

**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:

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

- and -

THE NORDIC INSURANCE COMPANY

Respondent

DECISION ON A PRELIMINARY ISSUE

COUNSEL:

Daniel Strigberger for the Applicant

Lora Castellucci for the Respondent

BACKGROUND:

Pouvanandran Kishokumar was a passenger in a vehicle that was involved in an accident on February 22, 2009. The vehicle was insured by the Nordic Insurance Company (“Nordic”). He submitted an application for payment of accident benefits to Economical Mutual Insurance Company (“Economical”), the insurer of his aunt and uncle’s vehicle. Mr. Kishokumar lived with his aunt and uncle at the time of the accident, and claimed to be financially dependent upon them.

Economical accepted the claim, but disputed that the Claimant was dependent upon its insureds. It forwarded a Notice of Dispute Between Insurers to Nordic, alleging that they were in higher priority to pay the claim. Nordic maintained that the Claimant was financially dependent upon his aunt and uncle, and Economical advised that it would proceed to arbitration.

The parties agree that Economical sent its Notice to Applicant of Dispute Between Insurers on May 6, 2009. There is no dispute that this was within the ninety-days permitted by section 3 of the regulation. Nordic did not apparently receive the notice until May 12, 2009. It continued to dispute priority, and Economical then sent its Notice of Intention to Arbitrate on May 10, 2010. This notice was received by Nordic on May 11, 2010.

Nordic contends that Economical is barred from proceeding with this priority dispute, as it did not initiate arbitration within the one-year time frame permitted by subsection 7(2) of *Regulation 283/95*.

HEARING:

Counsel agreed to have this issue determined by way of a preliminary hearing. A hearing was convened on April 11, 2012 in Mississauga, Ontario, pursuant to the *Arbitration Act, 1991* and *Ontario Regulation 283/95* of the *Insurance Act*.

ISSUE IN DISPUTE:

1. Did Economical initiate arbitration against Nordic within one year of giving notice under section 3, as required by section 7(2) of *Regulation 283/95*?

RESULT:

1. Yes, Economical initiated arbitration within the one-year time frame provided in section 7(2) of the regulation. The “one-year clock” started on May 12, 2009, the date that Nordic received notice from Economical that it was disputing its obligation to pay benefits to Mr. Kishokumar.

RELEVANT PROVISIONS:

At the time of this accident, the following provisions were in force:

Regulation 283/95:

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.

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 section.

7. (1) If the insurers cannot agree as to who is required to pay benefits, or if the insured person disagrees with an agreement among insurers that an insurer other than the insurer selected by the insured person should pay benefits, the dispute shall be resolved through an arbitration under the Arbitration Act, 1991.

7. (2) The insurer paying benefits under section 2, any insurer against whom the obligation to pay benefits is claimed or the insured person who has given notice of an objection to a change in insurers under section 5 may initiate the arbitration but no arbitration may be initiated after one year from the time the insurer paying benefits under section 2 first gives notice under section 3.

FACTS :

The parties filed an Agreed Statement of Facts at the hearing. No *viva voce* evidence was called.

As outlined above, the parties agree that Mr. Kishokumar claimed that he was financially dependent upon his aunt and uncle and submitted an Application for Accident Benefits to Economical, their insurer. The application was received on March 17, 2009. Economical disputed that the Claimant was financially dependent upon their insureds, and took the position that Nordic, as the insurer of the vehicle in which he was an occupant, was in higher priority to pay the claim.

The parties also agree that Economical sent a letter and Notice to Applicant of Dispute Between Insurers (“DBI Notice”) to Nordic that was dated May 6, 2009. It was received by Nordic on May 12, 2009. Economical then sent a Notice of Intention to Arbitrate to Nordic, dated May 10, 2010. That document was received by Nordic on May 11, 2010.

PARTIES’ ARGUMENTS:

The parties’ dispute centers on whether the date of Nordic’s receipt of the DBI Notice on May 12, 2009 begins the “one-year clock” within which arbitration must be initiated, or whether the count begins on the date that the notice was sent by Economical (May 6, 2009).

Nordic contends that the “one-year clock” for providing notice of commencement of arbitration began on May 6, 2009, the date Economical forwarded its Notice of Dispute form to Nordic, and that the Arbitration notice was then received five days beyond the one-year allowable period. Economical disagrees with this approach, and argues that it is the *date of receipt of the DBI notice* that starts the one year time frame in section 7. It contends that it had until May 12, 2010 to provide notice of commencement of arbitration, and that it did so, in compliance with the regulation.

Counsel for Nordic submitted that as the phrase “gives notice” in subsection 7(2) is not defined anywhere, and the requirements for giving notice are not spelled out in the regulation, it is appropriate to turn to dictionary definitions of that phrase. She cited definitions of the word “give” from Webster’s online dictionary, including “to impart” and “to bestow without receiving a return”. Counsel noted that these definitions do not suggest or imply a requirement of receipt, and that the focus is on sending something rather than it being received.

Counsel for Nordic also contended that there are no arbitral or court decisions directly on point. She noted that in the case of *Bank of Montreal v. Big White Ski Development Ltd.* 49 D.L.R. (4th) 766 (B.C.C.A), the court considered the meaning of the word “give” in another statute, and opted for the definition that required that notice be provided or sent as opposed to being “received”.

Economical contends that the regulation provides the first insurer who has received a completed application for benefits with one year from the date that its notice is received by the insurer it is pursuing for priority (the ‘target insurer’), in which to initiate arbitration. Counsel argued that the section 3 notice in this case was received by Nordic on May 12, 2009, the arbitration notice sent by Economical and received on May 11, 2010 was within the one-year time frame permitted by subsection 7(2) of the regulation.

Counsel for Economical referred to and relied on Arbitrator Samis’ decision in *Economical Mutual Insurance v. Belair Insurance Company* (unreported, dated May 2, 2006). In that case, the notice of dispute was found to have been sent by the first insurer within ninety days of it having received a completed application for benefits, but only received by the ‘target insurer’ after the expiry of the ninety day period. Arbitrator Samis found that the phrase “giving notice” requires that something be received, and determined that the section 3 notice sent by Economical in that case was not provided within the required ninety days and that they were therefore in breach of the regulation.

Mr. Strigberger submitted that the above decision squarely addresses the issue in this case, and is determinative of the matter. He also referred to earlier court decisions addressing the question of when service of a document is effective, and noted that the focus is on the date upon which the document is received by the party it is intended for, as opposed to the date that it was sent.

ANALYSIS:

While the question posed in this case is narrow, the underlying issue raised is an important one – when is notice of a first insurer’s intent to dispute its obligation to pay benefits to a Claimant “given” to the ‘target insurer’? In my view, it is the date that the written notice required by section 3 of the regulation is actually received by the ‘target insurer’, as opposed to the date that it is sent. In some cases, depending on the method of transmission (facsimile, same-day courier) that date will be the same; in many cases, however, the notice is sent by regular mail and the few (or several) days it takes to travel from the insurer sending it to the company receiving it makes the difference between falling within or outside of the allowable time frame.

While Arbitrator Samis was addressing the question of whether a section 3 notice was sent in a timely manner in the *Economical v. Belair* case, *supra*, I find that his analysis is germane to the issue I am being asked to decide, as the parties here agree that it is the date that the section 3 notice was “given” by Economical to Nordic that starts the ‘one-year clock’ for the purpose of subsection 7(2). He referenced the Court of Appeal’s comments in the *West Wawanosh v. Kingsway* decision to the effect that the parties involved in priority disputes are presumed to be aware of the technical requirements and have access to skilled legal advisors. Arbitrator Samis also cited earlier court decisions in which the word “give” was found to mean passed from one party to another, and determined that the priority regulation requires that the party who is intended to receive the notice must actually receive it within ninety days.

I agree with this conclusion. I find that the act of giving notice cannot be carried out or completed until the notice is communicated and received by the intended recipient. While

it is possible to say that you have given someone a gift, even if it is still in the process of being delivered by a third party, the act of giving a concrete item is different than giving notice. At the risk of sounding circular, it is the very nature of notice that prevents it from being “given” until it is actually received by the person it is intended for. Put another way, notice is, by definition, a communication and so cannot be given until it is received by the intended recipient.

Applying the analysis above to the facts of this case, I find that Economical gave notice to Nordic of its intent to dispute its obligation to pay benefits to Mr. Kishokumar on May 12, 2009. It therefore had until May 12, 2010 to initiate arbitration under section 7. Given that it did so (barely) before that date, it has met its obligations under the regulation, and may proceed with the priority dispute.

I should mention that the situation in this case differs from those cases in which the parties dispute whether a notice was sent at all. Those “he said/she said” cases will turn on the factual finding of whether the evidence tendered in support of the notice having been sent in a timely manner is more compelling than the evidence surrounding the usual business practises regarding the receipt of letters or faxes at the responding insurer’s mailroom. In contrast, the result in this case is based on the conclusion that the date of the *receipt of a section 3 notice* is the determinative date, as opposed to the date that it was sent.

I will have my assistant contact the parties so that a further pre-hearing call can be arranged and the main issue discussed.

COSTS:

In light of my findings above, and the agreement of counsel at the hearing, Nordic is liable to pay both the legal costs incurred by Economical and all arbitration fees and disbursements related to the preliminary issue hearing, forthwith.

If counsel cannot agree on the quantum of costs payable, I invite you to contact me in writing and arrangements will be made for filing written submissions on the matter.

DATED at TORONTO, ONTARIO this _____ DAY OF MAY, 2012.

Shari L. Novick

Arbitrator