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

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

Applicant

- and -

WAWANESA MUTUAL INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Robert W. Kerkmann for the Applicant

F. Scott Taylor for the Respondent

BACKGROUND:

Vidya Sharma was injured when he lost control of the Honda vehicle that he was driving, and it flipped over and hit a tree. The accident took place in Brampton on May 30, 2007. Mr. Sharma had purchased the car a few days earlier, and it was not insured at the time of the accident.

The Motor Vehicle Accident Claims Fund ("the Fund") received Mr. Sharma's Application for Accident Benefits on October 12, 2007. The Fund assigned the claim to its outside adjusting firm, then known as CGI Adjusters Inc. ("CGI"). The adjuster assigned to the claim took various steps to investigate the matter, and provided notice to Wawanesa Mutual Insurance Company ("Wawanesa") of the Fund's intention to dispute priority of Mr. Sharma's claim on July 7, 2008. The reason for providing notice to Wawanesa was that it had issued a policy to the claimant's spouse at the relevant time, and while they had been separated for several years, they were not officially divorced.

It is uncontested that Wawanesa would be in higher priority to the Fund to pay the claim. However, the parties also agree that the Fund's notice was provided to Wawanesa well beyond the ninety-day period set out in section 3(1) of *Regulation 283/95*. The Fund contends that the 'saving provisions' of section 3(2) of the regulation excuse its late provision of notice, and should be found to apply. The parties do not dispute the relevant facts surrounding this issue, but Wawanesa disputes that the 'savings provisions' should be applied.

In the event that the Fund's late notice is excused and it can pursue Wawanesa for the benefits it paid out as a result of Mr. Sharma's claim, the parties also dispute whether the Fund can claim reimbursement for the expenses it incurred with respect to insurers' examinations conducted pursuant to section 42 of the *Schedule*.

ISSUES:

1. Is the Fund's notice to Wawanesa of its intention to dispute its obligation to pay benefits to Mr. Sharma provided beyond the ninety days permitted in subsection 3(1) of *Regulation 283/95* excused by the 'saving provisions' in subsection 3(2) ?

2. If so, are the expenses that the Fund incurred for section 42 examinations conducted recoverable from Wawanesa?

RESULT:

1. Yes, the 'saving provisions' in section 3(2) of the regulation apply to excuse the late notice provided by the Fund to Wawanesa, and Wawanesa is therefore required to reimburse the Fund for benefits it has paid out to Mr. Sharma and take over the adjusting of his claim.

2. Yes, the Fund may recover the costs of section 42 examinations conducted on Mr. Sharma from Wawanesa.

RELEVANT PROVISIONS:

Issue #1:

Regulation 283/95

> ***3. (1)*** *No insurer may dispute its obligation to pay benefits under section 268 of the Act unless it gives written notice within 90 days of receipt of a completed application for benefits to every insurer who it claims is required to pay under that*
>
> ***(2)*** *An insurer may give notice after the 90-day period if,*
>
> *(a) 90 days was not a sufficient period of time to make a determination that another insurer or insurers is liable under section 268 of the Act; and*

(b) the insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90-day period.

Issue #2:

Insurance Act

> ***268 (2)*** *The following rules apply for determining who is liable to pay statutory accident benefits:*
>
> ***268 (3)*** *An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits.*

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.*

EVIDENCE:

Calin Lau was the adjuster at CGI (now known as Claimspro) assigned to adjust Mr. Sharma's claim. He swore an affidavit setting out his involvement in the matter, and that affidavit as well as the transcript of his cross-examination was referred to at the hearing. Mr. Lau was also cross-examined by counsel for Wawanesa at the hearing. Finally, counsel also referred to several documents that were compiled in a joint document brief and filed at the hearing.

As stated above, the facts are not in dispute. The Fund received Mr. Sharma's application for benefits on October 12, 2007. Mr. Lau is a Senior Accident Benefits Specialist with Claimspro, and was assigned to adjust the Sharma claim on October 16, 2007. The police report was not received by the Fund until October 16. While it could argue that Mr. Sharma's application was therefore not "complete" until that date, nothing turns on that fact. Counsel agreed at the hearing that the ninety-day period commenced on October 12, 2007, and I will therefore focus on the investigation that Mr. Lau conducted from that date until January 10, 2008 in order to determine whether the criteria contained in subsection 3(2) of the regulation have been met.

The OCF-1 application form submitted on Mr. Sharma's behalf by his representatives, Canadian Injury Centers ("CIC"), indicates that Mr. Sharma was operating his vehicle without insurance on the date of the accident. The form also indicates that Mr. Sharma was unemployed, and that he was neither a listed driver on a policy, nor covered under a policy of his own, that of a spouse, or a dependant or employer. Under the heading "marital status", the box next to the "divorced" option is checked off. Mr. Sharma (like all claimants who apply to the Fund for benefits) also submitted a Form 3, in which he certified that he had investigated and determined that he did not have access to a motor vehicle liability policy, including that of a "spouse or former spouse".

Despite the representations made on the above forms, Mr. Lau took various steps to investigate whether priority for the claim could lie with another insurer. He wrote to Mr. Sharma on October 16 upon being assigned the file, and requested that a signed statement and other information be provided. He also ordered an Autoplus search, which revealed that Mr. Sharma was not covered by any auto policies on the date of the accident. He requested that a plate search be conducted on the vehicle involved in the accident, and it confirmed that Mr. Sharma was the registered owner of the Honda that was involved in the accident. Mr. Lau then requested that all documentation relating to the ownership permit referred to on the plate search be ordered, so that he could determine what insurance company Mr. Sharma had identified as insuring the vehicle when he registered the license plate with the Ministry of Transportation.

Approximately one month after that request was made, Mr. Lau received the documentation relating to the transfer of ownership for the Honda. The Application for Transfer names an insurer, but the copy of the document received was dark and the writing unclear. Mr. Lau requested that the original copy of the document be sent. It appears to indicate that the insurer is "Progress Insurance". Mr. Lau testified that he read it as saying "Broghers Insurance", and after conducting an internet search that was fruitless, he determined that no such company existed.

Mr. Lau also ordered a VINClaims search on November 2, 2007, to determine the insurance history on the vehicle. It revealed that a policy had been issued by State Farm Mutual Insurance, but was cancelled at the insured's request. He called State Farm to clarify the details of this, and was advised that the former owner of the vehicle had cancelled the policy on April 14, 2007, some six weeks prior to transferring the vehicle to Mr. Sharma.

Mr. Lau also continued to pursue Mr. Sharma and his representatives in order to obtain a signed statement. A record of his notes recorded on the "SMART" system that was in use at CGI at the time indicate that Mr. Lau spoke with someone at CIC on November 2, 2007, and suggested times that he would be available to meet with Mr. Sharma to take a statement. When no return call was received, he sent a letter to Mr. Sharma on November 7 enclosing a Statutory Declaration form to be filled out, and requesting that releases authorizing him to obtain various health records be executed. Mr. Lau advised that the Statutory Declaration includes several standard-type questions, many of which are designed to identify potential sources of insurance.

Mr. Lau received a letter from Mr. Eshel at CIC on November 14, 2007, advising that Mr. Sharma would prefer to provide a signed statement rather than complete the Statutory Declaration that was forwarded. He requested that Mr. Lau contact their office to schedule an appointment to take the statement. Mr. Lau then called CIC both on November 15 and 16 to arrange an appointment, and was advised that they would get in touch with Mr. Sharma and confirm an appointment for the following week. When no call was received, Mr. Lau sent a further letter to Mr. Sharma on November 21, copied to his representatives, with the same requests for information as had been contained in his November 7 letter. The letter also advised that no benefits would be payable as of November 28, if the requested information was not provided.

Someone at CIC then contacted Mr. Lau on November 27 to request that transportation be provided to Mr. Sharma for a medical assessment that had been arranged for later that

week. Mr. Lau advised that he had never received a response to his request that a meeting be scheduled with Mr. Sharma to enable him to take a signed statement. The representative asked that a further fax be sent with that request, directed to the attention of Mr. Eshel. Mr. Lau complied with that request, and later spoke with yet another person at the CIC office who advised that he would contact Mr. Sharma and then call back to arrange an appointment. After waiting a further ten days without a response, Mr. Lau sent yet another copy of the letter he had previously sent on two occasions to Mr. Sharma, copied to CIC, on December 6, 2007.

Mr. Lau also received a call from an assessment center on December 6, advising that the taxi company that had been hired to transport Mr. Sharma to an appointment had advised that Mr. Sharma was no longer living at the address that they had on file. The notes filed indicate that Mr. Lau called CIC and spoke with Mr. Eshel once again on December 11. Mr. Eshel finally admitted that he had not been able to locate Mr. Sharma in order to arrange an appointment to obtain a signed statement, but advised that he would try to do so again. A few days later, Mr. Lau called the clinic at which Mr. Sharma was receiving treatment, and requested that the clinic ask for Mr. Sharma's address and phone number when he next appeared for treatment. He also requested that they advise him to contact his legal representative.

Mr. Lau called CIC again on January 8, 2008 to inquire whether they had been able to get in touch with the claimant. He was initially advised that they had not, but he subsequently received a brief fax from CIC later that day advising that Mr. Sharma's new address was 60 Callowhill Drive in North York. Mr. Lau passed that information on to the assessment center. He was subsequently advised by that office that Callowhill Drive was in Etobicoke and not North York, and that an apartment unit number was required. No further steps were taken by Mr. Lau to investigate the priority issue before the ninety-day deadline passed on January 10, 2008.

Mr. Lau admitted under cross-examination that while he was roughly aware that the ninety-day period expired some time in January, he was not aware of the exact date, as he

had not diarized it. He testified that the SMART system in use at the time at his office did not have either a "tickler" system or an automated "bring-forward" system, and that he would often diarize important dates in the Outlook system.

On June 11, 2008, Mr. Lau received a report from Dr. Friedlich, a dentist who had conducted an assessment of Mr. Sharma under the auspices of LifeMark Assessments. He testified that he reviewed the report, and noted that Mr. Sharma had described himself to the dentist as being "unofficially divorced". At approximately the same time, Mr. Lau received correspondence advising that the law firm Neinstein & Associates had taken over as Mr. Sharma's representatives. After requesting details from them regarding the claimant's "unofficially divorced" spouse, Rose Leto at the Neinstein firm provided her contact information, and advised that Mr. Sharma had not been in contact with her for seven years.

A further search was conducted on July 7, 2008, and it was determined that Shama Sharma, Mr. Sharma's wife, was covered by an auto policy issued by Wawanesa on the date of loss. Mr. Lau sent a notice advising Wawanesa of the Fund's intention to dispute priority for payment of Mr. Sharma's claim on the same day.

PARTIES' ARGUMENTS:

As set out above, the issue to be determined is whether the Fund is estopped from asserting that Wawanesa is in higher priority to pay Mr. Sharma's accident benefits claim, given that it did not provide notice to Wawanesa within ninety days of having received a completed application for benefits.

Counsel for the Fund essentially relied on Justice Perell's comments in the *Liberty Mutual Insurance v. Zurich Insurance* decision [2007] O.R. (3d) 629), and contended that the ninety-day deadline for providing notice should be extended in accordance with section 3(2) of the regulation. He noted that despite the fact that the initial information provided by Mr. Sharma clearly suggested that there was no applicable insurance, Mr. Lau had conducted a thorough investigation into priority. He referred to the various

searches that were ordered, and Mr. Lau's efforts in following up with State Farm on the only lead obtained from these searches.

Counsel also outlined Mr. Lau's many attempts to obtain a signed statement from Mr. Sharma, in order to confirm the information provided on the forms that were filed by his representatives on his behalf. He referenced nine different phone contacts between Mr. Lau and CIC between November 2, 2007 and January 8, 2008 for the purpose of arranging a meeting in order to obtain a signed statement. He noted that Mr. Lau also sent four letters requesting that a meeting be set up. Mr. Kerkmannn also submitted that the courts have now made it clear that an adjuster's actions, or lack of action, in investigating priority after the expiry of the ninety-day period are not relevant.

Counsel for Wawanesa argued that the late notice provided by the Fund should not be excused, and that the Fund should not be permitted to transfer priority of the claim to Wawanesa. Mr. Taylor contended that the Fund did not meet the onus it faces to demonstrate both that ninety days was not sufficient within which to make a determination that another insurer was liable, and that a reasonable investigation had been conducted regarding whether another insurer was liable within ninety days.

Counsel contended that Mr. Lau's failure to diarize the January 10, 2008 deadline was a significant oversight, and argued that if he had been aware of this deadline he would likely have adopted a more proactive approach. He submitted that instead, Mr. Lau allowed Mr. Sharma's representatives to dictate the tempo of their interactions, and that he simply waited for his calls requesting that an appointment be scheduled with Mr. Sharma to be returned. Counsel contended that if Mr. Lau had been able to obtain a signed statement from Mr. Sharma within the permitted ninety-day period, he would likely have discovered that Mr. Sharma was not legally divorced at the time of the accident, and that would have led to the Wawanesa policy covering his spouse in a timely manner.

Mr. Taylor submitted that Mr. Lau should have scheduled an examination under oath, in order to put some pressure on Mr. Sharma and his representatives to provide the requested information before the expiry of the ninety-day deadline. He contended that someone with ten years of experience as an accident benefits adjuster, as Mr. Lau had, should have had a "tickler" system or some other method in place for keeping track of important dates as he conducted an investigation.

ANALYSIS & FINDINGS:

I agree that it is critical that an adjuster conducting a priority investigation have a clear sense of when the ninety-day deadline falls. It is prudent practice, in my view, to diarize the date, given the potential consequences of missing the deadline. However, I do not agree that the failure to do so is fatal to an insurer's contention that the 'saving provisions' of section 3(2) should apply.

Justice Perell's decision in the *Liberty Mutual v. Zurich* case cited above summarises the law in this area and attempts to set general guidelines with respect to the question of when the ninety-day period may be extended. He states that an insurer seeking to deliver a notice after 90 days must "show both that it exercised due diligence and also that there was something in all the circumstances that would justify requiring more than 90 days to make a determination about whether to issue a notice to a particular insurer" (at para.23). I am satisfied on the evidence in this case that the Fund made reasonable investigations necessary to determine if another insurer was liable within ninety days in this case, and has accordingly met the second branch of the test expressed in section 3(2)(b). Mr. Lau took all of the logical steps that one would expect to be taken in order to confirm that the information provided, suggesting that no other insurance coverage was available to Mr. Sharma, was true. The searches he conducted and the efforts he made are outlined above, and I will not repeat them here.

The focus then shifts to the question of whether ninety days was insufficient to make a determination that another insurer was liable under section 268 of the *Act*. This is required by section 3(2)(a), and is usually the more difficult part of the analysis. In the

Liberty Mutual case, the arbitrator found that Liberty did not meet this branch of the test, as the police report that included the father's address, which turned out to be the piece of information that ultimately led the adjuster to determine that the Zurich policy should be primary, had been received within the ninety-day period.

I find that in this case, despite Mr. Lau's reasonable efforts, no information was available to him prior to the expiry of the ninety-day period that would have allowed him to conclude that another insurer was liable under section 268. All signs pointed to a single vehicle accident, with the claimant driving an uninsured vehicle. The information provided indicated that Mr. Sharma lived alone, was unemployed and was not in a relationship of dependence with anyone. The OCF 1 form submitted indicated that he was "divorced", which turned out not to be true.

The courts have clearly stated that section 3(2) of the regulation is to be interpreted strictly, and that a misrepresentation made by a claimant, even regarding a material fact, does not automatically result in the ninety-day period being extended. (*Primmum Insurance Co. v. Aviva Insurance Co. of Canada*, [2005] O.J. no. 1477 (S.C.J). However, I find that when Mr. Sharma's misrepresentation with respect to his marital status is combined with his lack of co-operation in committing to meet with Mr. Lau to provide a signed statement, despite Mr. Lau's repeated requests that he do so, the ninety days was insufficient within which to make a determination that Mr. Sharma was in fact still legally married to Shama Sharma, the Wawanesa insured.

I note that Mr. Sharma also moved at least once during the relevant period and did not provide his new address either to the Fund or to his own representatives. This also resulted in some delay, as the focus of the inquiry shifted to determining his whereabouts so that he could be contacted by his representatives in order to confirm a meeting time with Mr. Lau. To further complicate matters, his representatives were quite responsive to Mr. Lau's efforts to arrange a meeting with him, and consistently returned his phone calls and responded to his letters, albeit in a disorganized manner. This would have presumably left Mr. Lau with a sense that he was not being ignored and may have lulled

him into a false sense of security. If he had been 'stonewalled' in his efforts to communicate with Mr. Sharma himself and his representatives, he would likely have become more aggressive in his attempts to obtain confirmation of the information that had been received.

Given all of the circumstances outlined above, and keeping in mind that a standard of perfection is not required, I find that the Fund has established that ninety days was insufficient in which to determine that another insurer was liable under section 268 of the *Act*, and it has therefore also satisfied the first branch of the test set out in section 3(2)(a) of the regulation.

Accordingly, the Fund is not prevented from pursuing Wawanesa as the priority insurer for Mr. Sharma's claim. Given that the Wawanesa policy was in effect at the relevant time, and by virtue of the priority scheme set out in section 268(2) of the *Act*, it must reimburse the Fund for benefits paid out and take over the adjusting of Mr. Sharma's claim.

ARE SECTION 42 EXPENSES RECOVERABLE ?

I was advised at the hearing that the Fund has paid out a total of $15,742.87 on this claim. Other than approximately $1360 in medical and rehabilitation benefits, the balance of the amounts paid out have been either for section 24 assessments or Insurer's Examinations conducted under section 42 of the *Schedule.* The parties agree that the cost of section 24 assessments incurred by the Fund should be reimbursed by Wawanesa, but Wawanesa takes the position that the cost of section 42 examinations are not recoverable in a priority dispute. The Fund disagrees.

Counsel for the Fund was unable to confirm the exact amount incurred for the section 42 examinations conducted at the hearing, but undertook to do so if it became necessary.

Both counsel made detailed submissions on this point at the hearing. Counsel for Wawanesa noted that the relevant parts of section 268 of the *Act* and *Regulation 283/95*

refer to an insurer's liability to pay "benefits", and do not mention the cost of examinations or expenses that an insurer incurs in the handling of a claim. He argued that if the Legislature intended that the expense of a section 42 examination be recoverable in a priority dispute, they would have explicitly said so and that to read this right to recovery into the scheme would amount to me exceeding my jurisdiction. Counsel relied on Arbitrator Malach's decision in *Certas Direct v. Allstate* (unreported, dated November 10, 2004), in which he concluded that as the regulation is silent with regard to the recovery of these expenses, an arbitrator has no authority to award them.

Counsel for Wawanesa also noted that arbitrators and judges agree that section 42 expenses incurred by an insurer are generally not recoverable in a Loss Transfer case. He contended that these decisions should be persuasive in this context, as the obligation to reimburse under those provisions also focuses on the word "benefits".

Counsel for the Fund relied on Arbitrator Jones' decision in *Wawanesa v. Kingsway* (unreported, dated April 6, 2005), in which he determined that the cost of insurers' section 42 examinations are recoverable in a priority dispute. He noted that the arbitrator chose not to interpret the language in the *Act* and regulation as restrictively as Arbitrator Malach had in the *Certas* case, and that he cited "good policy reasons" for requiring the priority insurer to reimburse the first insurer for the cost of examinations incurred.

Counsel for the Fund also referred to Arbitrator Jones' decision and the subsequent appeal in the case of *Zurich Insurance v. Co-operators' Insurance* (unreported, dated January 3, 2007, upheld by Wilson, J., May 1, 2008), relating to the recoverability of legal fees in a priority dispute. He noted Arbitrator Jones' reference to having exercised the equitable relief provided to arbitrators in section 31 of the *Arbitration Act* in the *Wawanesa* case cited above, to find that the cost of section 42 examinations are recoverable, and his declining to do so in the circumstance where legal costs were being sought by an insurer, while stating that he would do so in "extreme cases". Justice Wilson upheld the decision and did not find any error of law. She also explicitly agreed that an arbitrator in that position could exercise his or her discretion, if the facts of a particular case merited it.

Counsel argued that that must lead to the conclusion that arbitrators can exercise equitable jurisdiction to order reimbursement for expenses that are not explicitly provided for in the *Act* or regulations.

I agree with the position advanced by counsel for the Fund on this issue. I read Justice Wilson's upholding of Arbitrator Jones' decision in the *Zurich v. Co-operators'* case as an endorsement of the notion that arbitrators do have equitable jurisdiction to order priority insurers to reimburse the first insurer who adjusted the claim for legal fees incurred, when appropriate, and for costs of examinations conducted under section 42 of the *Schedule.* I am not certain that I need to exercise that jurisdiction to order Wawanesa to reimburse the Fund in this case however, as the right to conduct an insurer's examination appears in the *Schedule* and is designed to assist an insurer to determine whether an insured person is entitled to receive, or continue to receive a benefit. In my view, that makes it an integral part of the scheme to provide benefits to claimants, in a way that surveillance or adjusting costs are not. Either way, I find that the cost of examinations conducted pursuant to section 42 are recoverable in priority disputes between insurers.

I also agree that there are important policy reasons for favouring this approach. If insurers could not seek reimbursement for section 42 expenses in priority disputes, it would act as a disincentive for a first insurer who receives an application and decides to pursue another insurer for priority from properly adjusting the claim in its earlier stages. In my view, this would not benefit any of the parties involved in the accident benefits system, and is to be discouraged.

For all of the reasons expressed above, I find that Wawanesa is required to reimburse the Fund for any section 42 expenses it incurred in adjusting Mr. Sharma's claim, upon being provided with proper documentation confirming the amounts expended.

I remain seised of this matter in the event that the parties experience any difficulty in implementing my findings.

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

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Shari L. Novick

Arbitrator