

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

BETWEEN:

TD GENERAL INSURANCE COMPANY

Applicant

and

INTACT INSURANCE COMPANY OF CANADA

Respondent

AWARD

Heard: August 16, & September 5, 2012

Counsel:

Derek Greenside for the Applicant

Thomas Hughes for the Respondent

SCOTT W. DENSEM: ARBITRATOR

Introduction

This arbitration involves a claim for loss transfer indemnification by TD General Insurance Company ("TD") against Intact Insurance Company of Canada ("Intact") pursuant to section 275 of the *Insurance Act*, RSO 1990, c. I.8, as amended.

The claim arises out of an accident occurring on August 23, 2007 on Highway 401 westbound, between the Guelph Line interchange and Highway 25, in the vicinity of Campbellville Road, in the municipality of Milton, Ontario.

A collision occurred between a heavy commercial vehicle – a tractor trailer, insured by Intact and a passenger vehicle insured by TD. The collision gave rise to a claim for Statutory Accident Benefits pursuant to the Schedule under the *Insurance Act* ("SABS"), by Maria Chimonides. TD adjusted the SABS claim presented and seeks indemnification from Intact for the benefits it has paid out for the claim.

The parties agree that section 275 loss transfer indemnification is available to TD from Intact in that the Intact insured tractor trailer was a heavy commercial vehicle, and it was involved in the incident giving rise to the SABS claim. The question to be decided is apportionment of fault for the incident according to Ontario Regulation 668/90 – Fault Determination Rules ("FDR"), which will determine the percentage of indemnity to which TD is entitled.

The Issues

I have set out the issues for decision below as stated in the Arbitration Agreement.

1) Which of TD or Intact is liable to pay Statutory Accident Benefits to Maria Chimonides?

2) Which, if any, of the Ontario Regulations 668/90 – Fault Determination Rules apply to the circumstances of this accident?

3) What amount, if any, is owed by Intact to TD for reimbursement of Statutory Accident Benefits paid to Maria Chimonides, and for interest?

At the hearing of the matter the parties narrowed the issue for decision by agreeing that FDR 10 applies to determine the degree of fault to be attributed to the vehicles involved in the incident. They agree that FDR 10 (1) describes the circumstances of the incident because the vehicles were traveling in the same direction and in adjacent lanes immediately before the incident occurred. Counsel indicated that the parties also agree the evidence indicates the issue for decision is whether FDR 10 (3), or FDR 10 (4) applies to the circumstances of the incident.

FDR 10 (1), (3), and (4) are reproduced below:¹

10. (1) This section applies when automobile “A” collides with automobile “B”, and both automobiles are traveling in the same direction and in adjacent lanes.

10. (3) If the location on the road of automobiles “A” and “B” when the incident (a “sideswipe”) occurs cannot be determined, the driver of each automobile is 50 per cent at fault for the accident.

10. (4) If the incident occurs when automobile “B” is changing lanes, the driver of automobile “A” is not at fault and the driver of automobile “B” is 100 per cent at fault for the incident.

¹ See Ontario Regulation 668/90 – Fault Determination Rules

The parties positions can be summarized as follows:

TD submits that the Intact insured tractor trailer operated by Sergiy Zuzansky was traveling westbound in the middle lane of three westbound lanes on Highway 401. TD submits that the Intact insured tractor trailer was changing lanes into the right, westbound lane when the front right corner of the tractor clipped the left rear corner of the TD insured vehicle being operated by Mary Chimonides in the right, westbound lane. This contact caused Ms. Chimonides vehicle to rotate counter-clockwise and move across the front of the tractor trailer. The tractor trailer then contacted the left side of Ms. Chimonides vehicle in "T-bone" fashion, pushing it onto the north shoulder of the Highway. The critical point in TD's argument for the purposes of the application of the FDR it submits is applicable is proving on a balance of probabilities that the incident occurred as a result of the tractor trailer changing lanes.

If TD's position prevails then FDR 10 (4) applies to the incident. In that case the Intact insured tractor trailer, vehicle "B", would be 100 per cent at fault for the incident, and the TD insured car, vehicle "A", would not be at fault for the incident. This would result in TD being entitled to 100 per cent indemnity from Intact in its loss transfer claim.

Intact submits that the evidence does not show on a balance of probabilities that the tractor trailer was changing lanes when the incident occurred. Intact further submits that if there was an initial contact between the tractor trailer and the car before the T-bone collision, it was a "sideswipe" collision that occurred at a point when the location of the two vehicles on the road cannot be determined.

If Intact's position prevails then FDR 10 (3) applies to the incident. In that case the Intact insured tractor trailer, vehicle "B", and the TD insured car, vehicle "A", would each be 50 per cent at fault for the incident, and TD would be entitled to only 50 per cent indemnity from Intact for its loss transfer claim.

Evidence

Two documentary exhibits were entered into evidence, and *viva voce* evidence was received from four witnesses. The particulars of the evidence are listed below:

Exhibit 1: TD Brief of Documents, Tabs 1 – 12 (A through D).

Exhibit 2: August 18, 2001 letter from Jewell Radimisis L.L.P. to Kleinfeldt Consultants Limited.

Witness: Mary Chimonides.

Witness: Jessica Dufton.

Witness: John McGlone, Kleinfeldt Consultants Limited.

Witness: Sergiy Zuzanskyy.

Analysis

I will begin with a statement of the law which I believe to be applicable to loss transfer claims involving the application of the FDR. In my view the applicable law is set

out in the decision of Justice Perell in *ING Insurance Co. of Canada v. Farmers' Mutual Insurance Co. (Lindsay)*.²

In that case a Farmers' Mutual insured was traveling westbound on a two lane rural highway. A tractor-trailer (a heavy commercial vehicle) was parked on the side of the westbound lane such that it obstructed part of the lane. The Farmers' Mutual insured intended to pass the tractor trailer, and to do so he moved partially into the oncoming eastbound lane. He then became aware of an eastbound vehicle traveling lawfully in the eastbound lane. The Farmers' Mutual insured decided that he would not be able to safely pass the tractor trailer by continuing partially in the eastbound lane. He braked and turned his vehicle to the right colliding with the rear of the tractor trailer. His son was a front seat passenger and was injured. The son made a claim for SABS to Farmers' Mutual. Farmers' Mutual sought loss transfer indemnity from ING, the insurer of the tractor trailer.

Justice Perell describes the legislative intent behind the loss transfer scheme in the following way:³

In *Jevco Insurance Co. v. Canadian General Insurance Co.* (1993) 14 O.R. (3d) 545 (C.A.) at p. 547 the Court Of Appeal described in the scheme of the (FDR) as follows:

The scheme of the legislation under s. 275 of the Insurance Act and companion regulations is to provide for an expedient and summary method of reimbursing the first party insurer for payment of no-fault benefits from the second party insurer whose insured was fully or partially at fault for the accident. The fault of the insured is to

² [2007] O.J. No. 2150 ("*ING v. Farmers*").

³ Paragraphs 25 – 27

be determined strictly in accordance with the fault determination Rules, prescribed by regulation, and any determination of fault in litigation between the injured plaintiff and the alleged tortfeasor is irrelevant.

In *Jevco Insurance Co. v. Halifax Insurance Co.* [1994] O.J. No. 3024 (Gen. Div.), at para. 8, Matlow J. described the (FDR) as follows: 'They set out a series of general types of accidents and, to facilitate indemnification without the necessity of allocating actual fault, they allocate fault according to the type of particular incident in a manner that, in most cases, would probably but not necessarily correspond with actual fault.' In *Jevco Insurance Co. v. York Fire & Casualty Co.* (1996), 27 O.R. (3d) 483 (C.A.) at p. 486, Carthy J.A. stated that 'the purpose of the legislation is to spread the load among insurers in a gross and somewhat arbitrary fashion, favouring expedition and economy over finite exactitude.'

The (FDR) are to be liberally construed and applied and in accordance with their own factors and not those which would apply under the ordinary Rules of tort law: *Cooperators General Insurance Co. v. Canadian General Insurance Co.* [1998] O.J. No. 2578 (Gen. Div.).

Justice Perell appears to lay out a formula that an arbitrator should follow in dealing with a loss transfer – FDR case. He states:⁴

(The arbitrator's first task is)... To determine the facts; namely,... To determine what was 'the incident' and second to determine if that incident was described in any of the rules... To determine if the rule 'applies with respect to the insured'... Third, if the incident...was described in any of the rules, then...to apply that rule or rules, arbitrary and expedient as the application of the (FDR) might be. Fourth, if the incident was not described in any of the rules,...to determine the degree of fault of the insured in accordance with the ordinary rules of law.

In determining which FDR to apply (in that case, FDR 17 (2)), Justice Perell stated the following:

⁴ Paragraph 33.

My approach to the conclusion that rule 17 (2) applies is straightforward and consistent with the rough and ready nature of the (FDR), which favour expediency over accuracy in determining fault. My approach is that since it was found as a fact that the tractor trailer (automobile "A") was illegally parked when it was struck by (the Farmers' insured vehicle) (automobile "B") and since it was found as a fact that the accident occurred outside a city, town, or village, therefore the criteria for the application of rule 17 (2) were satisfied. There was no suggestion that the criteria for any other rule of the (FDR) were satisfied. Therefore, the correct conclusion is that rule 17 (2) applies.

On the issue of how one should determine which FDR applies to an incident, I agree with arbitrator Bruce Robinson who advocates a simple and straightforward approach. In *Royal & Sun Alliance Insurance Company v. AXA Insurance Company*⁵ arbitrator Robinson quoted some of the same passages as did Justice Perell in *ING v. Farmers'*, concerning the intended operation of the loss transfer – FDR system. Then he concluded⁶, "*A common sense approach is to be used when considering the (FDR) and the diagrams in the regulation.*"

With these statements of the law as a guideline for my analysis, I will review the evidence in the case and make determinations of fact in connection with the incident.

Mary Chimonides testified at the arbitration hearing. At the time of the accident she was 67 years old. She and her husband had been entertaining company on the evening of the accident. After dinner, Ms. Chimonides and John Ioannou decided to go to the Mohawk Casino.⁷ They left the Chimonides residence in Milton about 10:00 p.m. Ms. Chimonides had not consumed alcohol that day. They entered Highway 401

⁵ Private arbitration November 21, 2003.

⁶ At page 10.

⁷ Mr. Ioannou is the husband of Ms. Chimonides niece. They were visiting Canada from Cyprus.

westbound at the Highway 25 interchange. Ms. Chimonides had lived in the area for approximately 37 years and was very accustomed to Highway 401 in this area.

She intended to travel approximately 10 km west along Highway 401 and exit at Guelph Line to go to Mohawk Casino. She entered Highway 401 in the right lane of three westbound lanes. She testified that she remained in the right lane from the time she entered Highway 401 until the accident occurred, and that she did not cross into either the middle lane or the left lane.

Traffic was light. She was traveling approximately 90 to 95 km/h. She observed two tractor trailers in the middle lane ahead of her. As she got closer to them she noted them to be driving very close together, one behind the other. She testified that she commented to Mr. Ioannou that there might be an accident because the tractor trailers were so close together.

The tractor trailers were traveling slower than she was. She was just passing the first tractor trailer ahead of her and was just off the "tail" of the second tractor trailer furthest west when she "*had a hit*". It seemed to her that her vehicle was struck on the driver's side in the rear passenger door – gas tank area. After her vehicle was struck it turned to the left (counter-clockwise) and began facing in a southerly direction. There was a second impact along the driver side of her vehicle and then she was in front of the first tractor trailer that had been ahead of her. Her vehicle and the tractor trailer came to a stop half on the north shoulder and half in the right lane.

She was helped out of her car on the passenger side. She recalls asking "*who did this*", and testified that one of the tractor trailer drivers (she was not sure by this time

which of the tractor trailers had stopped, but one had "*taken off*") stated "*I did it*", and that he was "*sorry*".

On cross-examination Ms. Chimonides testified that the accident occurred about 1 km from The Guelph Line exit. The vehicles were traveling slightly uphill in the area where the accident occurred.

She did not make any specific observation of the tractor trailer she was passing just before the first collision. She stated, "*it came out of nowhere*". Significantly, she testified that, "*I never saw the tractor trailer move to the right*". On further cross-examination on this point she stated that she did not see the tractor trailer hit her but that she was going along "*fine*" and suddenly felt her car moving to the right.

Ms. Chimonides was shown some photographs of her vehicle taken after the accident.⁸ She agreed that it was not possible to see damage on the rear left side of the vehicle in any of the photographs. I would pause to comment here that the photographs in evidence are photocopies of originals. They are "grainy" black and white quality. It is not possible to determine whether there was damage to the left rear of Ms. Chimonides vehicle by looking at these photocopies of the original photographs.

Ms. Chimonides gave a statement to the police immediately following the accident.⁹ The statement is generally consistent with her arbitration testimony. She does appear to have made repetitive efforts to ensure the officer taking her statement understood that she was concerned the two tractor trailers she saw in the middle lane

⁸ Exhibit 1, Tab 11.

⁹ Exhibit 1, Tab 3.

were in her view traveling much too close together for safety. On no less than three occasions in her statement did she raise this point.

I must say that these comments (and similar comments she made on her discovery – see page 12, *infra*) did seem to me to be an exaggerated description of the situation given that there was no accident involving the two tractor trailers, and the fact that Ms. Chimonides is unable to comment on any driving action by Mr. Zuzansky that she observed which led to the accident involving her vehicle. I will note as well however, that the nature of the questions asked by the officer did seem to invite Ms. Chimonides to comment on how she felt about the operation of the tractor trailers, an inquiry which in my view has little forensic value in determining how the accident occurred.

There is some difference between her statement to the police, and her arbitration hearing evidence in the way Ms. Chimonides described the conversation that followed the accident after the drivers were out of their vehicles. In her statement to the police she said, "*when I got out of the car I said to him (the tractor trailer driver): 'why did you hit me?'*", to which the tractor trailer driver allegedly said, "*Sorry, I don't know*". In my view this bears only a passing resemblance to the way Ms. Chimonides described the post-accident conversation in her arbitration testimony, where she said "*who did this?*", and the tractor trailer driver allegedly said "*I did it, sorry*". I do not raise this point to call into question Ms. Chimonides' credibility. In general, apart from a tendency to embellish, I thought that Ms. Chimonides was doing her best to recall and describe the events as accurately as possible.

I highlight this evidence to indicate that in my view an adjudicator is ill-advised to place much reliance on what persons involved in an accident later recall about comments made in the aftermath of an event when emotions are still running high, to make findings of fact about how an accident occurred. Such evidence is often inconsistent, and not infrequently completely contradictory depending on which party is recalling the event. In my experience it is also not uncommon for persons having been involved in an accident to apologize in the sense of expressing regret about the accident having occurred. It does not follow from this however, that a party expressing regret about the fact of an accident should be found to have caused the accident unless there is persuasive evidence in addition to this to support the conclusion.

Ms. Chimonides was examined for discovery in a tort action she commenced arising out of the accident. The transcript of that examination was in evidence before me on this arbitration.¹⁰ With respect to the events leading up to the accident, in response to the question, "*Can you describe what happened in this accident?*", Ms. Chimonides said, "*I saw the two trucks driving on the middle lane, very, very close to each other, very close. And I said to John, 'Look at them how close they drive. They going to be cause an accident (sic) and innocent people will have to pay'. That's the exact words I said to John...*"

I would repeat my earlier comments concerning these remarks and Ms. Chimonides' tendency to embellish.

¹⁰ Exhibit 1, Tab 12 A.

On her examination for discovery Ms. Chimonides testified that she was traveling approximately 90 km/h through the event.¹¹ As indicated, at the arbitration hearing she testified that her speed was 90 km/h to 95 km/h. In her statement to the police¹² she estimated her speed to be between 90 km/h and 100 km/h. As will be seen, there is some evidence from the independent witness, Jessica Dufton, that would put the speed of the tractor trailers and Ms.Chimonides vehicle quite a bit higher than any of these estimates by Ms. Chimonides.

The evidence given by Ms. Chimonides on her examination for discovery similarly lacks any description of movement by the Intact tractor trailer before the first impact with her vehicle that could be described as a lane change. The essence of her discovery evidence (although parts of it were not very clear) was that she was 75% or more past the Intact tractor trailer in the right lane when she heard a “bang” coming from the area of the driver’s side passenger door. That was as much information as she could provide about how the accident occurred.

On her examination for discovery Ms. Chimonides was asked about events immediately following the accident.¹³ She described being assisted out of her vehicle by “two young ladies with a guy” who had called the police. She did not get their names at the scene because, “I was in no shape really.” She then described feeling ill and taking a few minutes to settle herself before walking over to an ambulance that had arrived. After receiving some attention from the ambulance attendants she telephoned her brother who came to the scene and drove her home. Throughout her description of the

¹¹ Exhibit 1, Tab 12 A, p. 34.

¹² Exhibit 1, Tab 3.

¹³ Exhibit 1, Tab 12 A, pp. 42 to 45.

events immediately following the accident there is no mention of any exchange with the tractor trailer driver. It does not appear she was asked a direct question about whether there was any exchange between her and the tractor trailer driver after the accident.

The tractor trailer driver, Sergiy Zuzansky, testified at the arbitration hearing with the assistance of a Ukrainian interpreter. He was almost 34 years old when the accident happened. He was employed as a commercial truck driver for P.E. Black Transportation. On the evening of the accident he was driving a loaded tractor trailer. While he could not recall the weight of the loaded tractor-trailer combination he did say that it was loaded with milk. He was traveling from Brampton to make a delivery in London. He was familiar with the route as he traveled it each night that he was working.

He did not recall what time he left Brampton that evening but he would normally leave the same time every night, between 10:00 p.m. and 11:00 p.m. he was expected in London between 12:30 a.m. and 1:30 a.m. it would usually take him approximately 2 hours to make the trip. He denied being in a rush on the evening of the accident.

Typically he would go to bed between 5:00 a.m. and 6:00 a.m. each morning and rise about 3:30 p.m. when his children arrived home from school. He did not recall what his routine was on the day of the accident, but he did remember that his children were not at school because it was summer vacation.

He testified that the accident happened approximately 11:00 p.m. between the Highway 25 and the Guelph Line interchanges on Highway 401. The accident occurred "*in the middle of a hill*" between these exits. He was traveling in the middle lane of three westbound lanes. He described the traffic as being "regular", which he further described

as normal for 10:00 p.m. He estimated his speed as less than 80 km/h because he was going uphill. He was intending to exit Highway 401 at Guelph Line to go into the Ministry of Transportation facility to have his truck and logbook inspected. It should be noted that on his examination for discovery when asked did he intend to exit somewhere else or make an additional stop before Wellington Road in London, he stated "*No, no need to.*"¹⁴

In the minute or so before the accident he testified that he did not have a recollection of any traffic directly ahead of him. He said that there was a tractor-trailer in the right lane. He remembers this because, "*I was passing it*". He had no recollection of traffic behind him. He did not see the Chimonides vehicle before the collision. He first saw the Chimonides vehicle when he noticed a passenger vehicle several metres in front of his truck at about a 90° angle. He described the vehicle as a four-door sedan. "*It was in my lane – the middle one*". He did not know how the vehicle came to be in front of his truck. "*I hit it and started moving towards the shoulder*". He did not try to change lanes before the collision.

After colliding with the Chimonides vehicle Mr. Zuzansky braked and purposely tried to move his truck and the car to the north shoulder of the road. He was successful in doing so and the vehicles stopped on the shoulder. He does not remember any portion of the car or his tractor-trailer being in the right lane after they reached the shoulder.

¹⁴ Exhibit 1, Tab C, p. 50.

He exited his truck and attempted to assist the people in the car. He described the occupants as a man and an elderly lady. He stated that the people behind stopped as well. He recalls the police and ambulance coming to the scene. He was asked if he recalled what he had told the police after the accident and he replied, "*Not in detail*". He noted some damage to the front of his truck where the bumper is mounted, but no other damage.

On cross-examination Mr. Zuzansky acknowledged that he had testified on his examination for discovery in 2009 without the aid of an interpreter. He explained that he felt that he was proficient enough in English to conduct his examination in English but having been through the experience was less certain that he would be comfortable doing it that way again. I note that it is clear from the examination for discovery of Mr. Zuzansky that he was uncertain about his abilities in English and was not sure he had understood all of the questions.¹⁵

Counsel for TD pointed out various discrepancies in the testimony Mr. Zuzansky gave on his examination for discovery and his arbitration hearing testimony. The first of these was the fact that Mr. Zuzansky testified on discovery¹⁶ that he was expected in London at 12:30 a.m., whereas in his arbitration testimony he stated that he was expected sometime between 12:30 a.m. and 1:30 a.m.

It was pointed out that on his examination for discovery Mr. Zuzansky testified that the weight of his loaded tractor-trailer was 80,000 pounds, but that he could not

¹⁵ Exhibit 1, Tab C pp. 98 to 101.

¹⁶ Exhibit 1, Tab C, p. 33.

recall that in this arbitration evidence in chief. He agreed when this was put to him that 80,000 pounds would be an accurate estimate of the weight of the loaded tractor-trailer.

He testified at his examination for discovery that his speed was approximately 80 km/h to 90 km/h, whereas in his evidence in chief he stated that he was traveling less than 80 km an hour because he was going uphill. Once again he agreed with counsel for TD that his earlier answer on examination for discovery was more accurate.

Mr. Zuzansky testified at the arbitration hearing that his tractor had 13 gears but he could not recall if he was in 12th gear at the time of the accident. His examination for discovery evidence was put to him where he stated definitively that he was in 12th gear at the time of the accident.

He stated that the arbitration hearing that he could not recall traveling in the middle lane of Highway 401 for about 10 km before the accident occurred. Once again his discovery evidence was put to him where he stated that he had been traveling in the middle lane for about 10 km. On this point I would note that the part of the discovery transcript dealing with this issue sets out Mr. Zuzansky's explanation for traveling in the centre lane for this distance. He explained that slow-moving trucks were entering Highway 401 from the truck stop at interchange 325 (the Guelph Line exit being 312).

I do not find any of these differences between Mr. Zuzansky's discovery evidence and his arbitration hearing testimony to be particularly compelling in so far as the issue before me is concerned. Like the other witnesses who testified at the arbitration hearing it was my impression that Mr. Zuzansky was trying, albeit imperfectly, to recall and describe the event as best he could. Counsel for TD in argument urged me to conclude

that Mr. Zuzansky lacked credibility and was a poor witness. I do not agree. Although I do have some concerns regarding parts of Mr. Zuzansky's evidence, I think he was equally as good a witness as Ms. Chimonides. I have already remarked upon her tendency to embellish. On the question of speed, the one area of discrepancy which I would consider most relevant to the issue, I would note that if Mr. Zuzansky's estimate of his speed is considered unreliable, then the estimate given by Ms. Chimonides is equally so. She gave three different versions of her speed in her police statement, discovery evidence, and arbitration testimony. None of them correspond to the estimate given by the independent witness, Jessica Dufton (*infra*, pp. 20 to 25). Ms. Dufton's evidence places both Ms. Chimonides' speed and Mr. Zuzansky's speed higher than any of Ms. Chimonides' estimates.

Mr. Zuzansky was asked series of questions by counsel for TD to address the visual blind spot area on the right side of his tractor-trailer. He agreed that there is a blind spot area where it would not be possible to see vehicles beside and to the right of the tractor trailer. This area is approximately 10 feet behind the right side mirror. He testified that he did not recall how long before the collision with the Chimonides vehicle that he had last checked his right side passenger mirror.

He stated that as far as traffic in the right lane was concerned he recalled that there was a tractor-trailer ahead of him at a distance. He could not estimate the distance but said that it was "visible".

With respect to his arbitration evidence in chief that he was passing a tractor-trailer in the right lane, his discovery evidence was put to him wherein in answering questions

about vehicles in the vicinity of his in the 10 seconds leading up to the accident, he stated that there was a tractor-trailer in the right lane about 150 m behind him. On cross-examination he stated that he had no recollection of a tractor-trailer being very close to his, in front of him in the middle lane.

Mr. Zuzansky was cross-examined on the statement he gave to the police following accident.¹⁷ There is a question and answer exchange at the end of the statement that appears to deal with a discussion that took place after the accident between Mr. Chimonides, Mr. Ioannou, and Mr. Zuzansky. The officer's handwriting who took the statement is very difficult to read. Referring to Mr. Zuzansky going over to the Chimonides vehicle after the accident, it appears to say, "*I ask what happened... The man said we (illegible word) hit from behind... I check his car but I was clear.*"

It was suggested by counsel for TD to Mr. Zuzansky that this indicated before the accident he had been checking for vehicles to his right because he wanted to change lanes, and did so after he thought he had determined it was clear to do so. Mr. Zuzansky denied that this part of the statement related to any description of how the accident occurred. He maintained his evidence that he was not attempting a lane change before the collision with the Chimonides vehicle. He explained that this part of the statement referred to him checking the Chimonides vehicle and his tractor trailer for damage after being told Chimonides had been struck from behind, and determining that it was "clear" of damage. I note that on examination for discovery Mr. Zuzansky was

¹⁷ Exhibit 1, Tab 4.

asked directly whether at the time of the accident he was trying to change lanes and he replied, "No."¹⁸

Another part of Mr. Zuzansky's police statement was put to him where he says, "*I was moving on 401 W. I(n) the middle lane an(d) something was behind me that made me scared. I see car going across the highway...*". Counsel for TD suggested to Mr. Zuzansky that it was the noise of the collision between his tractor-trailer and the left rear of the Chimonides vehicle in the right lane that frightened him. Mr. Zuzansky did not agree with this proposition. He testified that he did not hear the sound of any such collision. This was the one part of Mr. Zuzansky's evidence about which I had some doubt. His comment to the police officer seemed clear enough to me to suggest that something had occurred "behind" him before he observed the Chimonides vehicle across the front of his tractor-trailer. It is conceivable that this something was an impact between the right side of his tractor and the left rear of the Chimonides vehicle. It was troublesome to me that he did not acknowledge this in his arbitration hearing testimony.

In response to questions asked by me about the usual practice of tractor-trailer drivers to drive in the right lane if not passing another vehicle, he agreed that was the usual practice. Mr. Zuzansky stated, "*... of course I would have moved to the right lane.*" When asked whether he had thought about doing that before the accident his answer was, "*I don't remember*".

Jessica Dufton testified at the arbitration hearing. Ms. Dufton is an independent witness to the incident. She was traveling with her husband and children westbound on

¹⁸ Exhibit 1, Tab C, p. 59.

Highway 401. They were traveling home to Kitchener from the Toronto Zoo. She seemed rather confused as to where they had entered onto Highway 401, but in my view nothing turns on this. She was driving in the centre of three westbound lanes. They were approaching the Guelph Line interchange. She had observed Mr. Zuzansky's tractor-trailer ahead in the centre lane for approximately 5 minutes before the accident occurred. She was roughly 200 metres to the east of it. Of some significance, she stated that her speed was approximately 100 km/h to 110 km/h, and she was not gaining on Mr. Zuzansky's tractor-trailer.

As the Zuzansky tractor-trailer entered into a fairly sharp curve to the south she saw a second tractor-trailer that she described as being "*really close*" just ahead of Mr. Zuzansky's tractor-trailer. Right after that she noticed sparks coming from Mr. Zuzansky's tractor-trailer and about the same time smelled burning rubber. She noticed that Mr. Zuzansky's tractor-trailer was moving to the right over to the north shoulder of the highway. As she passed it she saw the Chimonides vehicle just off the "*nose*" of the tractor-trailer. At this point Mr. Zuzansky's tractor-trailer was still less than two car lengths behind the tractor-trailer in front of him.

She testified that she did not see the Chimonides vehicle until after she had begun to pass the tractor trailer. She concluded however, that even though she did not see it at any time before she noticed it perpendicular to Mr. Zuzansky's tractor-trailer that it must have been beside the tractor-trailer in the right lane before ending up in front of the tractor-trailer.

The tractor-trailer and the car came to rest on the gravel on the north shoulder of Highway 401. She drove past about 10 to 15 car lengths west of their position and also pulled over on the shoulder. She ran back to the accident scene. When she reached Ms. Chimonides, Ms. Dufton described her as being "*hysterical*" and she did not appear to know what was going on. She had some concern that the Chimonides vehicle could be struck by westbound traffic because its nose was protruding into the right lane.

She recalled an exchange between the tractor-trailer driver who came over, and Ms. Chimonides, with the tractor trailer driver saying "*I'm sorry, I'm sorry, I didn't know you were there*", while Ms. Chimonides was saying, "*you hit me, you hit me*". I note that there is nothing in the comment Ms. Dufton attributed to Mr. Zuzansky that would identify the location Mr. Zuzansky was referring to with his comment, "*I didn't know you were there*".

Ms. Dufton was asked by counsel for TD for her impression of what occurred based on the observations she had made, and the comments she heard the drivers make after the accident.

It appeared to me that Ms. Dufton's view of what had happened was significantly influenced by the interpretation she placed on her current recollection of the conversations after the accident. I believe that she concluded Mr. Zuzansky attempted a lane change and collided with Ms. Chimonides in the right lane because she inferred from Mr. Zuzansky's comment, "*I didn't know you were there*", that he must not have seen Ms. Chimonides before attempting a lane change.

According to Ms. Dufton's recollection however, Mr. Zuzanskyy did not admit to making a lane change, nor did he admit to being in Ms. Chimonides' lane at the time of any collision. Absent such an admission, we are left only with opinions and speculation as to what Mr. Zuzanskyy meant by his comment. That is a difficult enough exercise for an adjudicator. I do not believe that a lay witnesses' opinion as to what likely occurred, based on inferences to be drawn from Mr. Zuzanskyy's comments after the accident, is relevant.

In any event, once again I would note the difference in a witnesses' recollection of emotionally charged conversations after a traumatic event. The way Ms. Dufton recalled the conversations in her arbitration hearing evidence is different from the statement she gave to the police, and certainly different from when she was interviewed back in February, 2010.

Ms. Dufton was shown her statement to the police, and she identified it as such.¹⁹ Her statement to the police was generally similar to her evidence of the arbitration hearing. The essence of the statement is that she was traveling behind Mr. Zuzanskyy's tractor-trailer. It seemed to be traveling close behind another tractor-trailer in front of it. She saw sparks and smelled burning rubber. When she got closer she realized that there was a car "*T-boned*" across the front of Mr. Zuzanskyy's tractor-trailer. She estimated everyone's speed at approximately 110 km/h. When asked to describe the truck driver's driving, she stated "*normal, I thought he got too close to the truck that didn't stop* (in reference to the tractor-trailer ahead of Mr. Zuzanskyy)." In this statement there is no mention of any conversations after the accident. I acknowledge however,

¹⁹ Exhibit 1, Tab 5.

that the content of the statement was dictated by the officer's questions and he may not have asked anything about post-accident conversations.

Ms. Dufton was interviewed on February 5, 2010 in much greater detail, and gave a written, signed statement which included her recollection of post-accident conversations.²⁰ Most of the content of this statement is essentially the same as her statement to the police, and her arbitration hearing evidence. She described the traffic as heavy, but that it was flowing and not slowing down at all. They were traveling behind Mr. Zuzankyy's tractor-trailer. It was moving with the traffic at about 100 km/h. She stated, "*I did not see Mary Chimonides vehicle at all before the collision. I had no idea anyone was on the other side of the transport truck.*" She noticed sparks coming from the front area of the transport truck. She did not know why. She thought that some metallic part of the truck had broken off and was being dragged. She smelled burning rubber. She said "*if there was anything that happened to Mary's car before the truck dragged it, I wouldn't have been able to see it on that side. I didn't see her car prior to the collision on the roadway. I don't remember if the trucker put his right turn indicator on at any point up until he stopped. I did see him put on his four-way flashers after I passed him and he came to a stop... The trucker was close to the right lane when I saw the sparks. I don't know if he had already been moving into the right lane.*"

With respect to post accident conversations, Ms. Dufton said, "*The trucker got out of his truck. He didn't know that there was a car in front of him.²¹ He kept apologizing to Mary and saying 'Oh my God, I feel so bad, I'm so sorry'.*"

²⁰ Exhibit 1, Tab 6.

²¹ Arbitrator's emphasis.

In my view, if one were to rely on drawing inferences from post-accident comments to explain the accident, this version of the comments that Ms. Dufton attributes to Mr. Zuzansky is more validly interpreted as Mr. Zuzansky referring to not being aware that Ms. Chimonides' vehicle was in front of his tractor-trailer. In my opinion, there is nothing in this comment, or in the comments Ms. Dufton attributed to Mr. Zuzansky in her arbitration hearing testimony that would justify drawing the inference that he was referring to making a lane change without seeing Ms. Chimonides. It is simply speculation to do so.

I have already pointed out the frailty of relying on such conversations that take place in the heat of the moment after an accident when all parties are more concerned with the condition of persons involved in the accident than with what anyone is saying about the accident to infer how it occurred. It is not surprising to me that Ms. Dufton's recollection of what the drivers may have said about the incident is not consistent. As might be expected, it was my impression from her arbitration hearing testimony, and from Ms. Dufton's February, 2010 statement, that in the aftermath of the accident she was more concerned with the condition of the persons involved in the accident, and in particular, Ms. Chimonides, than with determining how the accident occurred.

I do not rely on any of Ms. Dufton's inferences from conversations taking place after the accident to conclude that Mr. Zuzansky made a lane change before colliding with Ms. Chimonides' vehicle in the right lane. Like Ms. Chimonides, Ms. Dufton's recollection of what was said after the accident when she was interviewed in February, 2010 was inconsistent with her arbitration hearing testimony. As with Ms. Chimonides evidence, I make this point not to impugn Ms. Dufton's credibility. I thought she was

doing her best to recall of an event which was undoubtedly upsetting for her, not to mention for those who were directly involved. I do not think however, that as an adjudicator I can rely on comments attributed to Mr. Zuzansky inconsistently described on different occasions by the same witnesses, to conclude that he must have been making a lane change just before colliding with Ms. Chimonides' vehicle. This is especially true where it has not been suggested in any version of the post-accident remarks Ms. Dufton or Ms. Chimonides attribute to Mr. Zuzansky that he admitted he was making a lane change or even that he intended to make a lane change.

On cross-examination Ms. Dufton again conceded that she never saw the Chimonides vehicle until it was across the front of Mr. Zuzansky's tractor-trailer. She admitted that she did not see any collision between the vehicles before then. She did not observe any attempted lane change by the tractor-trailer. The sparks, smell of rubber, and the tractor-trailer moving to the right all occurred at about the same time. She stated that she did not know the reason that the tractor-trailer was moving to the right when she saw the sparks and smelled the rubber. It was only after she passed the tractor-trailer that she realized that it was pushing the Chimonides vehicle toward the shoulder of the highway.

She also confirmed on cross-examination that Ms. Chimonides had no idea what had happened to cause the accident and that she was quite upset at the scene.

John McGlone of Kleinfeldt Consultants Limited testified at the arbitration hearing. Objection was taken by counsel for Intact to Mr. McGlone being qualified to offer opinion evidence. After cross-examination on his qualifications I was satisfied that Mr. McGlone

did have the necessary qualifications to provide opinion evidence. Having listened to and considered Mr. McGlone's testimony however, I conclude that it is not especially helpful to the tribunal in determining the issue to be decided in this arbitration. Therefore, I give no weight to Mr. McGlone's testimony, or to his report²² in determining which FDR applies to the circumstances of the incident.

On his examination in chief Mr. McGlone gave extensive evidence about the area of the "blind spot" for a driver operating a tractor trailer similar to the one being operated by Mr. Zuzansky. He testified that the blind spot is approximately 16 feet in length, which would be about the same length as the Chimonides vehicle in this case. In my view there is really no issue as to whether Mr. Zuzansky had a blind spot on the right side of his tractor-trailer. Indeed, Mr. Zuzansky concedes as much himself. I do not find the evidence of the blind spot particularly useful in determining the narrow FDR questions before me – firstly whether Mr. Zuzansky was changing lanes at the time of the incident, or whether there was contact between the vehicles before the Chimonides vehicle ended up perpendicular across the tractor trailer, and where on the road that contact occurred.

Mr. McGlone was asked by counsel for TD in examination in chief for his conclusion on the first point of impact between the tractor-trailer and the car. He responded that his conclusion on this issue is illustrated in figure 2 of the drawings in appendix B of his report. This drawing shows a sideswipe type impact between the left rear part of the Chimonides vehicle and the right front tire area of the Zuzansky tractor-trailer, with the Zuzansky tractor-trailer being partially in the right lane occupied by the

²² Exhibit 1, Tab 8.

Chimonides vehicle when this impact occurred. He went on to say that in coming to this conclusion he relied upon the description of the facts of the accident that had been provided to him in documentary form. In his arbitration hearing testimony he stated that he specifically relied on the evidence provided by the witness Jessica Dufton in reaching his conclusions as to how the incident was initiated.

I find this rather problematic, because Ms. Dufton was unable to provide any evidence based on her observations that confirmed a lane change by the Zuzansky tractor-trailer before any contact occurred between his tractor-trailer and the Chimonides vehicle. She also could not offer any evidence based on her observations as to the location on the road of the tractor-trailer and the Chimonides vehicle when the impact diagrammed by Mr. McGlone occurred. She did not see the Chimonides vehicle at all until she was passing the Zuzansky tractor-trailer and she observed it perpendicular to the front of the tractor-trailer. Therefore, I do not accept that Ms. Dufton's evidence provides a valid foundation for Mr. McGlone's conclusion that the impact Mr. McGlone describes in his report occurred as a result of the lane change by Mr. Zuzansky, or that it occurred with the Zuzansky tractor-trailer being partially in the right lane occupied by the Chimonides vehicle.

Similarly, it appears that Mr. McGlone was influenced by the evidence given by Ms. Chimonides passenger, John Ioannou, on examination for discovery in Mr. Ioannou's tort action.²³ Mr. Ioannou did not testify at the arbitration hearing. For this I make no criticism of counsel for TD who would likely have summoned Mr. Ioannou as a witness if he was not residing in Cyprus. Having said that however, I must nevertheless

²³ Exhibit 1, Tab 12 B.

state that I feel much more comfortable relying upon *viva voce* testimony where I have had a chance to hear the evidence first-hand, and evaluate the witness in person. Generally speaking, a transcript from an examination for discovery can be a useful tool, especially as a supplement to *viva voce* evidence. When a case turns on the facts like this one does however, I think an adjudicator needs to be exceedingly cautious in giving too much weight to transcript evidence only where it derives from an entirely different proceeding with an entirely different focus. This is particularly true when the witness testifies through an interpreter, as did Mr. Ioannou.

In my view Mr. Ioannou's transcript presents just such an example where caution is required. At page 52 Mr. Ioannou was trying to describe the accident for counsel using a rather *ad hoc* method of positioning business cards on the examination table to represent vehicles and describe what occurred. This exchange occurred:

Q. The witness is showing the rear-most truck has signals on the front and then partway back and at the rear of the truck. And you see the signals flashing?

A. He started to flash. The rest I couldn't see, because we passed him.

Q. Okay, but you could see the signal on the front corner of the truck?

A. This one, yeah, the front light here (indicating), the signal. And within short seconds this truck changed the lane, it came to our lane.²⁴ Our car got hit on the back, on the back left tire..."

If this were the only evidence given by Mr. Ioannou one might be left with the impression that he saw the Zuzansky tractor-trailer change lanes from the centre lane into the right lane causing the collision between the left rear of the Chimonides vehicle

²⁴ Arbitrator's emphasis.

and the Zuzansky tractor-trailer. Mr. Ioannou was examined further on the issue however, and in my opinion, as the following exchanges demonstrate, what he actually saw, and what he inferred from the circumstances must have happened, becomes very difficult to determine.

Q.²⁵ First was here (referring to the first impact between the Zuzansky tractor-trailer and the Chimonides vehicle), right here (indicating). We got hit there.

Q. The rear of Mary's car. Yes?

A. I'm sure he was changing lane, logical (sic) you cannot hit Mary's car from here then the car turned like this (indicating)...

Q.²⁶ ... As you started up the hill, did Mary slow down?

A. No, she did not.

Q. Did your speed change at all before the accident?

A. No.

Q. Did Mary apply her brakes before the truck contacted the rear of her car?

A. No. It was so sudden, we didn't know where it came from. It was as if something was dropped from up there (indicating)...²⁷

Q.²⁸ ... You and Mary had a conversation just as you were starting to pass the rear truck; correct?

A. Yes.

Q. Did you suggest to Mary that she slow down, so the two trucks can go ahead of her?

²⁵ Exhibit 1, Tab 12 B, p. 54.

²⁶ Exhibit 1, Tab 12 B, p. 56.

²⁷ Arbitrator's emphasis.

²⁸ Exhibit 1, Tab 12 B, p. 57.

A. I don't remember that I said something like that.

Q. Did she say anything to you about may be slowing down so the two trucks can pull ahead of you?

A. I don't recall anything like that. Everything looked normal. We were normally, literally in our lane, we just got hit from the sky...²⁹

Q.³⁰ What did Mary say?

A. She said, "look how close they follow." And I agreed with her.

Q. So you weren't worried about it? It didn't look dangerous to you?

A. I had no reason to worry. He was in his own lane and I didn't care, it didn't worry me; personally me, no.³¹

Q. Did Mary say she was worried by it?

A. I don't know about Mary. Me I didn't worry.

Taken in its entirety, Mr. Ioannou's transcript evidence does not satisfy me that he actually saw the Zuzansky tractor-trailer change lanes and collide with Ms. Chimonides' vehicle. I have no doubt that he concluded from the manner in which the accident unfolded that the initial collision between the Zuzansky tractor trailer and Ms. Chimonides vehicle caused the Chimonides vehicle to turn counter-clockwise across the front of the Zuzansky tractor-trailer. I would also agree that one of the ways the accident could have happened is if the Zuzansky tractor-trailer either changed lanes or drifted into the right lane with the front of the tractor striking the left, rear of the Chimonides vehicle. What I am not satisfied about however, is that anyone whose evidence is before me either in *viva voce* or transcript form actually saw this occur.

²⁹ Arbitrator's emphasis.

³⁰ Exhibit 1, Tab 12 B, p. 58.

³¹ Arbitrator's emphasis.

Mr. McGlone's evidence does not, in my opinion, advance the inquiry as to whether the Zuzansky tractor-trailer was changing lanes at the time of a first impact between the vehicles, or that the impact occurred in the right lane occupied by Ms. Chimonides. Mr. McGlone bases his opinion solely on inferences from the facts that he believes fit with his view as to how the accident most likely occurred. To focus on the FDR issue however, Mr. McGlone's evidence is of no greater value than any other witness as to whether Mr. Zuzansky was changing lanes when the incident occurred, or to confirm that the incident occurred when Mr. Zuzansky's tractor-trailer was partially in the right lane occupied by Ms. Chimonides. He offers no scientific or engineering analysis that would prove his view as to the most likely cause of the accident, and that is really the only basis upon which his opinion might carry more weight than any other view as to how the accident occurred.

When asked if it were possible that the accident could have occurred as it did without a first impact between the front right of the Zuzansky tractor-trailer and the left rear of the Chimonides vehicle, Mr. McGlone's response was that there was no evidence of any mechanical failure of Ms. Chimonides' vehicle that would explain how it otherwise could have ended up in front of Mr. Zuzansky's tractor-trailer.

In my opinion this begs the question that the Zuzansky tractor-trailer must have been changing lanes to cause the incident, and ignores other, equally plausible explanations as to how the accident could have occurred in the manner in which it did. First, driver error on the part of Ms. Chimonides could have led to a loss of control and put her vehicle in front of the Zuzansky tractor-trailer. I hasten to point out that there is no direct evidence that Ms. Chimonides did lose control of her vehicle and veer in front

of Mr. Zuzansky's tractor-trailer so I should not be taken as finding that this is what occurred. My point is, there is also no direct evidence that Mr. Zuzansky changed lanes leading to the collision with Ms. Chimonides vehicle. This is simply one explanation for what could have happened. Without direct evidence or scientific analysis to prove it, there is nothing other than inferences that could be drawn from the circumstances of the incident.

Secondly, the accident could have occurred as a result of Ms. Chimonides vehicle either changing lanes or drifting to the left, partially into the centre lane, as she was passing Mr. Zuzansky's tractor-trailer. This could have led to exactly the same type of front right/left rear vehicle collision that resulted in Ms. Chimonides vehicle turning counter-clockwise and moving perpendicular across the front of Mr. Zuzansky's tractor-trailer. I would stress that there is no direct evidence that the accident occurred as a result of Ms. Chimonides either changing lanes or drifting to the left as she was passing Mr. Zuzansky's tractor-trailer, so I should not be taken as finding that this is how the accident occurred. The arbitration hearing evidence indicated that there was insufficient space between the tractor-trailer ahead of Mr. Zuzansky's tractor-trailer for Ms. Chimonides to change lanes in front of Mr. Zuzansky, nor was there any reason for her to wish to change lanes since she was exiting at Guelph Line. While that may be true, this does not eliminate the driver error or drifting to the left scenarios.

Once again however, my point is that just as there is no direct evidence of these factors being the cause of the incident, there is no direct evidence that the incident was caused by Mr. Zuzansky changing lanes, or that his tractor-trailer was partially in the right lane when it first made contact with Ms. Chimonides vehicle.

A comment made by Mr. McGlone when he was being cross-examined by counsel for Intact sums up my point that I find Mr. McGlone's opinion evidence to be of no value to me in determining the FDR issue that I must decide. In my opinion engineering evidence based on scientific analysis if same were possible, would have been of assistance to the tribunal in this case. In my experience, engineers frequently seek out and examine as part of an accident reconstruction investigation, evidence found on the road after an accident. Such evidence typically includes tire marks, scrapes, or gouges, made by vehicles involved in the accident, and possibly the location of debris from vehicles.

Mr. McGlone agreed with counsel for Intact that he did not examine any such physical evidence from or at the scene of the accident in coming to his conclusion as to how the incident occurred. In fact, he agreed that he was not aware whether there was any such physical evidence to be examined in this case. Mr. McGlone expressed his view that in any event, it was too high a standard to meet to look for such physical evidence and make use of it to determine how a collision occurred. In my view, it is just such forensic investigation and analysis that accident reconstruction experts do in these types of cases to try to offer a scientific basis for an opinion as to how an incident most likely occurred. Mr. McGlone's opinion is entirely lacking in any such scientific basis.

Having reviewed the evidence before me in this case, I will now make the findings of fact that in my opinion the evidence supports, in the context of the FDR application issue that I am required to decide.

I find that the evidence indicates this incident occurred in the westbound lanes of Highway 401 between the Highway 25 and Guelph Line interchanges. The tractor-trailer being operated by Sergiy Zuzansky was traveling in the centre lane of three westbound lanes. The passenger vehicle being operated by Maria Chimonides was being operated in the right lane of three westbound lanes. The road in the area of the accident was slightly uphill and approaching a curve to the south.

All witnesses suggest that traffic was moving smoothly. Neither Ms. Chimonides nor Mr. Zuzansky was consistent in their estimates of the speed of their vehicles. I find that the witness Jessica Dufton is likely the most accurate in estimating the speed of the vehicles. She estimated the speed of Mr. Zuzansky's tractor-trailer to be approximately 100 km/h to 110 km/h. Her own speed was similar as she was not gaining or losing ground as she was following Mr. Zuzansky. I find that Ms. Chimonides was attempting to pass the Zuzansky tractor-trailer on the right just before the incident took place. This is clear from her own evidence and the evidence of the passenger in her vehicle, John Ioannou. I find that Ms. Chimonides was likely traveling at least 110 km/h and possibly more, given that she was passing the Zuzansky tractor-trailer.

I am satisfied that the evidence establishes there was an impact between the Zuzansky tractor near the right front of the tractor with the left, rear area of the Chimonides vehicle. While photographs introduced into evidence are inconclusive as to any damage on the left rear of the Chimonides vehicle, I base this conclusion on the evidence of Ms. Chimonides, the evidence of Mr. Ioannou, and the evidence of Mr. Zuzansky. A collision of this type is also consistent with the physics of how the

Chimonides vehicle would end up perpendicular across the front of the Zuzansky tractor-trailer.

Both Ms. Chimonides and Mr. Ioannou described an impact between the tractor-trailer and their vehicle. Mr. Zuzansky testified at the arbitration hearing that he was not aware of any impact between the front right of his tractor and the left rear of the Chimonides vehicle. I am satisfied however, that his police statement wherein he describes being "scared" by something behind him is likely indicative of the fact that there was a collision between his tractor-trailer and the Chimonides vehicle that preceded the T-bone impact at the front.

I find that the collision between the right front of the Zuzansky tractor-trailer and the left rear of the Chimonides vehicle caused the Chimonides vehicle to rotate counter-clockwise across the front of the Zuzansky tractor-trailer. Thereafter the tractor-trailer pushed the Chimonides vehicle to the north shoulder of Highway 401.

I will now deal with the application of 10 (4) or 10 (3) of the FDR.

As I have indicated, the case law draws a distinction between what an adjudicator must do in applying the FDR in a loss transfer arbitration context versus what might happen if a tort analysis was undertaken. The result is not necessarily the same.

To put this into context for this case, TD's argument for the application of FDR 10 (4) depends upon certain inferences being drawn from the location of the contact between the vehicles, the fact that Ms. Chimonides had no reason to be moving towards the centre lane, the fact that Mr. Zuzansky did have a reason to be moving towards the right lane, the position of other vehicles on the road in the vicinity of Mr.

Zuzansky's tractor-trailer, and on a particular interpretation of comments attributed to Mr. Zuzansky after the accident.

These are all factors that relate to the circumstances in which the incident occurred, and the location of points of contact between the vehicles involved. There is no direct evidence from any source that establishes Mr. Zuzansky was making a lane change when the incident occurred.

The opening sections FDR stipulate what I would submit is a restriction on the use of such factors by an arbitrator in determining FDR application. FDR 3 states as follows:

3. The degree of fault of an insured is determined without reference to,

(a) the circumstances in which the incident occurs, including weather conditions, road conditions, visibility or the actions of pedestrians; or

(b) the location on the insured's automobile of the point of contact with any other automobile involved in the incident.

This FDR, in my view, is intended to at the very least limit, if not eliminate any inquiry by the arbitrator into the circumstances surrounding an incident, and inferences which could be drawn therefrom, in deciding whether a particular FDR applies to the circumstances of the incident. Essentially then, an arbitrator must consider only relevant, direct evidence concerning the incident itself to determine FDR application.

In this case, there is no direct evidence from any witness or from the physical circumstances of the accident that establishes the Zuzansky tractor-trailer was changing lanes when the incident occurred. Indeed, counsel for TD properly conceded in his submissions that a conclusion the Zuzansky tractor-trailer was changing lanes

when the incident occurred would have to be based on inferences drawn from the circumstances leading up to and following the incident.

There is some evidence to indicate that Mr. Zuzansky would have had to change lanes from the centre lane to the right lane if not at about the time the incident occurred, then shortly thereafter. His arbitration hearing evidence was that he intended to exit at Guelph Line, about 1 km from where the accident occurred, so that he could attend the Ministry of Transportation facility for an inspection of his truck and logbook. As I noted earlier in my analysis, Mr. Zuzansky stated in his discovery evidence that he did not intend to make any stops before exiting Highway 401 at Wellington Road in London. Mr. Zuzansky is adamant however in both his discovery evidence and in his arbitration hearing evidence that he had not commenced any lane change before the incident occurred.

I have to say that if I were undertaking a tort analysis, Mr. Zuzansky's inconsistent evidence of his intentions might be of some concern. For loss transfer – FDR application purposes however, this evidence is still only evidence regarding the circumstances surrounding or leading up to the incident. It is not direct evidence of what happened in the incident.

As an arbitrator applying the FDR in accordance with the case law, I cannot ignore the fact that there is no witness to the event that can unequivocally state Mr. Zuzansky was changing lanes when the incident occurred. Mr. Zuzansky does not admit doing so, and I have found that his post-accident comments cannot be construed as an admission that he was making a lane change.

The witness upon whose evidence one might place the greatest reliance because she is independent – Jessica Dufton, clearly states that she did not see the Zuzansky tractor-trailer attempt a lane change before the incident occurred. It seems that she was keeping a reasonably close and steady eye on it because she had commented that it appeared to be close to another tractor-trailer in front of it. She also observed sparks coming from it which as it turned out were caused as a result of the T-bone collision with the Chimonides vehicle. She acknowledged on cross-examination that she saw the sparks at about the same time that she observed the tractor-trailer moving to the right, so by then it had already T-boned the Chimonides vehicle. She also testified that she did not see any signal on the Zuzansky tractor-trailer before she noticed sparks coming from it and had smelled the burning tire rubber.

I thought Ms. Dufton was a good witness whose observations were reliable. One would think then that if the Zuzansky tractor-trailer had been making a lane change just prior to the contact between the right front of the tractor and the left rear of the Chimonides vehicle that Ms. Dufton in all likelihood would have seen it.

As counsel for TD put it in his closing argument, it may well be that Mr. Zuzansky was contemplating a lane change, possibly to overtake the tractor-trailer in front of him or to prepare to exit at Guelph Line. I must deal with the application of the FDR however, in the arbitrary, “rough and ready” fashion mandated by the courts. Unlike the wide-ranging analysis that might be employed in a tort case, there is little, if any room for an inquiry into circumstances surrounding, leading up to, or following an incident. Therefore, absent direct evidence that the Zuzansky tractor-trailer was making a lane

change when the incident occurred, I am unable to find that FDR 10 (4) applies to the circumstances of this case.

I will now turn to a consideration of the application of FDR 10 (3). In my opinion this rule best describes the incident. I have found that there was a collision between the Zuzanskyy tractor-trailer and the Chimonides vehicle while they were still beside each other. This collision occurred while both vehicles were traveling in the same direction in adjacent lanes, and in my view would meet the description of a "sideswipe" type of collision.

Based on the evidence I also find that the location on the road of the vehicles when this sideswipe occurred cannot be determined. There is no direct evidence from any witness or from the accident scene that establishes the position of the vehicles when the sideswipe occurred. The accident could have happened with the tractor-trailer moving to the right and colliding with the Chimonides vehicle, or with the Chimonides vehicle moving to the left and colliding with the tractor-trailer. It is also conceivable that the vehicles both moved towards each other resulting in a collision. All that can be concluded on the evidence before me is that the physics of the collision between the right front part of the tractor-trailer and the left rear part of the Chimonides vehicle caused the Chimonides vehicle to rotate in a counter-clockwise fashion across the front of the tractor-trailer.

While determining which of these possibilities is most likely might be appropriate for a tort analysis, it is not necessary for me as an arbitrator to resolve this question to decide whether FDR 10 (3) describes the incident.

The fact that both vehicles were traveling in the same direction in adjacent lanes, that there was a sideswipe collision between them, and that their location on the road when this collision occurred cannot be determined, satisfy the criteria for FDR 10 (3).

Having determined that the criteria for the application of FDR 10 (3) are met, that is the end of the inquiry. Then, as Justice Perell states in *ING v. Farmers*, an arbitrator must apply the rule, "... *arbitrary and expedient as the application...might be.*"


Conclusion

1. FDR 10 (3) applies to the circumstances of the accident. Therefore, for loss transfer indemnity purposes the driver of the Intact insured tractor-trailer, Sergiy Zuzansky, is 50 per cent at fault for the incident, and the driver of the TD insured passenger vehicle, Maria Chimonides, is 50 per cent at fault for the incident.

2. TD is entitled to indemnity from Intact for 50 per cent of its loss transfer claim (subject to the determination of quantum issues, if any), plus appropriate interest.

3. I would like to receive counsels' submissions on costs, and be informed of any Offers to Settle, before making a final disposition of costs. I would ask that counsel contact my Coordinator to arrange a post-arbitration conference to discuss procedures to determine the costs issue (unless, of course, counsel can agree on costs).

Dated at Toronto, September 18, 2013.


Scott W. Densem, Arbitrator