IN THE MATTER OF the *Insurance Act,* R.S.O. 1990, c. I.8, as amended
AND IN THE MATTER of the *Arbitration Act*, S.O. 1991, c.17, as amended
AND IN THE MATTER of Regulation 283/95 made under the *Insurance Act*
AND IN THE MATTER of an Arbitration

BETWEEN:

JEVCO INSURANCE COMPANY

Applicant

- and -

CHIEFTAIN INSURANCE COMPANY

Respondent

AWARD

Counsel:

Jevco Insurance Company (Applicant): Amanda Lennox

Chieftain Insurance Company (Respondent): Mauro D'Agostino

Introduction:

This matter came before me pursuant to the *Arbitration Act*, 1991 to arbitrate a dispute as between two insurers with respect to a priority issue pursuant to the *Insurance Act* and its regulations: specifically Regulation 283/95 as amended.

This claim arises out of a motor vehicle accident that occurred on July 15, 2013. At that time Mr. Christopher McNeilly was involved in a motor vehicle accident while riding his motorcycle which was insured under a policy issued by Jevco Insurance Company (hereinafter called "Jevco"). Mr. McNeilly was also insured under a policy of automobile insurance with Chieftain Insurance Company (hereinafter called "Chieftain) which covered Mr. McNeilly's personal automobile. This latter policy contained optional benefits while the Jevco policy did not.

The main issue, for my determination, is what effect if any, the purchase of optional benefits under the Chieftain policy has with respect to priority for Statutory Accident Benefits with respect to the motor vehicle accident of July 15, 2013.

Exhibits:

The following documents were made exhibits at the arbitration hearing:

Exhibit 1: Arbitration Agreement dated March 6, 2015;

Exhibit 2: Agreed Statement of Facts together with documents tabbed 1 through to 22;

Exhibit 3: Letter Thomson, Rogers to Amanda Lennox dated March 21, 2014;

Exhibit 4: Extracts from log notes from Chieftain dated July 15, 2013;

Exhibit 5: Extracts from log notes of Jevco dated July 16, 2016.

The Issue In Dispute:

The issue for my determination as set out in the Arbitration Agreement is as follows:

> "As between Jevco Insurance Company (Jevco) and Chieftain Insurance (Chieftain) which insurer is responsible to pay Statutory Accident Benefits to Christopher McNeilly arising out of the motor vehicle accident occurring on July 15, 2013."

There are three other issues that are outlined in the Arbitration Agreement but counsel have agreed those issues should be put on the back burner until the first issue has been determined.

In reviewing the Factums and hearing the submissions of counsel it is clear that the narrower issue I have been asked to determine is whether Mr. McNeilly's purchase of optional benefits from Chieftain and the completion of the OPCF-47 affects the priority rules under Section 268 of the *Insurance Act*.

For the reasons outlined further in my decision I conclude that in this case the purchase of the optional benefits and the completion of the OPCF-47 does not change the ordinary rules of priority applying in accordance and as outlined in Section 286 of the *Insurance Act* with respect to Mr. McNeilly's Statutory Accident Benefit claim.

Facts:

The parties provided an Agreed Statement of Facts and various documents relevant to the issues. The salient facts that I have relied upon for the purposes of rendering this decision are as follows:

1. On July 15, 2015 Christopher McNeilly was driving his motorcycle with his wife, Sharon McNeilly, as a passenger. There was an accident and Christopher McNeilly and his wife sustained injuries.

2. Mr. McNeilly insured his motorcycle under a policy with Jevco bearing policy number JVHOAP68261. Mr. McNeilly did not purchase optional benefits under this policy.

3. Mr. McNeilly had also purchased an automobile insurance policy with Chieftain bearing policy number CHA9872428. Mr. McNeilly purchased optional benefits under that policy specifically a top up for his medical and rehabilitation benefits from $50,000.00 to $100,000.00. He also purchased a top up of his attendant care benefits from $36,000.00 to $72,000.00. A premium of $9.00 was charged for that.

4. As a result of the purchase of optional benefits and in accordance with the legislation and regulations, the Chieftain policy included an OPCF-47 – Agreement Not to Rely on SABS Priority of Payment Rules.

5. Mr. McNeilly applied for Statutory Accident Benefits to Jevco. The application was dated July 15, 2013 and was received by Jevco on July 31, 2013. The application was completed by Mr. McNeilly's mother, Gail McNeilly, who was acting as Mr. McNeilly's power of attorney at the time.

6. On July 23, 2013 Chieftain sent an accident benefits' package to Christopher McNeilly.

7. After having submitted the Application for Accident Benefits to Jevco and after Jevco received that Application for Accident Benefits, Gail McNeilly submitted an employer's confirmation form and various applications for expenses to Chieftain in August of 2013. Chieftain responded to those applications advising Gail McNeilly that those documents should be sent to Jevco as the initial Application for Accident Benefits had been sent to Jevco.

8. By letters dated August 7 and 13, 2013 Jevco sent letters to Mr. McNeilly (by way of Gail McNeilly August 7th and Mark McNeilly, his brother, August 13th) stating that it was its belief that accident benefits should be handled by Chieftain. A Notice to Applicant of Dispute Between Insurers was included with the letters.

9. By letter dated December 9, 2013 Michelle Baumann of the law firm Oatley Vigmond LLP (counsel to Mr. McNeilly) sent a letter to Chieftain advising that Mr. McNeilly was electing to receive Statutory Accident Benefits from Chieftain in light of his purchase of optional benefits under that policy. An Application for

Accident Benefit was not attached to that letter and an Application for Accident Benefits has never been submitted to Chieftain.

10. By letter dated March 6, 2014 counsel for Jevco commenced priority proceedings against Chieftain for the accident benefit claims of Mr. McNeilly. A Notice of Submission to Arbitration was served at the same time.

11. The Notice to Applicant of Dispute Between Insurers sent by Jevco to Chieftain identified the following reasons under part 3 as to the basis that they disputed priority:

> "We have received an Application for Accident Benefits from Christopher McNeilly who was involved in a motor vehicle accident in which he suffered injuries. Mr. McNeilly appears to be insured with Chieftain with a policy that has enhanced coverage and would be a higher priority than Jevco. Please confirm coverage and advise if you will accept this accident benefits claim."

12. The log notes of Chieftain marked as Exhibit 4 note that on July 17, 2013 the Chieftain adjuster spoke to Mark McNeilly, Christopher McNeilly's brother. The note indicates the following summary of the conversation:

> "Explained our involvement in this, given the Chieftain policy has enhanced AB. Christopher and Sharon will be retaining counsel although it is still to be discussed with them. Gave all my info to Mark."

13. The Application for Accident Benefits that was signed on July 15, 2013 and sent to Jevco did not have the name of any insurer noted in the box on the top left hand corner "Return this form to". However the log note from Chieftain marked as Exhibit 4 indicates that in a conversation on July 18th with the adjuster Mr. McNeilly advised that the hospital had provided him with the OCF-1s and he was filling them out.

The Law and Argument:

Jevco argues that Chieftain has priority to pay Statutory Accident Benefits for the following reasons:

1. The Chieftain policy includes an OPCF-47;

2. The OPCF-47 has been designed so that the priority rules are inapplicable and Mr. McNeilly's optional benefits are portable;

3. The OPCF-47 provides for mandatory and optional coverage;

4. Mr. McNeilly satisfied the 4 preconditions required for the OPCF-47 coverage to apply in accordance with Arbitrator Samis' decision in *Co-operators v Echelon* (Arbitrator Lee Samis January 5, 2015);

Chieftain argues that as Mr. McNeilly presented his Statutory Accident Benefit claim to Jevco that he did not satisfy the required conditions to engage the benefit of the OPCF-47. In order for the OPCF-47 to have been activated Mr. McNeilly would have had to have sent in his Application for Accident Benefits to Chieftain. Having elected to send it to Jevco the four conditions set out in Arbitrator Samis' decision (*Co-operators v Echelon* supra) are not activated and therefore Section 268 of the *Insurance Act* is applicable in terms of determining priority. As Mr. McNeilly was an occupant of the Jevco motorcycle when the accident occurred it ranks in priority to Chieftain.

For the reasons outlined below I agree with the submissions made by the Respondent, Chieftain.

Section 28 (1) of the Statutory Accident Benefits Schedule: for accidents after September 1, 2010 (hereinafter called the "SABS" provides that automobile insurance policies must offer various optional benefits including those optional benefits purchased by Mr. McNeilly. Section 28 (4) of the SABS states that where optional benefits are purchased by the insured person, the insurer shall issue to the person the endorsement set out in Ontario Policy Change Form 47 (OPCF-47). Section 28 (2) of the SABS notes that the optional benefits only apply to the named insured, the spouse of the named insured, the dependants of the named insured and of the named insured's spouse and the persons specified in the policy as drivers of the insured automobile. This latter section is designed to ensure that only those individuals who have purchased and paid for the optional benefits will receive the benefit of the coverage.

As Arbitrator Samis pointed out in the only decision that has been rendered as yet on this optional benefit issue (*Echelon v Co-operators*), where a customer decides to pay this additional premium to enjoy the enhanced benefit, then there is obviously a compelling legislative intent that they should actually receive those benefits when needed. While I agree with Arbitrator Samis on this point it is my view that the various optional benefit provisions and in particular the OPCF-47 presupposes that those individuals who pay for the enhanced benefits and want to receive those benefits will actually apply to that insurer **first** for Statutory Accident Benefits when injured in an accident. That did not happen here.

The wording of the OPCF-47 is key in this case. I reproduce the wording of that endorsement below:

AGREEMENT NOT TO RELY ON SABS PRIORITY OF PAYMENT RULES
OPCF-47

Issued to	Policy Number	Effective Date Year Month Day

1. Purpose of This Endorsement

This endorsement is part of your policy. It has been made because persons who are entitled to receive optional statutory accident benefits under this policy may, by the priority of payment rules in Section 268 of the *Insurance Act*, be required to claim under another policy that does not provide them with the optional statutory accident benefits that have been purchased under this policy. This endorsement allows these persons to claim Statutory Accident Benefits (SABS) under this policy including the optional statutory accident benefits provided by this policy, provided they do not make a claim for SABS under another policy.

2. What We Agree To

If optional statutory accident benefits are purchased and are applicable to a person under this policy, and the person claims SABS under this policy as a result of an accident and agrees not to make a claim for SABS under another policy, we agree that we will not deny the claim, for both mandatory and optional statutory accident benefits coverage purchases, on the basis that the priority of payment rules in Section 268 of the *Insurance Act* may require that the person claim SABS under another insurance policy.

In reviewing the endorsement it is my view that the purpose of the endorsement is to ensure that when an individual who has purchased an optional benefit under one policy and applies to that insurer for Statutory Accident Benefits that that insurer cannot deny their insured's claim on the basis that pursuant to Section 268 of the *Insurance Act* that another insurer is higher in priority. Clearly this wording is antiquated. This endorsement was introduced in 1997 and does not appear to have been amended since that time. Over the course of the years the case law with respect to "denial of benefits based on priority" developed to the point that an insurer with almost no nexus to the insured at all was obliged to accept the first Application for Accident Benefits. This law developed as an insured would frequently not receive any accident benefits as various insurers that he may apply to would deny entitlement on the grounds that they did not rank in priority. This resulted not only in Regulation 283/95 but the amendment to that Regulation 34/10. These regulations together with the case law all of which have post-

dated the OPCF-47 endorsement have made it impossible for an insurer to deny benefits on the grounds they are not the priority insurer. That battle is left up to an inter-company dispute. Therefore in today's world of accident benefits the wording of the OPCF-47 agreeing that the insurer will not deny an insured's claim under Section 268 of the *Insurance Act* is simply meaningless. Therefore in cases such as this one has to try to come up with an interpretation that fits the changing landscape of how accident benefits are handled by insurers and how priority disputes are handled by insurers. It is my view that the only way that the OPCF-47 can be interpreted is that if the insurer who receives the claim for Statutory Accident Benefits is the insurer who provides the optional benefits (in accordance with the OPCF-47) then they do not have the right to make a priority dispute claim under Regulation 34/10 for any of the benefits they are paying to their insured. I find that the purpose of the endorsement is that the optional benefit insurer if they receive the Application for Accident Benefits gives up the right to pursue another insurer for priority that would otherwise have existed.

For example in this particular case if Mr. McNeilly had applied to Chieftain first for accident benefits, then pursuant to the OPCF-47 Chieftain would not have had the right to make a priority dispute claim against Jevco on the grounds that they were the proper insurer to pay accident benefits pursuant to Section 268 of the *Insurance Act*. Clearly absent the OPCF-47 Jevco would have stood in priority to Chieftain as Mr. McNeilly was an occupant of that vehicle on the date of loss. Section 268 (2) of the *Insurance Act* states:

> "In respect of an occupant of an automobile
>
> i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured."

Also relevant is Section 268 (2) 5.2 which states as follows:

> "If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, the occupant of an automobile in which respect of which the person is the named insured or the spouse or a dependent of the named insured the person shall claim Statutory Accident Benefits against the insurer of the automobile in which the person was an occupant."

Therefore, in this case, Mr. McNeilly as a named insured under both the Chieftain and the Jevco policies would under normal circumstances have had a choice as to whether he wished to apply to Jevco for Statutory Accident Benefits or to Chieftain. If he had applied to Chieftain (and had not purchased the optional benefits with the OPCF-47 endorsement) then Chieftain clearly would have had a right to pursue a priority claim against Jevco.

Once again that is not what happened in this case. Mr. McNeilly chose (through his power of attorney) to apply to Jevco for Statutory Accident Benefits. In my opinion the OPCF-47 presumes that an individual who has purchased the optional benefits will apply to their optional benefit insurer. There is no regulation nor any endorsement that deals with a situation when the insured does not apply to their optional benefit insurer in the first instance. There is no right to "re-elect" under the SABS or under the *Insurance Act*. Absent any provision under the *Insurance Act* or the Statutory Accident Benefits Schedule to reapply or re-elect to another insurance company I find that there is no option for Mr. McNeilly to re-elect. This however seems a harsh result as it deprives an insured of access to optional benefits for which they have paid. However I see no alternative. This may require regulatory amendment. I however must interpret the legislation and the regulations as I find them.

Pursuant to Regulation 283/95 as amended by Ontario Regulation 38/10 an insured can only file one Application for Accident Benefits. The insurer that receives that accident benefits application cannot "deflect" the application by suggesting that the insured go elsewhere. Jevco quite properly in this case accepted the Application for Accident Benefits. The regulation does not provide for an opportunity for an insured to re-elect. Rather the scheme of the legislation and regulation as a whole is intended to simplify the process for both the insured and the insurer. It is also instructive to review the bulletin issued by the Commissioner of Insurance on November 19th. The insured chooses where to file his or her Application for Accident Benefits. They are ensured a prompt and efficient handling of their accident benefit claim without any concern about priority. If the insurer that receives the Application for Accident Benefits feels that they are not the proper insurer to be handling the claim then there is a process for that to be resolved as between the insurers. The dispute is not between the insured and insurer. Once again the whole legislative scheme is predicated on the fact that someone who would pay for the optional benefits would therefore choose to apply to that insurer for Statutory Accident Benefits.

It is instructive to review the bulletin issued by the Commissioner of Insurance on November 19, 1997 (FSCO bulletin A10/97) entitled **Understanding the Operation of the OPCF-47 – Optional Accident Benefits**. This, in my view, provides support for the analysis I have outlined above with respect to the rationale behind how the OPCF-47 operates.

The bulletin states that the endorsement has been mandated to ensure that optional accident benefits are "portable" and that an insured person is able to access the optional benefits regardless of how the priority of payment rules are set out under Section 268 of the *Insurance Act* and how those are interpreted.

The bulletin goes on to note that the effect of the endorsement is that the OPCF-47 is applicable if the optional benefits are purchased and those benefits are "applicable" to the person under the policy. If the benefits are purchased and are applicable to the person then the OPCF-47 operates to permit the insured person **to claim both mandatory accident benefits and optional accident benefits under that policy and the insurer will not deny those benefits on the basis that the priority payment rules under Section 268 would otherwise make another**

insurer liable to pay the mandatory accident benefits. In reviewing this document it is clear that the implementation of the OPCF-47 is predicated on the insured applying to its optional benefit carrier. I quote one of the examples given in the bulletin:

> "For example, an insured person had purchased the additional income replacement benefit and has now suffered an impairment as a result of an accident and is unable to work. If this person qualifies to receive the income replacement benefit, then the optional benefits would be "applicable" and the OPCF-47 would become operational. **The insured person should apply to the insurer from whom the optional benefit coverage was purchased. This insurer would be responsible for paying both the mandatory and the optional benefits.**"

The final note of this bulletin is also instructive and I quote:

> "It is important to note that the insured makes one SABS application only. In this case the insured can choose which insurance policy to go with. The insured would choose the policy with supplementary medical, rehabilitation and attendant care coverage. This insurer would be responsible for paying both the optional and mandatory coverage."

The question in this case is whether the OPCF-47 became operational when Mr. McNeilly applied for these benefits to Jevco rather than to Chieftain. I find it did not.

This then brings the analysis to the four conditions that are outlined on the OPCF-47 as found by Arbitrator Samis in *Co-operators v Echelon*. I have concluded that while Mr. McNeilly meets some of those conditions he does not meet all of those conditions and therefore the terms and conditions of the OPCF-47 were not activated.

The first requirement is that the optional statutory benefits are purchased. Clearly Mr. McNeilly purchased the optional benefits.

The second requirement is that those benefits are applicable to a person under the policy. Mr. McNeilly is the named insured. He purchased the optional benefits and he could be eligible to access optional medical, rehabilitation and attendant care benefits that he had purchased. Therefore under the OPCF-47 the benefits are applicable to Mr. McNeilly. It is my finding that it is irrelevant whether or not Mr. McNeilly is or will be found to be catastrophic. The fact is that he has had injuries for which medical and rehabilitation benefits and attendant care benefits are being claimed. His entitlement to these benefits may exceed the standard limits and accordingly those optional benefits are applicable to him even though he may not yet have access to them. I find that this interpretation is consistent with the Superintendent's bulletin. I also agree with Arbitrator Samis' conclusions that the OPCF-47 use of the wording "applicable to a person under this policy" also refers to Section 28 (2) and those individuals listed who would be entitled to claim optional benefits.

The third criteria to bring the OPCF-47 to operational status is "the person claims SABS under this policy as a result of the accident." Mr. McNeilly did not meet that criteria. Mr. McNeilly applied to Jevco. While in retrospect that may have been a mistake, that is not what is in dispute in this arbitration. This arbitration is about whether or not the OPCF-47 changes the ranking of priority and not about what Mr. McNeilly should have or could have done differently. Having chosen to apply to Jevco Mr. McNeilly did not claim his SABS under his optional policy and therefore the OPCF-47 was not activated.

Due to my finding with respect to criteria 3 it is not necessary to move on to criteria 4. Criteria 4 is that the person (Mr. McNeilly) agrees not to make a claim for SABS under another policy. Arguably having already applied to Jevco for his accident benefits Mr. McNeilly would not meet the fourth criteria either as he has already made a claim for SABS under a different policy than the one that provided the optional benefits.

Had Mr. McNeilly met all four criteria (and in particular if he had applied to Chieftain) then the OPCF-47 would have been activated which would then mean that Chieftain was committed to not pursuing a claim against Jevco (otherwise the proper priority insurer). This is clear from the wording on the OPCF-47 where it confirms that once those four criteria are met that the insurer agrees that they will not deny the claim for either the mandatory or optional statutory benefits coverage on the basis that the priority of payment rules under Section 268 of the *Insurance Act* might have otherwise required that Mr. McNeilly pursue SABS under another insurance policy. I have already commented on the fact that the use of the words "they will not deny the claim" makes little sense in the present day world of priority disputes. However it seems to me that the only way to interpret it to have the endorsement make sense in the context of the present *Insurance Act* and regulations is to find that the OPCF-47 means that not only will the insurer not deny the claim for the mandatory or optional statutory benefit coverage based on the priority of payment of rules but that they will also not seek to pursue a priority claim under Section 268 of the *Insurance Act*. I therefore respectfully disagree with Arbitrator Samis in his conclusion that the OPCF-47 does allow in appropriate circumstances for there to be a priority dispute between insurers in the face of an operational and activated OPCF-47.

To find otherwise would result in the creation of some complicated system for reimbursement and administrative claims as found by Arbitrator Samis in the *Co-operators v Echelon* case. With the greatest of respect to my fellow Arbitrator I do have trouble agreeing with his approach and interpretation of the OPCF-47. It seems to unduly complicate the process contemplated by the endorsement.

If I were to have found that Jevco was not the priority insurer in this matter but Chieftain was, I would also have concluded that Chieftain would not have a right to pursue a claim for reimbursement against Jevco with respect to the mandatory level of benefits. I do not find the wording of the regulation, the OPCF-47 and Section 268 of the *Insurance Act* provides a basis for pursuing a portion of benefits paid. Clearly Chieftain could not pursue Jevco for the optional benefits as they did not provide for those benefits. I find that the intent of the legislation as a whole is to to ensure an orderly and I believe fair distribution of the risk. If Chieftain had been

the priority insurer, it would be the priority insurer for all purposes of Mr. McNeilly's claim. Chieftain would have been obliged to pay Mr. McNeilly mandatory and optional benefits (all of which he paid for in his premium) with no right of reimbursement. Similarly Chieftain would always be responsible for administering the claim.

I believe that the regulation and the endorsement was intended to simplify the process for the insured's receipt of optional benefits in certain circumstances and to pre-empt private disputes between insurers on this issue and not to set up a complex scheme for priority disputes, reimbursements between various insurers nor placing the administration of a Statutory Accident Benefit claim with an insurer who would not be actually making the payments.

While I have in this decision commented on Mr. McNeilly's rights with respect to re-election I do not purport to decide what Mr. McNeilly's options may be. That is for another forum. I am simply asked to decide as between Jevco and Chieftain which is the priority insurer in the circumstances of this case and I conclude that with the OPCF-47 not having been made operational because Mr. McNeilly applied to Jevco initially, that Jevco is therefore the priority insurer for Statutory Accident Benefits for Christopher McNeilly with respect to the motor vehicle accident of July 15, 2013.

Order:

With respect to the question as to which insurer is responsible to pay Statutory Accident Benefits to or on behalf of Mr. Christopher McNeilly arising out of the accident of July 15, 2013 I find that Jevco Insurance Company is the insurer responsible to pay those benefits.

Costs:

The arbitration agreement provides that costs shall be in the discretion of the Arbitrator. It also provides that for the purpose of determining entitlement to costs the Arbitrator shall take into account the conduct of the arbitration proceedings and any conduct that has led to any unnecessary costs or delay.
This case involved a novel issue. There was only one decision on point which was rendered relatively recently and which did not proceed to an appeal. The circumstances of this case were quite different than those in the case decided by Arbitrator Samis.

Considering the novel issue in this case, the excellent Factums that clearly outlined the parties' positions and their effort to streamline their submissions I conclude that this is one of those cases where despite the success of Chieftain that I find each party will bear their own legal costs. However the costs of the Arbitrator and any related disbursements will be paid by Jevco.

If counsel cannot agree upon costs then a further prehearing can be scheduled to argue the issues of costs.

DATED THIS 11th day of March, 2016 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP