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 an Arbitration

BETWEEN:

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

Applicant

- and -

CERTAS DIRECT INSURANCE COMPANY

Respondent

AWARD

Counsel:

The Dominion of Canada General Insurance Company (Applicant): Nicholaus de Koning

Certas Direct Insurance Company (Respondent): Shelley Khan

Introduction:

This matter came before me pursuant to the *Arbitrations Act,* 1991, to arbitrate an issue between the above-noted insurers with respect to a priority dispute pursuant to the *Insurance Act* and its regulations: specifically Regulation 283/95 as amended. This claim is with respect to a motor vehicle accident that occurred on November 12, 2012. A claim for Statutory Accident Benefits was advanced arising out of injuries sustained in that accident by one Cory Parchment. The parties selected me as their Arbitrator on consent and this matter proceeded to a hearing with documentary evidence only on November 13, 2015.

Exhibits:

The following documents were made exhibits at the arbitration hearing:

Exhibit 1: Arbitration Agreement dated November 13, 2015

Exhibit 2: Joint Documents Brief (including tabs 1 through to 16)

The Issue in Dispute:

The issue for determination is as between the Dominion of Canada General Insurance Company (hereinafter called "Dominion") and Certas Direct Insurance Company (hereinafter called "Certas") which insurer is liable to pay Statutory Accident Benefits to Cory Parchment as a result of the accident of November 12, 2012.

This issue at the time of the arbitration had resolved down to a determination of the question:

"Did Cory Parchment have regular use of a vehicle owned by One Thirteen Haulage on November 12, 2012 so that he is a deemed named insured under the Dominion policy?"

At the time of accident Dominion insured a 2013 Kenworth truck owned by its named insured, One Thirteen Haulage. The Dominion policy was APC8584395. Mr. Cory Parchment was the driver of that vehicle on the date of loss. He applied by way of an OCF-1 for Statutory Accident Benefits to Dominion.

Certas insured a 2009 Nissan Altima by way of policy number K0469254. The named insured under that policy was Chenille Parchment who, it is agreed by all parties, was the spouse of Cory Parchment. The policy was in full force and effect on November 12, 2012.

Dominion accepted the OCF-1 and adjusted Mr. Parchment's claim for Statutory Accident Benefits. When their investigation disclosed that Mr. Parchment was married and that his spouse had a valid policy with Certas they served a Notice to Applicant of Dispute Between Insurers on or about March 12, 2013.

Dominion takes the position that as Cory Parchment was the spouse of a named insured under the Certas policy that Certas is the priority insurer.

Certas takes the position that Dominion should be the priority insurer as Cory Parchment would be a deemed named insured under the Dominion policy as he had regular use of the 2013 Kenworth truck at the time of the accident.

No witnesses were called at this arbitration. I have been asked to make a number of factual determinations on documentary evidence only. However it is a difficult task as there are numerous variations of the facts and a number of inconsistencies.

Unfortunately there was never an examination under oath of Cory Parchment. Mr. Parchment despite having being summoned on a number of occasions to attend both an EUO and the arbitration hearing failed to attend. I did have an opportunity however to review the transcript from the examination under oath of a Wilfred Robinson who took care of the One Thirteen Haulage business as of the date of the accident.

Summary of Facts

There were a number of facts that counsel were able to agree on. Most importantly there is no disagreement that Chenille Parchment was Cory Parchment's spouse as of the date of the accident. Certas accepts that if they are unsuccessful in their argument concerning regular use that it would be the priority insurer.

In addition the following summary of facts are not in dispute and there were no inconsistencies with respect to these facts.

Cory Parchment was injured in the accident of November 12, 2012. At the time of the accident he was nearly 30 years of age (date of birth: December 15, 1985). Mr. Parchment had a history of employment as a truck driver having been previously employed with Load Simplified as a long haul driver and Waste Management in Toronto as a city driver.

There is also no dispute that on November 12, 2012 Mr. Parchment was working for One Thirteen Haulage and was driving their Kenworth 2013 truck in the course of that employment when he was involved in a motor vehicle accident. Dominion and Certas both agree that on November 12, 2012 One Thirteen Haulage made the Kenworth 2013 truck available for Mr. Parchment's use. The question is whether that use was "regular".

It is also undisputed that Cory Parchment submitted an OCF-1 to the Dominion. The document was dated December 4, 2012. Mr. Parchment signed it but it may have been completed by and submitted to Dominion by Epic Rehab. They had submitted an OCF-23 which had been denied by Dominion on the grounds that they had not yet received an OCF-1. Mr. Parchment in a later statement seemed to be unaware of some of the information in that document. Particularly the purported return date to work which according to Part 8 of the OCF-1 was December 3, 2012.

The OCF-1 did not identify any other policy under which Mr. Parchment could make a claim. When asked under Part 4 whether he was covered under his spouse's policy the box "no" was checked off. He indicates that he is applying under his employer's policy on the grounds it is a company car.

Under Part 8 with respect to employment Mr. Parchment (and/or Epic Rehab) indicates the following:

1. May, 2012 to October, 2012 Waste Management, 260 New Toronto Street, Toronto: driver/city driving 42 hours per week $2,400.00 every 2 weeks gross income.

2. October, 2012 to present One Thirteen Haulage, 1 Arrow Road, Toronto: driving/city driving 60 hours per week $2,500.00 every 2 weeks.

It is also noted that Mr. Parchment was prevented from returning to work from November 12, 2012 but returned to work December 3, 2012.

It is at this point the facts become contentious. While the OCF-1 indicates employment from October, 2012 to present with One Thirteen Haulage there is some significant doubt as to whether Mr. Parchment was actually full time employed during that time period, part time employed during that time period or if in fact he only worked on the date of the accident only. The relevant evidence on that issue is as follows.

Firstly, Dominion accepted that Mr. Parchment was employed. They accepted he would be entitled to an income replacement benefit but asked him to provide an OCF-2 (Employer's Certificate) to confirm that employment and to provide confirmation of the income loss. Mr. Parchment for reasons unknown chose never to provide the OCF-2. In a log note with respect to a conversation he had with an adjuster for Dominion Mr. Parchment suggests that he is not going to pursue this claim because he can't be bothered to complete the forms.

On November 14, 2012 Anna Wielgolaska, the adjuster with Dominion, had a conversation with Cory Parchment. He advised her he was in the course of his employment at the time of the accident. He had just dropped his last load and was coming back to the shop. He confirmed he did not have a car but his wife had a car: a Nissan that was insured with Desjardins. He confirmed he was not a listed driver on her policy. He did not have WSIB. He had not returned to work. He also advised that he did not want to go through his wife's insurance and when suggested that her policy would have priority he indicated he would be speaking to a lawyer. This suggests to me that Mr. Parchment for some reason was very reluctant to proceed with a claim through Certas.

On January 31, 2013 Dominion met with Mr. Parchment and secured a signed statement from him. In that statement he confirms he was in the course of his employment at the time of the accident. He advises he does not own his own vehicle or have regular use of any vehicle. His wife had a vehicle insured with Desjardins. On the question of employment he advises that at the time of the accident he was working full time at One Thirteen Haulage Inc. He had been working at that company since October, 2012 to present. He worked 60 hours per week Monday to Friday and occasionally on Saturdays. He says he has not returned to his full time job and he has only worked one day after the accident. He says he is self employed. The statement is signed by Parchment on February 7, 2013.

Dominion not having had a response from One Thirteen Haulage to some communications that they had sent them and/or not having received an OCF-2 called the One Thirteen Haulage phone number on February 27, 2013 and spoke to one Wilfred Robinson. He advised that Cory Parchment had only worked for One Thirteen the day of the accident as the regular driver was not available. Wilfred advised that Cory had not worked for him since the accident.

There was a follow up conversation between the adjuster, Ms. Wielgolaska, and Cory Parchment on March 15, 2013. According to the log notes Cory called as he wanted to know what the "Notice to Applicant of Dispute Between Insurers" was about. He said he did not want to go through his wife's insurance as she is already paying higher rates. He was advised that his wife's policy was highest in priority and he should speak to Desjardins about the rates. Mr. Parchment also asked how the adjuster had determined that he had returned to work on December 3, 2012. The adjuster advised that it was on his OCF-1. Mr. Parchment stated that he did not know what application the adjuster was referring to. During the course of the conversations some inconsistencies were pointed out to Mr. Parchment and he was asked if he could explain them especially with respect to the information from Mr. Robinson. According to the log note Mr. Parchment started laughing and said that they could "forget about the benefits".

On March 18, 2013 there was a telephone discussion between Razenn Santiago, Certas' adjuster, and Ms. Wielgolaska. Ms. Santiago advised that she had also spoken to Mr. Parchment earlier. He had advised her that he had been hired by One Thirteen Haulage 2 days prior to the accident. The log note also indicates the following:

> "ADV that when I asked the claimant to explain the discrepancies between the OCF-1/OCF-24 and his statement he laughed it off and told me to forget the benefits. ADV he told her same."

The log notes of Certas show a conversation between Razenn and Cory Parchment on March 18, 2013. Mr. Parchment confirms in that conversation that while he was initially looking for compensation for the period he is off work that he now only wants to deal with the outstanding balance at the clinic.

On April 4, 2013 Dominion secures a signed statement from Wilfred Robinson. He advises that he is the operation manager of One Thirteen Haulage Inc. owned by Lorna Partav who is his aunt. He says he has been handling the day to day business since September or October of 2012. The 2013 Kenworth 7800C dump truck was purchased in or around September or October of 2012. Mr. Robinson advises that Cory Parchment is not his regular worker. His regular driver had not worked for the 2 weeks prior to November 12, 2013 (I assume that is a typo and it should of read 2012) as there was no work. On November 11, 2012 Mr. Robinson says he called Cory (whom he had previously spoken with but had not hired because there was no work) to see if he was interested in working for one day: November 12, 2012. There was no contract of employment as they agreed on one day of work only. He did not ask Cory as to whether he had WSIB as he was only working for one day. If he had planned to hire Cory for a

period of a month or longer he would have asked confirmation with respect to his coverage. He confirms Cory Parchment only worked for him one day on November 12, 2012 and has not worked for him since. Of note this statement is taken approximately 5 months after the accident.

On April 8, 2013 Certas secured a statement from Chenille Parchment. She confirmed that she owned 2 cars: the 2009 Nissan and the 1998 Honda Civic which had however only been picked up in March of 2013. She states:

> "I have refused to add Cory under my insurance policy as he did not have access to the car all the time...my husband does not drive the cars. He gets around and to his work by carpooling with his friends. My husband does not use the car as it is impossible for him to use my car. I don't allow him to use the car as he is not a listed driver on my policy."

On the same date Certas secured a statement from Cory Parchment. In that statement Mr. Parchment says he was employed as a part time truck driver for One Thirteen Haulage. He started there in the middle of October. He states: "As of February, 2013 I am no longer with the company."

He confirms he worked Monday to Friday 6:00 a.m. to 4:00 or 5:00 p.m. and occasionally Saturdays from 6:00 a.m. or 7:00 or until 2:00 p.m. He earned a percentage of what the truck makes for the week. Prior to working at One Thirteen he worked at Waste Management. He says he did not have an exact date that he left One Thirteen. However at the time of taking the statement he was a full time truck driver for Golden Choice which is "under the same family as One Thirteen". He also says in the statement that after the accident he did not return to work because the truck was not repaired and also because of his injuries. He did not get paid for those 2 months and he will not be filing an income replacement benefit claim as that involves having to fill out the AB forms.

Mr. Robinson did attend an examination under oath and that transcript reflects that the examination took place on May 28, 2015. That is approximately 2 and ½ years after the accident. A review of the transcripts, in my view, make it quite clear that Mr. Robinson had little if any useful recollection in May of 2015 as to what had occurred in or around October/November of 2012.

He states that he did interview Cory Parchment before hiring him. He thinks he interviewed him one night and then told him to come in in the morning because his previous driver had called in sick that day. Someone Mr. Robinson was familiar with in the truck yard knew Cory and had said Cory could come and work for him for a few days until his driver came back. Mr. Robinson could not recall whether Cory started working the day right after the interview or whether it was 2 or 3 days thereafter. He confirms, however, that "We're not going to hire him permanent. My driver is ill, so I just needed a guy to fill in for a few days."

Mr. Robinson could not remember how long Mr. Parchment worked for him. Mr. Robinson and One Thirteen Haulage were unable to produce any documents to provide any clarity on this issue. All the records had been thrown away when Mr. Robinson moved and the only records available were from 2014.

Mr. Robinson did remember taking the keys to the truck back but could not recall if it was the same day but "I know I took it after the accident".

Mr. Robinson's evidence was that One Thirteen Haulage had 15 drivers and 15 trucks. If one driver got sick there was not a list of people that he would contact. He would just randomly call in people. They might use a different driver for one hour, two hours, a day or for a week. Mr. Robinson confirms "Cory was not a regular driver".

After the accident the unit that was involved in the accident was parked for 3 months. The usual driver of that unit never came back as the truck was not drivable. Mr. Robinson believes he got another job.

Finally Mr. Robinson indicates that as with all potential drivers that he may hire that he tested Cory Parchment by driving with him. He finished his EUO stating:

> "I don't remember the date of the accident. I didn't even remember the day I hired him, I don't remember if it is Tuesday, it's a Monday or it's a Thursday. I don't remember. I am telling the truth. I don't remember."

I find that Mr. Robinson's statement of April 4, 2013 is more likely to reflect an accurate version of events then his EUO in May of 2015 which clearly showed a very poor memory with respect to the events surrounding Mr. Parchment's employment and the accident of November, 2012.

Position of the Parties

Dominion submits that the onus of proof is on Certas to establish that Mr. Parchment had regular use of the One Thirteen Haulage truck on November 12, 2012. Dominion submits that the evidence available with its inconsistencies and lack of documentation does not meet the burden of proof. Dominion submits that if I find that Mr. Parchment was only driving the vehicle for the first time on November 12, 2012 that does not constitute "regular" use. They further suggest that even if he had been driving the vehicle for 2 or 3 days prior to November 12, 2012 that that did not constitute regular use. Dominion submits that Certas is clearly the priority insurer as there is no issue with respect to the spousal relationship and the coverage available under the Certas policy.

Certas submits that either Dominion has the burden of proof or that it is a shifting burden of proof. Certas submits that if Dominion has the burden of proof that they too have been unable to disprove based on the available evidence that Mr. Parchment did not have regular use of the

Kenworth truck on the date of the accident. Certas submits that there was a consistency in Cory Parchment's evidence that I should accept. In his statements and the OCF-1 Cory Parchment repeatedly states that he had been employed by One Thirteen since October of 2012. They suggest that this constitutes regular use. Certas also submits that if Cory Parchment only had regular use of the vehicle for 2 or 3 days prior to the accident or even the day of the accident that that still constitutes regular use as his evidence was that he remained employed with One Thirteen until February of 2013. Therefore while he may not have been driving m the vehicles were still available for his regular use. Certas asks me to find that Mr. Parchment had employment for at least 2 to 3 weeks prior to the accident and subsequent to the accident with One Thirteen Haulage to establish the regularity of the use.

Finally Certas submits that Mr. Robinson's evidence should not be relied upon because of the inconsistencies. Rather they suggest that Mr. Parchment had no reason to lie and his evidence overall is more consistent and should be accepted by me.

The Law

The relevant portion of Section 268 (2) of the *Insurance Act* provides as follows;

Liability to pay

(2) The following rules apply for determining who is liable to pay statutory accident benefits:

1. 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,

   ii. If recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant.

Section 268 (5) is also relevant which sets out the following:

(5) Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the spouse is the spouse or dependent, as defined in the *Statutory Accident Benefits Schedule*, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy.

(5.2) 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, an occupant of an automobile in respect of which the person is the named insured or the spouse or 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 if I find that Mr. Parchment was a deemed named insured under the Dominion policy by virtue of the regular use issue then pursuant to Section 5.2 Mr. Parchment would have to claim benefits from Dominion as he was the named insured under their policy and an occupant of the automobile on the date of loss.

The Statutory Accident Benefits Schedule for accidents on or after September 1, 2010 (hereinafter called "the SABS") under Section 3 (7)(f) provides the following definition that is generally referred to as the "deemed named insured" provision:

(f) An individual who is living and ordinarily present in Ontario is deemed to be the named insured under the policy insuring an automobile at the time of the accident if, at the time of the accident,

i. The insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity.

With respect to the facts of this case all agree that One Thirteen Haulage made the insured automobile (the Kenworth truck) available for Mr. Parchment's use on November 12, 2012. The only issue is whether that use would be considered to be regular. If the use is regular then Mr. Parchment is a deemed named insured under the Dominion policy.

There have been numerous cases dealing with the question of regular use over the course of the years. I agree with Arbitrator Densem in his decision of *The Dominion of Canada General Insurance Company v Federated Insurance Company of Canada* (private arbitration decision Arbitrator Scott Densem October 31, 2012) where he sets outs a series of propositions that can be derived from a review of the case law relating to regular use. Those propositions set out by Mr. Densem with which I agree are as follows:

1. "Regular" is intended to describe "periodic, routine, ordinary or general" as opposed to "irregular or out of the ordinary or special".[1]

[1] *Personal Insurance Company v ING Insurance Company of Canada* (unreported decision of Justice Morrissette, June 12, 2007)

2. The language of the deemed named insured provision does not require that the use be frequent, exclusive or personal to be regular.[2]

3. "Regular use" has been defined in a number of arbitration decisions as being use that is "habitual, normal and occurred uniformly according to a predictable time and manner". Cases where the individuals have been found not to be regular users of the subject vehicle were only those cases where the characterization of the use was "irregular at best and out of the ordinary".[3]

4. The wording of the deemed named insured provision requires an examination of whether a vehicle is available for regular use, not whether there was actual regular use of the vehicle. The section does not appear to require that the individual actually used the vehicle regularly but rather that it is made available should he wish to use it regularly. Actual use is evidence of the availability of the vehicle.[4]

5. "Regular use" is not limited to users of vehicles who are employees of the corporation making the vehicle available for use. This section speaks of an "individual" not an employee.[5]

6. Courts and Arbitrators have looked at the pattern of use, amongst other evidence, to ascertain whether, at the time of the accident, the vehicle was being made available to the claimant for "regular use". An adjudicator must look back from the date of the accident to examine the nature of prior use. To limit the inquiry into the nature of the use solely to the day of the accident, or the days immediately preceding the accident, would result in an artificial exercise and ignore material evidence regarding the pattern of use leading up to the day of the accident. [6]

What I draw from the above is that I must examine the evidence in this case to determine whether Mr. Cory Parchment's use of the Kenworth truck could be described as routine, habitual or that occurs over a predictable pattern. I must examine the evidence taking into consideration that regularity of use generally suggests use on more than one occasion. The pattern or prior use is relevant to that examination. Before turning to my analysis and determination of this case reference must be made to a case included in the Respondent's

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[2] *Riesner v Liao* [1993] O.J. No. 805 (General Division) aff'd [1994] O.J. No. 1033 (Div. Ct) leave to appeal refused [1995] O.J. No. 2489 (Court of Appeal) and *Schneider v Maahs* [2000] O.J. No. 4050 (CanLII)

[3] *Zurich Insurance Company v Personal Insurance Company* [2009] I.L.R. I-4836

[4] *Unifund Assurance Company v St. Paul Fire & Marine Insurance Company*, Arbitrator Samworth August 9, 2000

[5] *Zurich Insurance Company v Personal Insurance Company (*supra at note 3)

[6] *Zurich Insurance Company v Personal Insurance Company (*supra at note 3)

materials: *TD General Insurance Company v Markel Insurance Company*. This was a decision of Arbitrator Lee Samis dated December 13, 2013 that was upheld on appeal by Justice Lederman [2014] O.J. No. 5851. This case is relevant as it does seem on its facts to be the closest case that was put before me to the facts involving Cory Parchment.
The case involved an accident on November 26, 2008. One Kuldip M. was an occupant of a 2000 Volvo tractor which was insured by Markel. The vehicle was being operated by a Jasbir K. According to Kuldip he had been contacted by Jasbir with respect to the possibility of accompanying him on a long haul trip using the Markel vehicle. In order to accompany Jasbir on the trip Kuldip took leave from his employment as a labourer. Kuldip already had the necessary training and testing to get his AZ license for the purpose of driving trucks. While Kuldip's evidence was that this was a one time trip to get a sense as to whether he liked the employment or not, Jasbir's evidence was that if Kuldip found the experience suitable he would become part of the team that operated the vehicle. The truck was making a run from Toronto to Alberta. It was about 60 to 70 hours of driving. The accident occurred partway into the trip.

Arbitrator Samis decided that the vehicle was made available for Kuldip's regular use at the time of the accident. While the use was not long standing it was regular as it involved many hours of use on the particular trip. Arbitrator Samis did not find Kuldip's evidence about the one time nature of the trip convincing and concluded it was more likely than not that Kuldip would have continued on with the arrangement. Arbitrator Samis noted the following:

> "There is some reluctance to find "regular" use in circumstances where the relationship is short lived as in this case. But the duration of the relationship with the vehicle is not the direct issue. The direct issue is whether the permitted use was "regular". I am not satisfied that regular use requires use that is long standing in nature...although that certainly would be greater evidence of a use that is regular. However, I am satisfied that the particulars of this case, that for the duration of the involvement of Kuldip with the Volvo vehicle, there was a relationship whereby the vehicle was made available for his regular use."

Arbitrator Samis goes on to comment that if the accident had not occurred that there would be every expectation that the use of the vehicle would continue.

On appeal Justice Lederman noted that both Kuldip and Jasbir gave evidence that supported the Arbitrator's conclusions that Kuldip was using the trip as a trial run and that he would become part of the team if the experience was suitable. There was a financial arrangement by which both drivers would be paid for the trip. While the usage was relatively short lived Justice Lederman pointed out that it involved many hours of operation on this particular trip and prior to the accident there was every expectation the use of the vehicle would continue. Justice Lederman gave deference to Arbitrator Samis and felt that his interpretation of regular use and his application to the facts was reasonable and there was no reason to disturb them.

I find that that case is distinguishable from the present case on 2 grounds:

1. The trip that Mr. Parchment was on did not involve a number of hours of driving but was a one time trip only of a duration of approximately a day; and

2. There is no credible evidence that Cory Parchment, but for the accident, would have continued to have the use of the vehicle other than for that one day.

Analysis

I will first address the issue of the burden of proof. In my view the burden of proof in this case falls upon Certas. Arbitrator Densem in the *Dominion of Canada General Insurance Company v Federated Insurance Company of Canada* concluded in that case that the Dominion had the burden of proof on a balance of probabilities to establish regular use.

The question of the burden of proof was examined in more detail by Arbitrator Shari Novick in the decision of *Economical Mutual Insurance Company v ACE INA Insurance Company* (decision of private Arbitrator Novick March 24, 2015).

In that case Arbitrator Novick raised a concern with respect to the arbitrary manner in which an Application for Accident Benefits is submitted. Under the priority dispute rules (Regulation 283/95) the first insurer that receives an application must "pay now, dispute later". She therefore suggests that it is not always fair to ascribe the burden of proof to the Applicant insurer in a priority dispute. In a system that is designed to ensure that claimants, who may not be aware of the complicated system dictating which insurer is the priority payor. It would be manifestly unfair if the first insurer to receive an application who is not the priority insurer must not only adjust the claim but must also bear the onus of proving or disproving some fact that may be casually alleged by a claimant.

In that particular case the question for Arbitrator Novick was whether Economical as the Applicant insurer must bear the onus of disproving the claimant's allegation that she was the spouse of its insured. She concluded that it was incumbent upon the Applicant insurer as the initiator of the process to lead some evidence to show why the obligation to continue to pay the claim in question should not remain with them. The Arbitrator must then apply the balance of probability test to the evidence presented in order to determine what evidence to accept.

In this particular case Dominion has provided sufficient evidence to establish that Cory Parchment was married as of the date of loss to Chenille Parchment who was a named insured under the Certas policy. Therefore subject to the regular use issue Dominion has satisfied their onus that Certas would be the priority insurer. Certas however takes the position that they are not the priority insurer alleging that Mr. Parchment had regular of the Dominion vehicle. I find that Certas has the onus of proof to establish that Mr. Parchment had regular use of the Dominion vehicle. As Arbitrator Novick suggested I do not think it would be fair to ascribe a burden of negative proof to the Dominion as suggested by Certas.

I therefore find that Certas has the onus of proof on a balance of probabilities to establish that Cory Parchment had regular use of the vehicle owned by One Thirteen Haulage on November 12, 2012. I also find that Certas has not satisfied that burden of proof.

There were simply too many questions and inconsistencies with respect to the various statements and conversations and documents that have been ascribed to Cory Parchment. I do not accept Certas' submissions that there was no reason for Cory Parchment to lie. There seemed to be a number of reasons that he may have chosen to elaborate or exaggerate the status of his employment with One Thirteen Haulage. The first would be to establish entitlement to income replacement benefits. Once questioned on some inconsistencies with respect to the application for income replacement benefits Mr. Parchment backed down and chose not to pursue them. It is unusual for an individual who is not working due to injuries in an accident and who is losing an income (alleged earnings of up to $2,500.00 per month) not to pursue a claim for those benefits where the insurer has indicated that they are prepared to accept that claim at least for a one month period. The failure of Mr. Parchment to provide any documentation including an OCF-2 is suspicious in my mind.

The other reason that Mr. Parchment may choose to present a certain set of facts is that he clearly did not want to make a claim for accident benefits under his spouse's policy. There seemed to be some issue between Mr. Parchment and his spouse with respect to the use of his wife's vehicle. As much as one can be adamant on paper Chenille Parchment seemed to be adamant in her statement that her husband was not to be listed on her policy and was not to drive her vehicles. She states she refused to add him under her policy. The log notes suggest that Mr. Parchment seemed to be reluctant to make any claim through the Desjardins policy again giving some motivation for his position under his OCF-1 that he was not covered under his spouse's policy and an explanation for claiming a longer history of use of the One Thirteen Haulage vehicle than may have in fact been the case.

I found the most compelling piece of evidence to be the statement of Wilfred Robinson made in April of 2013. At the time that statement was made Mr. Robinson had been handling the day to day business of One Thirteen Haulage since September of 2012. Therefore there would be a greater recollection at that time of the events involving Cory Parchment and the accident in November of 2012 than there would be a couple of years later when he gave his statement under oath. In the 2013 statement Mr. Robinson was quite clear that Cory Parchment was not a regular worker. There was no contract of employment. They agreed on one day of work. He states "Cory has only worked for me one day on November 12, 2012 and has not worked for me since". I find that that is the most likely scenario that occurred in this case. There was no reason for Mr. Robinson not to acknowledge that Mr. Parchment had worked either before or after November 12, 2012 and I find he had no reason to fabricate any facts. His inability to provide clear evidence in May of 2015 was, in my view, as a result of the considerable time that had passed and the numerous drivers that would have passed through Mr. Robinson's employment over those years. I also find that the answers on his examination under oath were not wholly inconsistent with the evidence given in his initial statement in any event.

My conclusion is also consistent with a telephone conversation between Mr. Robinson and the Dominion adjuster on February 27, 2013 when he advised her that Mr. Parchment had only worked for him for one day as his regular driver was not available and he had not worked for them since.

Having found that Cory Parchment on a balance of probabilities only drove the Kenworth truck on that one day and was only employed by One Thirteen Haulage for that one day the question that I then have to address is whether that would constitute regular use.

Having reviewed the case law and in particular the criteria outlined by Arbitrator Densem I find that the use of the Kenworth truck on one day does not establish a pattern of use that one would consider regular. It was not normal, habitual nor occurring uniformly. I find it was not use that was in a predictable time or manner. I find that Mr. Parchment's use of the Kenworth truck was in fact irregular and out of the ordinary.

I did carefully review the decision of Justice Brown in the case of *Zurich v The Personal.* At page 9 of that decision Justice Brown states the following:

> "I imagine a case could arise where the claimant's first use of a vehicle occurred on the very day of the accident. In that scenario the adjudicator would have no record of prior use to consider and would have to resort to other evidence to decide the question. However none of the reported decisions have dealt with that unusual scenario".

This case appears to be that unusual scenario. I do not find that there is any evidence or any credible evidence presented to support Certas' argument that Mr. Parchment continued to have the vehicle available for his use after November 12, 2012. The vehicle was damaged and according to Mr. Robinson was in the yard for 3 months. The regular driver of that vehicle stopped working for One Thirteen Haulage as there was no truck for him to drive. There is no evidence to suggest that Mr. Parchment had available for his use any other vehicles with One Thirteen Haulage. In the circumstances where there is no or insufficient evidence of ongoing employment or ongoing availability of a vehicle for Mr. Parchment to use the only conclusion that I can draw is that Mr. Parchment did not have regular use of the Dominion vehicle on the day of the accident. I am aware of the key words "at the time of the accident". There is no or insufficient evidence to satisfy me that Mr. Parchment had any prior use of the Dominion vehicle or that it was available to him to use either in the days leading up the accident or the days after the accident.

I therefore conclude that Mr. Parchment did not have regular use of the vehicle owned by One Thirteen Haulage on November 12, 2012 and I conclude Mr. Parchment is not a deemed named insured under the Dominion policy.

Order

I find that Dominion is not the priority insurer with respect to the accident benefit claim of Cory Parchment arising out of the accident of November 12, 2012 and that Certas is the priority insurer for the reasons outlined above.

Costs

Pursuant to the Arbitration Agreement payment of legal costs shall be fixed in the amount of $2,500.00 payable by Certas to Dominion.

As Certas was unsuccessful in the arbitration despite very creative arguments on the part of Certas' counsel, I find that Certas is also responsible for the costs of the arbitration.

Dated this 7th day of December, 2015 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP