IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, as amended, Section 268 and Regulation 283/95 made thereunder

AND IN THE MATTER OF THE ARBITRATION ACT,
S.O. 1991, c. 17, as amended

AND IN THE MATTER OF THE MOTOR VEHICLE ACCIDENT CLAIMS ACT, R.S.O. 1990, c. M41

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 -

PILOT INSURANCE COMPANY and KINGSWAY GENERAL INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

John Friendly for the Applicant

Grant R. Dow for the Respondent Pilot Insurance Company

ISSUES:

1. Did the Motor Vehicle Accident Claims Fund "the Fund" provide written notice of its intent to dispute priority within 90 days of receiving a completed application for accident benefits and if not, do the saving provisions of Section 3 (2) apply?

DECISION:

1. The Fund failed comply with the requirements of Section 3 of Regulation 283/95 and the "savings provisions" do not apply. Accordingly it is responsible to pay accident benefits to or on behalf Mr. Grzanka

HEARING:

The hearing in this matter took place in the City of Toronto in the province of Ontario on December 22, 2009. A subsequent teleconference hearing was held on April 29, 2010 to deal with further case law submissions.

FACTS:

This priority dispute arises out of a cyclist/motor vehicle collision that occurred on or about November 30, 2006. At that time, a Mr. Waldmar Grzanka was a cyclist who was struck by a motor vehicle. As a result of his injuries, Mr. Grzanka submitted a signed application for accident benefits on December 19, 2006, which was received by the Fund on or about March 7, 2007.

An application for accident benefits, when submitted to the Fund, requires, pursuant to part II of the application, that a "motor vehicle accident (police) report" be attached before the applicant can make an application for payment of accident benefits from the MVACF. No such police report was attached to the application for accident benefits. For reasons which I will set out later in this decision, the Fund did not put the respondent, Pilot Insurance on notice regarding the priority issue until October 10, 2008 or approximately one and a half years after the Fund received the application for accident benefits.

The Fund took a number of positions at the hearing. These included:

1. Until a police report is received, there is no completed application and accordingly the time for putting an insurer on notice does not begin to run;

2. If there is "deemed" point at which the Fund should be expected to realize no police report was available, and the 90 day period begins to run, then this occurred sufficiently late in the process that the Fund complied with the 90 day requirement, or alternatively the saving provisions of section 3 (2) of Regulation 283/95 should apply;
3. There is, in essence, a different definition of a "completed" application for the purposes of an insurer providing benefits to an insured than for the purpose of an insurer putting another insurer on notice for a priority dispute. If this is so, the Fund argues it provided notice to Pilot within the required time frame.

Before delving into the merits of the parties' positions, it is necessary to set out in some detail the basic of this case.

As noted above, the application for accident benefits was received by the Fund on or about March 7, 2007 but without the required police report. The Fund retained CGI Adjusters who made repeated requests of Mr. Grzanka to provide a police report between March 24 and May 8, 2007 in order to complete his application for accident benefits.

On May 8, 2007 the Fund obtained a signed statement from Mr. Grzanka. Mr. Grzanka indicated in the statement that after his bicycle was struck by a motor vehicle, the driver of that vehicle stopped and assisted him and made a call on her cell phone, "calling 911" to advise police of the accident. The police subsequently arrived on the scene and apparently investigated the accident. Mr. Grzanka indicated in his statement that the police had not provided him with a police report or had the police constable given him his card.

It is clear that Mr. Grzanka himself made efforts to obtain a police report. For example, on January 12, 2007 Mr. Grzanka made a formal application with the Police Services for a copy of the police report, but the Police Services required the officers name, badge number and plate number of the vehicle involved as well as drivers name, which Mr. Grzanka did not have.

While the Fund took other steps to attempt to determine who the insurer of the striking vehicle might be, it was not until approximately mid September 2007 that an investigator hired by the

Fund determined that the investigating police officer was Constable Andrew Taylor of 22 Division Traffic and that the radio call involving the accident was compiled under file K139444.

The investigator spoke to Constable Taylor on September 20, 2007. The constable indicated at that time that his reports, notes and memo book for that time frame had gone missing from the police division. The constable indicated that it was "very possible he did not write an official report on the incident". The constable told the investigator that he would contact the investigator when and if his memo pad was found.

In his report of October 15, 2007, the investigator reported that he had learned that the vehicle driver had placed a call to the police to report the accident. The investigator reported that the police advised him that any information in such a call could only be obtained by way of a court order or Freedom of Information request. The investigator also stated the police advised that a record could exist of the call and directed the investigator to make a Freedom of Information request. In his report, the investigator recommended an inquiry be made of the Toronto Police Services Freedom of Information Unit.

The original Freedom of Information application was made on October 12, 2007. On November 29, 2007, the Toronto Police Services denied the request citing privacy issues. The investigator then followed up with Toronto Police Services, who on December 10, 2007 wrote a letter to the investigator advising that the Toronto Police Services had written the 911 caller/third party driver, requesting disclosure of her name etc. On or about January 17, 2008 the investigator advised the Fund that the Freedom of Information request had again been denied.

It would appear, from a review of the documentation submitted at the hearing, that very little was done with regard to locating the driver by way of the 911 call between January 17 and May 21, 2008, a period of 124 days. I note, however, that the Fund did, on May 22, 2008, write to Kingsway General Insurance Company and ask them for their position on priority with regard to the accident. The Fund had received certain information which suggested Kingsway might have insured the vehicle involved in the accident. This later turned out to be incorrect. Kingsway

failed to respond to this letter and the Fund turned the matter over to their legal counsel, who served Notice of Commencement of Arbitration on Kingsway on or about July 9, 2008.

It would appear that the lawyer for the Fund was assigned the file in early July, 2008. In addition to serving the Notice of Commencement of Arbitration against Kingsway, counsel on August 21, 2008 filed a motion to obtain, among other things, the particulars of the 911 call. I note the supporting affidavit was dated August 11,2008.

On September 4, 2008, the Fund obtained an unopposed Order to provide particulars of the 911 call. The records were provided by the Toronto Police Services on September 8, 2008, identifying Michelle Loo as the driver of the vehicle that struck Mr. Grzanka. A driver record and insurance search conducted on September 12, 2008 provided contact information and Ms. Loo confirmed her involvement in the accident and that her insurer was Pilot on October 8, 2008. It would appear that the time from counsel for the Fund becoming involved on the file until the information confirming Pilot's involvement was approximately 90 days.

Notice of Commencement of Arbitration was served on Pilot by the Fund by fax on October 14, 2008.

The Fund made a number of submissions with regard to the running of the 90 days for service of the Notice of Dispute.

It's initial position was that until a police report is received, there is no completed application and accordingly the 90 days does not begin to run. I do not agree with this position. To allow such a position could result in the Fund continually denying an injured applicant access to needed accident benefits through no fault of the applicant. That is what, arguably, has happened in this case. While the Fund did do Section 42 assessments, it repeatedly rejected the applicant's requests, citing the fact that they had not received the police report and accordingly the application was not complete. In fairness to counsel for the Fund, this position was taken before the appeal decision of Mr. Justice Perell was released in Her Majesty the Queen in Right of Ontario as Represented by The Minister of Finance (2010 ONSC 1770).

While that decision has clarified the law in this area somewhat I wish to make it very clear that the Fund can not simply take the position that it has not received a completed police report and therefore there is not completed application and accordingly continuously not pay benefits.

In Her Majesty the Queen in Right of Ontario as Represented by the Minister of Finance and Lombard Insurance, (unreported decision Arbitrator S. Novick, released December 28, 2009) Arbitrator Novick dealt with a somewhat similar situation. In that case a cyclist collided with a motor vehicle while the cyclist was fleeing from mall security guards on June 30, 2007. The police officer prepared an incident report on the same day, but that report indicated no further action would be taken and no police report was prepared. On July 10, 2007 the claimant requested a police report from police for the purposes of a claim for medical treatment. The claimant retained a paralegal who submitted the application for accident benefits to the Fund. The applicant indicated that a police report had been requested. The Fund responded by saying it required a police report and the application was not completed and the claim could therefore not be processed until a police report was provided. An investigation was undertaken by the Fund and the police were contacted on February 1, 2008, the investigator hired by the Fund spoke with the claimant's paralegal, who gave the investigator a copy of the police investigation report. Arbitrator Novick found, as a fact, that at this point, the representative of the Fund realized that no police was going to be produced, and accordingly the application for benefits would be deemed to have been complete. The 90 days therefore begun to run when the Fund should have reasonably known that there was no police report.

Justice Perell rejected Novick's approach. In doing so, he held that a " completed application form" could mean one thing when considering the relationship between the insured and the insurer and another thing when dealing with a claim of priority between insurers.

Justice Perell noted:

> "In this context of exercising its rights, a completed application is needed not for the purposes of performing the first insurer's obligations to pay benefits but rather it is needed for the first insurer to exercise its right to dispute its obligation to pay benefits. In this context, a first insurer would be able to exercise its rights if it receives: (1) a genuinely completed application; or (2) an application, which although inaccurate or incomplete in some particulars, is nevertheless functionally

adequate. Further, once again, under the doctrines of waiver or estoppels, there are situations where a first insurer by its conduct might be treated as if it had received a completed application."

Mr. Justice Perell, in Lombard, went on to note:

> "In the case at bar, all that happened on February 11, 2008 was that the Fund learned that it would not be receiving the information it needed to dispute its obligation to pay benefits through the medium of a MVA (Police) Report. In my opinion, this triggered an obligation on the Fund to pursue this information elsewhere, which is what it did, but it did not create a situation where the Fund should be deemed to have received a completed application, when it clearly had not received a completed application…… There was nothing in the Fund's conduct that would be the basis for estopping it from asserting that it had not received a completed application.
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> I understand that it is very rare that it would be impossible to obtain a MVA (Police) Report, and thus the circumstances of this case presented a rare problem. In my view, the correct solution for that rare problem was to treat the application form as a completed application for the purposes of having an insurer (the Fund) promptly pay benefits but not as a completed application for the different purposes of allowing the insurer to exercise its rights to dispute its obligation to pay those benefits, provided that the insurer continues to take steps to ascertain the missing information."

Justice Perell then held that the 90 days ran from the date the Fund obtained the licence number of the vehicle in question.

I have some difficulty with the approach taken by Justice Perell. It sets up a different test for what is a completed application depending on the purpose. While this may well be desirable, it is certainly not what the regulation states. It also adds uncertainty and complexity in applying the regulation. As was stated by Mr. Justice Sharpe of the Ontario Court Appeal, in Kingsway General Insurance Company and West Wawanosh Insurance Company , Docket C36235, released February 25, 2002 :

> "The Regulation sets out in precise and specific terms a scheme for resolving disputes between insurers. Insurers are entitled to assume and rely upon the requirement for compliance with those provisions. Insurers subject to this Regulation are sophisticated litigants who deal with these disputes on a daily basis. The scheme applies to a specific type of dispute involving a limited number of parties who find themselves regularly involved in disputes with each other. In this context, it seems to me that clarity and certainty of application are

> of primary concern. Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records. Given this regulatory setting, there is little room for creative interpretations or for carving out judicial exceptions designed to deal with the equities of particular cases."

The approach set out in Lombard will add uncertainty and complexity to accident benefit insurers who are already overburdened with rules, guidelines and deadlines.

Having said this, I accept that I am bound by Mr. Justice Perell's decision. Counsel for the Fund argues that the date to be designated for having received the completed application form would be on or about September 12, 2008 being the date that the Fund received the 911 information. The Fund put Pilot on notice on or about October 14, 2008 clearly within the 90 days of receiving the 911 information.

If the analysis were simply to be when was the information received and when was notice given, I would agree with the Fund's position. Mr. Justice Perell, however, noted in his decision, that there may be a situation where the first insurer by its conduct might be treated as having received a completed application.

In my view, such a situation may occur when the first insurer does not act diligently in attempting to obtain the necessary information when it first learns that there may not be a police report forthcoming. In our case the Fund obtained a signed statement on May 8, 2007 from the claimant indicating that a police report may not be available and that a 911 call had been made. By this time the claimant himself had made a request to the Police for a report without success and the Fund was aware of this. Very few efforts were made by the Fund between May 2007 and October 2007 to obtain the necessary information. On or about October 15, 2007 the Fund investigator interviewed the investigating officer and knew that there well may have been no police report. The Fund also knew at that point that the 911 call existed and there were two possible ways to get the information. Certainly by October 15, 2007, at the latest, and possibly earlier, the Fund should have been attempting to obtain the 911 information. In fairness to the Fund, it did attempt to obtain the information by way of a Freedom of Information Application.

However, it was clear by January 17, 2008 when the second request was denied that the Freedom of Information route would not be successful.

I am troubled that it took from January 2008 until August 2008 to proceed with the court application. I accept such a court application takes time to prepare and bring before the courts. Counsel for the Fund, once he received the file moved expeditiously and obtained the necessary order and the information. I am not satisfied that the Fund moved with sufficient speed between January and August of 2008 and accordingly because of this delay, they are estopped from taking the position that the competed application was not received until September 2008,

In my view the Fund should have moved for the court order far earlier than it did. At the very latest it should have been moving in February 2008 to obtain the records through the courts. It did not. Had it done so, it would appear that they would have been able to obtain the records with approximately 90 days, as was subsequently done. Accordingly, even if one were to deem the application completed by February, the Fund would not have come with the saving provisions of Section 3 (2), as 90 days from that date would have been sufficient time to obtain the information.

For the reasons I have set out above, I find that the Fund failed comply with the requirements of Section 3 of Regulation 283/95 and accordingly it is responsible to pay accident benefits to or on behalf Mr. Grzanka

In the event that the parties cannot agree with regard to the issue of costs I may be spoken to.

Dated at Toronto, this _____ day July 2010.

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M. Guy Jones
Arbitrator