IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, SECTION 268 and *REGULATION 283/95*

AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c. 17;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

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

Applicant

- and -

KINGSWAY GENERAL INSURANCE COMPANY and ROYAL and SUNALLIANCE COMPANY OF CANADA

Respondents

PRELIMINARY DECISION

COUNSEL:

Robert W. Kerkmann for the Applicant

Rohit Sethi for Kingsway Insurance

Pamela A. Brownlee for Royal and SunAlliance

ISSUE:

1. Where a first insurer who receives an application for accident benefits (MVACF in this case) takes the position that no motor vehicle accident has occurred and denies the claim, can a priority dispute be triggered under *Regulation 283/95*?

RESULT:

In the event that an insurer takes the position that no accident has occurred, a priority dispute is not triggered until it is determined by an arbitrator at the Financial Services Commission of Ontario that there is a requirement to pay benefits under the *Statutory Accident Benefits Schedule*.

As no finding has yet been made that Mr. Carr is entitled to benefits, the priority dispute is premature.

BACKGROUND:

Wendell Carr alleges that he sustained injuries when a van reversing out of a driveway struck him, as he was walking along Keele Avenue in Toronto on December 14, 2007. He claims that the van did not stop after striking him. Mr. Carr submitted an application for accident benefits to the Motor Vehicle Accident Claims Fund ("the Fund") on February 1, 2008.

It was subsequently determined that the van alleged to have struck Mr. Carr is owned by Julian Phillips, and insured by Kingsway General Insurance ("Kingsway"). The Fund provided notice to Kingsway of its intent to dispute its obligation to pay benefits to Mr. Carr shortly after receiving his application. Kingsway investigated the matter, and reported that Mr. Phillips denied that his vehicle was involved in the incident as alleged. Kingsway accordingly advised the Fund that they were not prepared to accept priority of the claim.

The Fund also placed Royal and SunAlliance ("Royal") on notice of the claim, as Mr. Carr's wife was a named insured on an auto policy issued by them. Royal asserts that this policy had been cancelled prior to the date of the accident.

The Fund denied Mr. Carr's claim for accident benefits, stating that there was "insufficient evidence to conclude that you were struck by the vehicle as alleged". Mr. Kerkmann advised at the hearing that Mr. Carr has applied for mediation at the Financial Services Commission of Ontario ("FSCO"), and is challenging the Fund's denial. Consequently, the issue of whether the incident occurred as alleged by Mr. Carr will ultimately be decided by an arbitrator at the Commission.

The Fund takes the position at this hearing that either Kingsway or Royal should 'step into the Fund's shoes' and defend the claim brought by Mr. Carr at FSCO, as at least one of them is in higher priority than the Fund under section 268(2) of the *Insurance Act*. The Respondents disagree, and contend that this arbitration should be held in abeyance pending the determination at FSCO of whether or not Mr. Carr is entitled to accident benefits. They contend that if there was no accident, there can be no priority insurer and *Regulation 283/95* is not triggered.

The parties agreed to have this "threshold question" decided as a preliminary issue. A hearing was convened, and proceeded with the understanding that if I determine that *Regulation 283/95* has been triggered, Kingsway would take over the handling of Mr. Carr's claim, pending the resolution of the priority dispute. The parties also agree that if it is ultimately determined that the Royal policy issued to Ms. Carr was in effect on the date of the accident, Royal would be the priority insurer pursuant to section 268(2) of the *Insurance Act* and would assume priority over Mr. Carr's claim.

HEARING:

The arbitration hearing on the preliminary issue set out above was held on October 30, 2009 in Toronto, Ontario pursuant to the provisions of *Regulation 283/95* of the *Insurance Act* and the *Arbitration Act,* S.O. 1991.

RELEVANT PROVISIONS:

The following provisions are relevant to my determination of this matter:

Regulation 283/ 95

> **1.** All disputes as to which insurer is required to pay benefits under section 268 of the Act shall be settled in accordance with this Regulation
>
> **2.** The first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act

Statutory Accident Benefits Schedule

> **3.** (1) The benefits set out in this Regulation shall be provided under every contract evidenced by a motor vehicle liability policy in respect of accidents occurring on or after November 1, 1996.
>
> (2) The benefits set out in this Regulation shall be provided in respect of accidents that occur in Canada or the United States of America, or on a vessel plying between ports of Canada or the United States of America.
>
> (3) Benefits payable under this Regulation in respect of an insured person shall be paid by the insurer that is liable to pay under subsection 268 (2) of the *Insurance Act.*

PARTIES' SUBMISSIONS:

The Fund

Counsel for the Fund noted that there are no provisions in either the *Insurance Act* or the *Statutory Accident Benefits Schedule ("SABS")* that require the Fund to respond to Mr. Carr's claim. He contended that the only provision that obligates the Fund to pay benefits to Mr. Carr in this situation is section 2 of Regulation 283/95, and argues that once that section is engaged, the regulation applies and a priority dispute is triggered. Mr. Kerkmann submitted that I should decide which insurer may ultimately be responsible to pay benefits to Mr. Carr and require them to defend the FSCO application, rather than adjourning this arbitration to await the result of the FSCO proceeding.

Counsel emphasized the fact that Mr. Carr's application for benefits was sent to the Fund in error, stating that once the vehicle that he alleges struck him was identified, its insurer should have received the application. Mr. Kerkmann contended that if Mr. Carr's representative had acted properly, either Kingsway or Royal would incur the costs of defending the FSCO application instead of the Fund, and submitted that that is how the process should play out. He noted that whatever happens at FSCO – whether it is found that Mr. Carr was involved in an accident as alleged, or not – the Fund would not be responsible to pay his claim, and argued that it is therefore unfair to force the Fund to participate in that proceeding.

Mr. Kerkmann submitted that the case law provides that legal fees and expenses incurred by an insurer at a FSCO proceeding are not recoverable in a priority dispute, citing Arbitrator Jones' decision in *Zurich Insurance v. Co-operators' Insurance* (unreported decision, dated January 3, 2007, upheld on appeal by Wilson, J. May 1, 2008). He submitted that the case law is unclear regarding the right of a first insurer to recover its expenses from an insurer that is ultimately determined to be the priority insurer, and contended that as a result, the only fair way to administer the scheme is to first determine who the proper insurer is if benefits are found to be payable, and to direct them to handle any FSCO proceedings brought.

Kingsway

Counsel for Kingsway contended that the issue of which insurer is in priority to pay Mr. Carr's claim should only be arbitrated if and when there is a determination that an "accident" occurred. He noted the requirement in section 1 of Regulation 283/95 that disputes over which insurer is "required to pay benefits" be settled in accordance with the regulation, and argued that a finding that Mr. Carr is entitled to benefits under section 3(2) of the *SABS* is therefore required before the regulation is invoked and a priority dispute commenced.

Mr. Sethi contended that as the Fund was the first insurer to receive Mr. Carr's application in this case, they are in the best position to investigate the claim and decide whether or not the accident took place as alleged. He submitted that in light of the Fund's position that Mr. Carr was not involved in an accident, there is no entitlement to benefits under the *SABS* and therefore no need to proceed to the priority analysis in section 268(2) of the *Insurance Act.*

Counsel also submitted that if the first insurer that receives an application can deny the claim but insist that another insurer defend the FSCO application that results, the priority insurer may well end up having to pay interest to the claimant and potentially a special award if the denial of benefits is not maintained. He argued that that would be manifestly unfair, given that the priority insurer may not have made the same determination and may have adjusted the claim in an entirely different manner.

Royal and SunAlliance

Counsel for Royal and SunAlliance echoed the above concerns. She submitted that the *SABS,* section 268(2) of the *Insurance Act*, and *Regulation 283/95* all comprise different parts in the regulated scheme that provides for the payment of accident benefits, but that an initial determination of whether or not an accident has taken place must be made under the *SABS* before the other parts are addressed. If it is determined that an accident has taken place and a claimant is entitled to benefits, the "priority ladder" in section 268(2) of

the *Act* then dictates which insurer is required to pay. If a dispute arises with respect to that, resort must then be had to *Regulation 283/95*.

Ms. Brownlee contended that when the first insurer that receives an application for benefits takes the position that there was no accident, a form of 'legal limbo' is created. She submitted that if the insurer maintains this position they must endure the consequences, which in this case means that the arbitration should be held in abeyance pending the determination at FSCO of whether or not an accident took place.

Counsel reiterated the point that section 1 of *Regulation 283/95* specifies that the regulation is only engaged when an insurer is required to pay benefits, and contended that in these circumstances, the Fund does not even "get through the door".

ANALYSIS & FINDINGS:

Having considered the parties' submissions on this issue, I accept the Respondents' argument that this proceeding should be held in abeyance pending the determination at FSCO of whether or not Mr. Carr is entitled to benefits under the *SABS*. While I appreciate that this will require the Fund to participate in a hearing when there is no chance that it will ultimately end up being the priority insurer, I am persuaded that there are sound policy reasons for this result.

There are a few distinct regulatory pieces that make up the accident benefits "puzzle". The *SABS* contains a series of rules that regulate the payment of benefits by insurers to claimants. The Schedule sets out various tests that claimants must meet in order to be entitled to the different categories of benefits provided, but all are premised on the injuries suffered having been sustained in an "accident". The question of whether or not the injuries arise from an accident is occasionally the subject of a dispute between a claimant and an insurer, and when it arises, the matter is decided by FSCO. If benefits are found to be payable, there may be more than one insurer with a connection to the claimant who may be liable to pay. Section 268(2) of the *Insurance Act* provides a

hierarchy among those potential payors, at the bottom of which is the Fund. When factual disputes or interpretive differences lead to disputes about which insurer is in priority, *Regulation 283/95* provides that these must be resolved by private arbitration.

The Fund has denied Mr. Carr's claim for benefits, and has asserted that the incident he describes did not occur as alleged. Mr. Carr has challenged the Fund's denial, and claims that he is entitled to benefits under the *SABS*. Given the dispute between Mr. Carr and the Fund at this "threshold level", I find that it is premature for the Fund to claim that either or both of the Respondents in this case are in priority to pay the claim. If the Fund's position that no accident took place is upheld at FSCO, there will be no requirement for any insurer to pay benefits to Mr. Carr under the *SABS*. Consequently, section 1 of *Regulation 283/95* would not be satisfied and the regulation would not be engaged.

If the Fund's position is not accepted, I assume Mr. Carr will be found to be entitled to benefits and I will then have to determine the priority dispute. In my view, the Fund's argument that the priority dispute should be determined in advance of a FSCO determination regarding Mr. Carr's entitlement to benefits is akin to placing the proverbial "cart before the horse".

It is clear that the underlying reason for the Fund's position is that the legal fees and expenses that it will incur in the course of defending the claim at the FSCO will not be recouped. Mr. Kerkmann pointed out that regardless of the result at FSCO, the Fund will not be obligated to pay Mr. Carr's benefits and so to require them to incur these costs is unfair. I agree, and am sympathetic to Mr. Kerkmann's argument. However, this appears to be a necessary result of the priority scheme, as it currently exists.

Regulation 283/95 was promulgated to address the problem of the delay in payment of benefits to claimants resulting from the length of time required for priority disputes between insurers to be resolved. The regulation essentially requires the first insurer who receives an application for benefits to "pay now, dispute later". While that has resolved the unfairness visited upon claimants under the prior regime, the burden has now shifted

to the first insurers. They will often, as in these circumstances, be required to participate in a FSCO proceeding and bear the significant costs of that process, only to have it determined later on that another insurer is in priority to pay the claim.

As counsel pointed out, the case law provides that these costs will not generally be recoverable from the insurer ultimately found to be in priority to pay the claim. In *Zurich v. Co-operators'*, *supra,* Arbitrator Jones determined that arbitrators who conduct hearings pursuant to *Regulation 283/95* have the equitable jurisdiction to order legal costs incurred to be repaid, but that it should only be "used in the most extreme of cases." He stated that the intention behind the regulation was to create a quick and efficient scheme for resolving priority disputes and that if legal costs incurred were routinely recoverable, much time would be spent examining accounts and arguing about their reasonableness. He suggested, however, that in situations in which an insurer deliberately refused to accept priority in order to avoid paying costs or expenses, they may be ordered to do so.

In the appeal decision of this case, Justice Wilson stated that she agreed with Arbitrator Jones' assessment of the facts of the case, and that she did not find any error in law in his reasons. She stated that the decision to either award or decline an insurer's request for reimbursement of legal fees is an exercise of discretion based on the particular facts of each case. What I take from these comments is that there will be cases in which arbitrators will find that equity favours the repayment of costs incurred by the first insurer. This may be one such case. I have not heard any evidence surrounding the investigations undertaken by the Fund, the actions taken by Kingsway, or what the documentation relating to the Royal policy provides. If we get to that stage and if it is clear that either of the Respondents intentionally delayed the decision to take the claim over so as not to incur the costs of the FSCO hearing with Mr. Carr, I will consider exercising my equitable jurisdiction and ordering them to repay the Fund for the legal costs it incurs.

In conclusion, this arbitration will be held in abeyance pending the determination at FSCO regarding Mr. Carr's entitlement to benefits under the *SABS*. I remain seised of the matter, and await further word from the parties regarding the result at FSCO.

DATED at TORONTO, ONTARIO this _____ DAY OF JANUARY, 2010.

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Shari L. Novick
Arbitrator