to Mr. Palmer, and that this evidence meets the common law reliability and necessity test discussed above. If I am wrong with regard to this evidence meeting the common law admissibility test, I find nevertheless that the evidence is admissible by operation of section 21 of the *Arbitration Act*, and section 15 of the *Statutory Powers Procedure Act*.<sup>5</sup>

The important circumstances to consider include Mr. Palmer's own testimony. He acknowledged that around the time that this accident occurred he was working as a volunteer driver for the Catholic Children's Aid Society that was located in the Dufferin Mall. He was frequently driving through the Dufferin Mall either dropping off or picking up children at the offices of the Catholic Children's Aid Society that were located in the Mall just a short distance further along the road upon which this accident occurred.

Both Mr. Mabee and Mr. Cunningham testified that they and Lawrence were satisfied the license plate number they observed was correct at the time as recorded on Exhibit "2". Their evidence on this point was not shaken on cross-examination.

The evidence of Mr. Mabee and Mr. Cunningham was that they were about 4 feet behind the vehicle when they were observing the license plate to record it and that this vehicle was the only vehicle, and Ms. Shur was the only pedestrian in the immediate vicinity. It was suggested by counsel for Jevco that perhaps the witnesses Mabee, Cunningham, and Lawrence had simply erroneously recorded the plate number of Mr. Palmer's vehicle because it happened to be in the parking lot that day, but was not the vehicle that was involved in the accident with Ms. Shur. Based on the evidence that I have outlined I reject this argument. I find that the evidence of the independent witnesses Mabee and Cunningham, taken together with the evidence of Inna Shur, establishes on a balance of probabilities that the vehicle involved in the accident on December 17, 2008 was the vehicle owned and operated by Handel Palmer and that this vehicle struck Ms. Shur on the road in front of the entrance doors to the Dufferin Mall.

In contrast to the evidence of the witnesses Mabee, Cunningham and Shur, I did not find the evidence of Handel Palmer similarly credible. When initially asked by counsel by Jevco whether he had been involved in any kind of accident or incident in the Dufferin Mall around December 17, 2008, his initial response was limited to the effect of "*I am not aware of any such thing happening*".

It required much more pointed examination to elicit from Mr. Palmer the acknowledgment of an incident so similar to the event described by the first three

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<sup>5</sup> R.S.O. 1990, c. 22, as amended.

witnesses that coincidence was an unlikely explanation. Apart from his uncertainty as to when it occurred, and the fact that he denied striking anyone, the incident he described was virtually identical to the December 17, 2008 accident involving Ms. Shur. He testified that on this occasion he was driving south along the road beside the Mall. A lady came out from the front door area of the mall and crossed in front of his vehicle. As he was about five feet from her and while he was still moving ahead slowly Mr. Palmer said that the lady fell while directly in front of his vehicle. He got out of his car and asked her if she was okay. She replied "yes", and then they went their separate ways.

I find that the incident described by Mr. Palmer was one in the same as the accident involving Ms. Shur on December 17, 2008. Although it might be possible that Mr. Palmer is describing some other incident, the remarkable similarity to the incident described by the witnesses Mabee, Cunningham, and Inna Shur to the incident described by Mr. Palmer, makes that unlikely. The only substantial difference in their descriptions is Mr. Palmer's testimony that he did not strike the pedestrian crossing the road.

I did not find that Mr. Palmer's testimony had the same ring of truth as the testimony of the witnesses that I have previously described. I would also note that of the four witnesses Mr. Palmer may have (or at least may have believed himself to have) the most to gain or to lose from a finding that he did not or he did strike Ms. Shur with his car on December 17, 2008. I will not speculate on the possible consequences of that observation as there was no evidence led in the arbitration about it. I will however, take judicial notice of the fact most people would believe that legal and other consequences often ensue when one strikes a pedestrian with one's vehicle.

## **Conclusion**

For the foregoing reasons I find that on December 17, 2008 Inna Shur was struck by a vehicle owned and operated by Mr. Handel Palmer. It is admitted that the respondent, Jevco Insurance, insured Mr. Palmer's vehicle at the time of the accident. Therefore, applying the priority rules in section 268 (2) of the insurance Act, I find that Jevco Insurance Company has higher priority than the applicant, MVACF, for the payment of SABS.

MVACF is entitled to reimbursement from Jevco for the SABS payments made to Ms. Shur to date, and, if applicable, Jevco must take over from MVACF the handling of Ms. Shur's ongoing claim for SABS.

As was indicated at the beginning of this Award, This portion of the arbitration dealt only with determining whether there was responsibility to reimburse past SABS and to pay future SABS. Counsel should advise if evidence and submissions will be required to determine the issues of the amount of reimbursement and any interest thereon.

As the successful party, MVACF is entitled to its costs of this arbitration from Jevco. This includes arbitration fees and disbursements. If counsel are unable to agree on costs I invite them to contact my office to make arrangements for submissions on the issue.

Dated at Toronto, this 2<sup>nd</sup> day of August , 2011

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Scott W. Densem, Arbitrator