

**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990,  
c. I. 8, section 275 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 -

**LOMBARD GENERAL INSURANCE COMPANY**

**Respondent**

**DECISION**

**COUNSEL:**

Daniel Strigberger for the Applicant

Linda M. Kiley for the Respondent

**ISSUE:**

1. Did Economical comply with the requirement in section 3 of *Regulation 283/95* to provide written notice to Lombard within ninety days of receiving a completed application for benefits ?

**RESULT:**

1. No, Economical did not comply with the ninety day requirement and cannot proceed with the priority dispute.

**BACKGROUND:**

Mehsin Al-Maamouri was involved in an accident while he was driving a taxi on September 13, 2007. He submitted an Application for payment of accident benefits to Economical Mutual Insurance Company (“Economical”), the insurer of his personal vehicle, approximately one and one-half years later on April 1, 2009. Economical began paying benefits to the Claimant, and conducted an investigation into whether any other insurer would be in priority to pay the claim. The taxi that the Claimant was driving at the time of the accident was insured by Lombard General Insurance Company (“Lombard”).

Economical asserts that the adjuster assigned to the claim sent a Notice to Applicant of Dispute Between Insurers (“DBI Notice”) by mail to Lombard on May 27, 2009. Lombard denies having received this form, and claims that the first time it became aware of the priority dispute was on March 12, 2010, when the Economical adjuster sent a copy of the DBI Notice by fax.

The parties agreed to have the above matter decided by way of a preliminary hearing. The sole issue before me at this stage is whether or not Economical provided notice to Lombard within ninety days of having received the Claimant’s application, as required by section 3(1) of *Regulation 283/95*. Economical does not argue that the “saving provisions” in section 3(2) of the regulation would apply to “save” its late notice, if I find that the DBI form was not sent in May 2009 as alleged.

**RELEVANT PROVISIONS:**

***Ontario 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 section.

***Arbitration Act – Section 53***

4. If a reasonable effort to serve a notice or other document under subsection (1) or (2) is not successful and it is not possible to serve it under subsection (3), it may be sent by prepaid registered mail to the mailing address that the addressee specified in the arbitration agreement or furnished to the arbitral tribunal or, if none was specified or furnished, to the addressee's last-known place of business or residence.
5. Unless the addressee establishes that the addressee, acting in good faith, through absence, illness or other cause beyond the addressee's control failed to receive the notice or other document until a later date, it shall be deemed to have been received,
  - (a) on the day it is given or transmitted, in the case of service under subsection (1), (2) or (3);
  - (b) on the fifth day after the day of mailing, in the case of service under subsection (4).

**EVIDENCE:**

Counsel conducted examinations under oath of four witnesses prior to the arbitration hearing – Shannon Wallis, the Economical adjuster assigned to adjust the claim, and three Lombard employees involved in either the mailroom process or the assignment of accident benefits claims. Transcripts from those examinations were filed at the hearing. Various documents, including the “log notes” from the Economical claims file were also filed in evidence, and referred to by counsel.

Ms. Wallis also testified at the hearing, as did Tina DaSilva and Camille McLarty from Lombard. The relevant parts of their evidence are set out below.

*Shannon Wallis*

Ms. Wallis was the key witness at the hearing. She was asked detailed questions about her handling of Mr. Al-Maamouri's claim, and her recollection of the events surrounding the preparation of the DBI Notice and its delivery to Lombard. Ms. Wallis began working with Economical as an accident benefits adjuster in June 2007, and had just under two years of experience in the field at the time of the events in question.

Ms. Wallis was assigned the claim on April 2, 2009, a day after Mr. Al-Maamouri's application was received by Economical. She testified that she reviewed the police MVA Report and called the Claimant's legal representative that day. She stated that she identified a priority issue at the outset, when she determined that Mr. Al-Maamouri had been driving a taxi insured by Lombard at the time of the accident. As the application was first submitted to Economical nineteen months after the accident, she called Lombard on April 15, 2009 to ask whether an earlier claim had been presented to them. Her notes of that call indicate that she was told that no claim for accident benefits had been submitted by Mr. Al-Maamouri, but that a claim had been reported by a third party. She noted the Lombard claim number in her log notes.

Ms. Wallis testified that this was the first priority dispute file that she had been assigned. She stated that because it was the first time that she took the various steps involved in that process, she remembered the things that she did, if not the exact dates on which she did them. She explained that her team leader, Alex Berton, had provided her with a DBI Notice and that she completed that form on May 14, 2009. Her log notes for that day make no mention of this, but do refer to her having worked on the Response to the Application received from the Claimant's representative, and she testified that she recalled having completed the DBI Notice at the same time as the Response.

Ms. Wallis stated that she knew that she had ninety days from the date of receipt of the OCF 1 form to dispute priority. She testified that on May 27, 2009 she reviewed the DBI Notice and the Response to the Application that she had prepared with Mr. Berton. She recalled making some corrections to the notice, signing it, and placing a copy of the notice in envelopes that she had addressed to each of Lombard, the Claimant and his representative. She recalled placing the three envelopes in the mail bin at her office around 4 p.m. that day.

When asked how she had obtained Lombard's address and to whom at Lombard the notice was directed, Ms. Wallis stated that she had looked up Lombard's address on the internet, and wrote down the general address that she found on its website on the envelope.

Ms. Wallis' log notes contain two entries for May 27<sup>th</sup>. The first one notes that she discussed the file with Mr. Berton, and contains a reference "to send out priority dispute to Lombard". The second entry, logged on to the system one minute later states – "PRIORITY DISPUTE SENT TO LOMBARD" (recorded in upper case letters), followed by the sentence "prepared priority dispute letter with notice to applicant of dispute between insurer's; c.c. claimant and rep".

Ms. Wallis admitted that despite the mention in the above entry that she had prepared a letter with the notice, she in fact had neither prepared nor sent a letter accompanying the DBI notice. When asked why she had not done so, she replied that she had not been provided with a standard letter, and had not been told that she needed one. She stated that she likely wrote that entry in her log notes because she had written a cover letter with her Response to the application that had been submitted, and had prepared both of these documents at the same time.

While the log notes after this date include various details relating to the adjusting of Mr. Al-Maamouri's claim, the next reference to the priority dispute is approximately ten months later, on March 12, 2010. Ms. Wallis notes on that date that she re-submitted a

copy of the DBI Notice ...”along with request for an answer as we are approaching the one year mark of May 14, 2010”, after being advised to do so by her team leader. She explained that she re-printed the file copy of the notice and faxed it, along with a cover page, to Lombard as well as to the Claimant and his representative. She acknowledged that the cover page mistakenly refers to the original notice having been sent on May 14, 2009, whereas her notes indicate that it had in fact been sent on May 27, 2009.

One of the other documents referred to by counsel at the hearing was a letter sent by the Claimant’s representative to Ms. Wallis on March 22, 2011 enclosing a file copy of the DBI Notice that had been forwarded to his office. The notation on the DBI Notice indicates that it was transmitted by fax on March 12, 2010. The cover letter from the representative states – “please find enclosed as requested today a copy of the Notice to Applicant of Dispute Between Insurers”. When Ms. Wallis was asked why she had requested that the Claimant’s representative provide her with a copy of the DBI Notice that she had previously sent to him, she could not answer, and stated that she did not recall having made this request.

The documents filed at the hearing contain two versions of the DBI Notice in question. One version includes Lombard’s address in Part 2 and the Lombard claim number that Ms. Wallis stated she had been provided with in Part 3, whereas the other version contains neither of these details. Each of the above notices was signed by Ms. Wallis, although the signatures are distinctly different. Ms. Wallis explained that the one without the address and claim number was a draft copy of the notice that was mistakenly kept in her file. However, when she was cross-examined about which one of the notices she claimed to have mailed to Lombard in May 2009, her evidence on the point was vague and left the impression that she was not at all certain.

The material filed also contains a page printed from the Lombard website showing the address, telephone number and two fax numbers – one general fax number and one identified as a claims fax number – of its head office. Ms. Wallis testified that when she faxed out what she claims was the “follow-up second DBI notice” to Lombard she had

intended to send it to the claims department's fax number noted. However, it is clear from the fax cover page sent to Lombard on March 10, 2012 that she in fact sent it to the other general fax number.

*Joey Chacko*

Mr. Chacko was examined under oath by counsel prior to the hearing. Mr. Chacko has worked for Lombard for thirty-three years as the Supervisor of Mail and Distribution, and is essentially in charge of all mailroom processes. Both parties advised that they accepted the evidence provided by this witness at the examination, and he was not called to testify at the hearing.

The transcript of his evidence from the examination indicates that Mr. Chacko stated that if a letter is received in the mailroom that is not addressed to a particular person, his staff is instructed to open the envelope. If the document has a claim number on it and relates to an Ontario claim, he stated that it would be placed in a bin and delivered to the Central Region Claims department by trolley. He explained that the mailroom was on the 4<sup>th</sup> floor of Lombard's head office, and that the above Claims department was located on the 5<sup>th</sup> floor.

*Tina DaSilva*

Ms. Da Silva is Lombard's Claims Supervisor for the Central Region. She had six clerical staff, including the receptionist, reporting to her at the time of these events. She estimated that the claims department received between 80 and 100 pieces of mail each day, and explained the various steps taken by her staff from the time a letter is received in the department from Lombard's mailroom.

Ms. DaSilva explained that the mailroom staff delivers letters received in the mailroom by trolley to the mail clerk for the Claims Department. The clerk, who has thirty-two years of service with Lombard, would ensure that the correspondence had a claim number

on it, and would then “date stamp” it. She explained that correspondence received in her department relates to auto claims, property claims, liability or accident benefits.

She stated that her staff is familiar with DBI Notices, and that the mail clerk would be aware that these should be directed to the Accident Benefits department. The clerk would place the form in the AB department’s “scanning tray”, and the AB clerk would then pick up the document and scan it. She stated that the same process would be followed with any documents received by fax. Ms. DaSilva testified that once a document was scanned, it was placed in a box for thirty days, after which it would be shredded.

It appears that in this case, the Lombard claim number that had been provided to Ms. Wallis that she noted on the DBI form did not relate to Mr. Al-Maamouri, but rather to another taxi driver covered by the same fleet policy, who was involved in an accident on the same day and had filed a claim for property damage to the vehicle. Ms. Da Silva explained that a fleet policy of this type could cover more than five-hundred drivers, and that it was certainly possible to have more than one claim reported on any given day.

In any event, Ms. DaSilva testified that once the DBI form in question was received, the AB clerk would have noticed that the claim number on the document did not have an AB adjuster assigned to it. The form would have then been directed to an AB supervisor who would have determined that no claim had yet been set up, and at that point a new claim would have been established, and an adjuster assigned.

*Camille Mclarty*

Ms. Mclarty was one of the adjusters at Lombard who was assigned to work on Mr. Al-Maamouri’s claim. She explained that she received the file in June 2011, after the prior adjuster had left the company. She testified that she reviewed the file contents and that it was clear that the first notice that Lombard had received relating to a priority dispute was received from Economical in March 2010. She stated that there were no log notes on the file prior to that date, and no indication that a DBI notice had been received in 2009, as alleged by Economical.

The documents filed at the hearing indicate that an Accident Benefits adjuster from Lombard wrote to Ms. Wallis on May 18, 2010, acknowledging receipt of the March 12, 2010 faxed copy of the DBI Notice and referring to an earlier conversation they had about the matter.

**ARGUMENTS & ANALYSIS:**

Counsel for Lombard noted that there was no evidence that Economical could point to that indicates that Lombard had received the DBI Notice prior to March 12, 2010, when the parties agree that Ms. Wallis sent it by fax. She submitted that the only evidence supporting Economical's position that the notice had been mailed to Lombard on May 27, 2009 was that of Ms. Wallis herself, who had not handled a priority dispute before and who counsel claimed made several errors in her handling of the matter.

Ms. Kiley argued that Ms. Wallis' contention that she mailed the notice does not stand up to scrutiny. She pointed to the fact that while the witness claimed to have completed the document on May 14, 2009, her log notes from that day do not contain any reference to her having done so. The May 27th log note entries do refer to the DBI notice having been sent to Lombard, but also refer to a cover letter being sent, which Ms. Wallis conceded she did not prepare. Ms. Kiley also referred to the two versions of the DBI notice in Economical's file, and the witnesses' confused evidence regarding which one she thought she had mailed out. Counsel pointed to other inconsistencies in Ms. Wallis' evidence, and urged me to find that no written notice had been provided to Lombard within ninety days, as required.

Counsel for Economical argued that the evidence supported his contention that Ms. Wallis did mail the DBI notice to Lombard, as alleged. He referred to the various log entries referring to the steps that she had taken prior to the notice having been mailed, and to Ms. Wallis' statement that she remembered taking the various steps, including putting the notices in the mail, as it was the first priority dispute that she had been assigned. Counsel submitted that Ms. Wallis' log notes generally corroborate what she

stated that she recalled doing on the file, and that the minor inconsistencies noted could all be explained.

Mr. Strigberger also noted that the Lombard claim number that Ms. Wallis had been provided and had noted on the DBI form was incorrect, and that the envelope addressed to Lombard enclosing the notice did not refer to a particular person or department. He suggested that given these complications, and the evidence provided by the Lombard witnesses, the document would likely have been reviewed by 6 or 7 different people after it arrived at Lombard's office. He contended that given the number of people who would have reviewed the document, there was a good chance that it got lost or was misplaced.

*Was the DBI notice mailed to Lombard on May 27, 2009 as claimed?*

This is a purely factual question and a difficult determination to make. On the one hand, a bright and well-meaning Economical claims adjuster insists that the notice was mailed out, as indicated in her log notes. She had a clearer recollection of steps taken on a file than would usually be the case in these circumstances, given that it was the first priority dispute file that she had been assigned. On the other hand, Lombard denies having received the notice in 2009, claiming that the first time it became aware of the priority dispute was in March 2010 when a follow-up letter was faxed.

While counsel rightly claims that it is difficult to prove that something was not received, the witnesses called by Lombard testified to a well-organized system for receiving and sorting mail received at its head office. I note that all of the employees referred to had decades of experience in their positions, and spoke to reliable practices being in place once a document was delivered by the mailroom to its various departments.

After reviewing all of the evidence carefully, I conclude that the DBI notice was not sent in May 2009 as alleged by Economical. Without repeating all of the evidence outlined above, it is clear that the log notes filed cannot be taken as an accurate reflection of the tasks carried out by Ms. Wallis. While she seemed certain that she had completed the

notice on May 14, 2009, the date that appears on the form, there is no reference to her having done so in the notes. The May 27<sup>th</sup> log entry refers to a cover letter having been prepared and sent with the DBI notice, while Ms. Wallis admitted that no letter was sent. When confronted with different versions of the notice itself, Ms. Wallis could not explain why they were all in the file and was unclear about which one she thought she had mailed.

I accept that any of these inconsistencies on their own may not be important enough to override what Ms. Wallis states is her clear memory of having put the three copies of the notice in the mail bin at her office. However, when all of these details are taken together, along with the fact that the follow-up fax she sent in March 2012 contained an incorrect date and was sent to the general fax number instead of to the fax number for the Claims department that she had intended to forward it to, I am left to question whether the envelope that she says she had addressed to the Lombard head office actually contained the correct information to get it there.

While the regulation does not require that a DBI Notice be sent in a particular way, it is clearly preferable for adjusters to use a method that enables its delivery to be confirmed, such as fax, courier or registered mail. At the very least, a follow-up mechanism should be in place so that a notice sent by regular mail can be confirmed as having been received.

Aside from the above, the most compelling fact that ‘tips the balance’ in Lombard’s favour is that the Claimant’s representative sent a letter to Ms. Wallis in March 2011, shortly after this arbitration process was commenced, enclosing a copy of the DBI notice that they had received. While Ms. Wallis claimed that she did not recall having asked for this, it is clear from the cover letter that it was being sent to her at her request. The fax notation on the notice provided indicates that it was received on March 12, 2010, and there is no reference to an earlier copy having been received. I can only presume that when this issue first arose between the parties, Ms. Wallis asked the Claimant’s representative when they had received a copy of the DBI Notice. In my view, it is telling

that Economical was unable to provide any responding evidence on this point, such as a letter or note from Ms. Wallis that she had followed up with the representative after receiving this letter to ask whether a mailed copy had been received in May 2009. This lends support to my finding that on a balance of probabilities, the DBI Notice was not sent to Lombard within ninety days as alleged.

Mr. Strigberger argued in the alternative that the “deemed delivery” rule found in section 68(5) of the *SABS*, section 53(5) of the *Arbitration Act* and the *FSCO Dispute Resolution Practice Code* would apply, and would deem a document that is placed in the mail to have been received five days after it is mailed. He submitted that if I was not prepared to find that Lombard received the DBI notice in May 2009, but I accept that Ms. Wallis did mail it, I should conclude on this basis that the notice was provided.

I do not accept this argument for two reasons. Firstly, as outlined above, I am not convinced that the notice was correctly addressed to Lombard or mailed out as alleged. Further, section 53(5) of the *Arbitration Act*, which clearly governs this process, addresses documents sent by registered mail but does not speak to those forwarded by regular mail.

For all of the reasons expressed above, I find that Economical did not provide written notice to Lombard of its intention to dispute its obligation to pay benefits to Mr. Al-Maamouri within ninety days as required by section 3 of the regulation. Accordingly, it cannot proceed with this priority dispute.

**COSTS:**

Given the result, Economical is responsible to pay the legal costs incurred by Lombard in this arbitration. If the parties cannot agree on the quantum of costs payable, or if an Offer to Settle has been filed that would impact on the result, I invite counsel to contact me so that a timetable for filing written submissions can be established.

I also find that Economical is responsible to pay all arbitration fees and any related disbursements incurred in this matter.

**DATED at TORONTO, ONTARIO this \_\_\_\_ DAY OF DECEMBER, 2012.**

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**Shari L. Novick**  
**Arbitrator**