IN THE MATTER of a dispute between Liberty Mutual Insurance Company and the Commerce Insurance Company pursuant to Regulation 283/95 under the *Insurance Act*, R.S.O. 1990, I.8 as amended

AND IN THE MATTER of an Arbitration pursuant to the *Arbitration Act*, S.O. 1991.

BETWEEN:

LIBERTY MUTUAL INSURANCE COMPANY

Applicant

-and-

THE COMMERCE INSURANCE COMPANY

Respondent

AWARD

COUNSEL:

Linda Matthews for the Applicant

Douglas Wright for the Respondent

ISSUES:

1. Which insurer, Liberty Mutual Insurance Company or the Commerce Insurance Company is higher in priority to pay Statutory Accident Benefits?
2. Does section 268 (5) of the *Insurance Act* apply to this situation?
3. If so, what are the implications of section 268 (5) applying?
4. If Regulation 283/95 does apply to this situation, which insurer received the first completed Application for Benefits?

5. If Liberty Mutual received the first completed Application, did it put Commerce Insurance Company on notice as required by section 3 of Regulation 283/95, and if not, do the "saving provisions" of section 3(3) apply?
6. If Commerce received the first completed application, then what are the ramifications?

ORDER:

1. Commerce Insurance Company is responsible to pay Mrs. Ponnudurai's benefits, and reimburse Liberty Mutual for accident benefits already paid by Liberty Mutual Insurance Company.

HEARING:

The Arbitration hearing was held in the City of Toronto, in the Province of Ontario, on May 15, 2001, before me, M. Guy Jones, pursuant to the provisions of Regulation 283/95 and the *Arbitration Act*, S.O. 1991.

THE FACTS:

The essential facts of this case are not in dispute and may be summarized as follows:

On August 3, 1996, Mrs. Rizwana Ponnudurai was a pedestrian in a parking lot in the City of Toronto when she was struck by a motor vehicle. The vehicle was owned by Antonio Marchione and insured by Liberty Mutual Insurance Company.

At the time of the accident, Mrs. Ponnudurai was a resident of the State of Massachusetts. At that time Mrs. Ponnudurai's spouse had a valid contract of motor vehicle liability insurance with Commerce Insurance Company. That company was not a licensed motor vehicle insurer in

Ontario, however, on May 30, 1974 Commerce executed a Power of Attorney and Undertaking and agreed to the following terms:

> Not to set up any defence to any claim, action or proceeding, under a motor vehicle liability insurance contract entered into by it, which might not be set up if the contract had been entered into in, and in accordance with the law relating to motor vehicle liability insurance contracts of the Province or Territory of Canada in which such action or proceeding may be instituted, and to satisfy any final judgment rendered against it or its insured by a Court in such Province or Territory, in the claim, action or proceeding, up to
>
> (1) the limit or limits of liability provided in the contract; but
>
> (2) in any event an amount not less than the limit or limits fixed as the minimum for which a contract of motor vehicle liability insurance may be entered into in such Province or Territory of Canada exclusive of interest and cost and subject to any priorities as to the bodily injury or property damage with respect to such minimum limit or limits as may be fixed by the Province or Territory.

Mrs. Ponnudurai subsequently hired a lawyer in Massachusetts to represent her with regard to any claims that she might have arising out of the motor vehicle accident in Ontario. What then transpired was a series of letters between Mrs. Ponnudurai's Massachusetts solicitors and Commerce, as well as Liberty Mutual Insurance Company. While I will deal with the correspondence in greater detail later in my decision, I will set out the chronology of the more important documents at this time.

On September 10, 1996, Mrs. Ponnudurai's solicitors wrote to Commerce indicating to Commerce that they understood that Ontario had a system of no fault benefits substantially different from those available in Massachusetts and that they were giving notice of a claim against Commerce.

Commerce responded on September 16, 1996 by way of a letter and an enclosed "Application for Benefits – Personal Injury Protection" which was the standard form for the Massachusetts Personal Injury Protection Plan ("PIPP").

Mrs. Ponnudurai's solicitors completed the form and returned it to Commerce. On November 25, 1996 Mrs. Ponnudurai's solicitors wrote Commerce again indicating that Mrs. Ponnudurai was seeking replacement service benefits through Commerce Insurance Company for her child.

On December 26, 1996 Mrs. Ponnudurai's solicitors again wrote Commerce, this time enclosing a copy of the Ontario Statutory Accident Benefits Schedule, and advised that it was their understanding that it was Commerce's responsibility to provide the Ontario Accident Benefits to Mrs. Ponnudurai. In addition, in December 1996, Mrs. Ponnudurai's lawyers forwarded medical bills to Commerce for their attention and payment.

While there was further correspondence between the parties, it would appear that nothing of great consequence with regard to this matter occurred until July 25, 1998, at which time Mrs. Ponnudurai's solicitors forwarded a completed Application for Accident Benefits to Liberty Mutual.

The next significant document appears to have been a letter dated March 11, 1999 from Commerce to Mrs. Ponnudurai's new solicitor, Mr. Bardi. Commerce indicated at that time that Mrs. Ponnudurai's prior attorney had withdrawn the claim against Commerce. This assertion by

Commerce appears to have been based on a telephone conversation between a Commerce adjuster and Mrs. Ponnudurai's previous solicitor on September 16, 1996. A note made by the adjuster immediately after the conversation was filed in tab 3 of the Respondent's Book of Productions. While I accept that the conversation occurred between the parties, and the adjuster may well have concluded that Commerce could "void our loss", a review of the entire correspondence both before and after the September 16, 1996 note, makes it clear that Mrs. Ponnudurai had in fact not abandoned her claim against Commerce, and I find this to be so.

The next major event occurred on February 3, 1999 when Mrs. Ponnudurai issued a statement of claim against Liberty Mutual for payment of statutory accident benefits in Ontario.

Following this, Mrs. Ponnudurai's solicitors, on July 27, 1999, forwarded a completed Application for Accident Benefits to the Commerce Insurance Company requesting that Commerce pay the various statutory accident benefits which they claim were owing by Commerce.

Subsequent to this, on December 24, 1999, in response to the Application for Accident Benefits that Liberty had received in July of 1998, Liberty served Commerce with a 'Notice of Dispute" pursuant to Regulation 283/95. It would appear that Commerce never served a "Notice to Dispute" in response to the Application for Accident Benefits that they received in July 1999.

Finally, on November 23, 2000 Liberty made a "without prejudice" payment to Mrs. Ponnudurai in the amount of $22,504.90 on account of Caregiver Benefits payable at a rate of $256.00 per week for fifty-eight weeks plus interest from August 14, 1998 to October 31, 2000.

ISSUES AND ANALYSIS:

In order to have a full understanding of what transpired in this case and how the matter should have been resolved, it is first necessary to have an understanding of the "priorities system" established by the Ontario Legislature to deal with situations where a person has been injured in Ontario in a motor vehicle accident and there is a disagreement as to who should pay the injured party's statutory accident benefits.

Section 268 (1) of the Insurance Act establishes that every motor vehicle liability policy in Ontario shall provide certain statutory accident benefits as set out in the Schedule. Section 268.1 sets out the "priority" rules that apply when a question arises as to which particular insurer is to pay the accident benefits if there is more than one possible insurer that might be responsible to pay those benefits.

Section 1 of Regulation 283/95 then requires that all disputes as to which insurer is required to pay benefits under section 268 of the *Insurance Act* shall be settled in accordance with this Regulation. Section 2 requires that the first insurer to receive a completed application for benefits is responsible for paying benefits to an insured party pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act.

In terms of the priority of payment of this particular case, one must first look to section 268(2) in order to determine which insurer should have paid the accident benefits. That section states:

> The following rules apply for determining who is liable to pay statutory accident benefits:
>
> 2. In respect of non-occupants,
>
> i. The non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,
>
> ii. If recovery is unavailable under subparagraph (i), the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,
>
> iii. If recovery is unavailable under subparagraph (i) or (ii), the non-occupant has recourse against the insurer of the automobile involved in the incident from which the entitlement to no-fault benefits arose,
>
> iv. If recovery is unavailable under subparagraph (i), (ii) or (iii), the non-occupant has recourse against the Motor Vehicle Accident Claims Fund.

Section 268(4) allows the insured to decide which insurer he or she will claim benefits from if they have recourse against more than one insurer. However, this is specifically overridden by section 268(5) which states:

> Despite subsection (4) if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is a spouse or a dependent, as defined in the Statutory Accident Benefits Schedule, of a named insured, the person shall claim Statutory Accident Benefits against the insurer under that policy.

In our fact situation, there is no doubt but that Mrs. Ponnudurai was the spouse of a named insured under a contract evidenced by a motor vehicle policy when she was a pedestrian hit by a motor vehicle. That contract of insurance was issued by Commerce Insurance Company.

There was some initial confusion as to whether or not Commerce, a Massachusetts insurance company not writing policies of insurance in Ontario, was responsible to pay Ontario Accident Benefits for one of its insureds injured in Ontario. However, it is clear that on May 30, 1974 Commerce Insurance Company executed a Power of Attorney and Undertaking, which in effect, precluded Commerce from asserting a defence that its policy does not include Statutory Accident Benefit coverage, given that the coverage is mandatory pursuant to section 268 of the *Insurance Act*. This has been so interpreted by the Court of Appeal in Healy vs. Interboro Mutual Indemnity Insurance Company (1999) 44 OR (3rd) 404.

In light of the signing of the Power of Attorney and Undertaking, and in light of the fact that Mrs. Ponnudurai was the spouse of a named insured within the meaning of section 268(5), Commerce Insurance Company should have paid her the accident benefits in question. I note that section 268(5) is mandatory so neither Mrs. Ponnudurai or Commerce had any choice in the matter.

Counsel for Commerce, at the commencement of the hearing, conceded that his client was, pursuant to section 268(5), responsible to pay the accident benefits. The question was then raised by both parties as to whether or not I had the jurisdiction to hear the case given that there was no longer a "dispute" between the parties as to which company was responsible under the

Insurance Act to pay the benefits. Section 1 of Regulation 283/95, requires there to be a "dispute" as to which insurer is required to pay in order for the matter to be resolved by a private arbitration. Liberty Mutual, the applicant in the matter, took the position that because of the agreement between the parties that Commerce is the insurer responsible under the Act to pay accident benefits, Regulation 283/95 does not apply, and they may pursue any necessary remedy for repayment from Commerce through the courts. Commerce, while not taking an absolute position on jurisdiction suggests that if I have jurisdiction, Liberty has failed to serve Commerce with a "Notice of Dispute" within ninety days of receiving a completed Application for Accident Benefits and is therefore precluded from proceeding with the application pursuant to section 3 of Regulation 283/95.

Neither party was able to provide me with any case law on this point. As noted above, section 1 of Regulation 283/95 requires that "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". While it is true that the parties have now reached an agreement as to which insurer is, at law, in priority, there is no agreement as to which insurer is actually required to pay the benefits. Indeed, each insurer is looking to the other to pay the Accident Benefits in this case. This, in my view, is a complete answer to this issue, and accordingly I find that I do have jurisdiction.

The next issue to be determined is which insurer received the first completed Application for Accident Benefits. Section 2 of Regulation 283/95 requires that the first insurer that receives a completed Application for Benefits is responsible for paying the benefits pending the resolution of any dispute as to which insurer is required to pay benefits.

While Liberty Mutual received the first formal completed Application for Ontario Accident Benefits on July 25, 1998, this does not end the inquiry. It has been held by numerous arbitrators that an Application for Accident Benefits need not be on a certain form in order to be valid.

It is perhaps worthwhile, at this point in time to briefly review the obligations of the various parties with regard to reporting, forwarding and completing accident benefit applications. These are set out in section 59 (1) of the Schedule which states:

> (1) A person who wants to apply for benefits under this Regulation shall notify the insurer within thirty days after the circumstances arose that gave rise to the entitlement to benefits, or as soon as practicable thereafter.
> (2) The insurer shall promptly provide the person with,
> (a) the appropriate application form;
> (b) a written explanation of the benefits available under this Regulation; and
> (c) written information to assist the person in applying for benefits, including information to assist the person in making any possible elections.
> (3) The person shall submit an application for benefits to the insurer within ninety days of receiving the application forms.
> (4) A failure to comply with a time limit set out in subsection (1) or (3) does not disentitle a person to benefits if the person has a reasonable excuse.

In reviewing the documentation filed in this matter, it is clear, and I so find, that at very least, Mrs. Ponnudurai, through her solicitor, on September 10, 1996 let Commerce know that they would be making a claim for Statutory Accident Benefits. Her solicitor stated:

> Apparently, in Ontario there is a system of no-fault benefits which is substantially different than ours. Under that system, it may well be that Commerce's insurance policy must provide benefits for Mrs. Ponnudurai. Therefore, please accept this letter as a Notice of Claim.

Commerce responded on September 19, 1996 by forwarding a "Massachusetts Personal Injury Protection Law" Application Form which is normally used for persons applying for Massachusetts Accident Benefits. Mrs. Ponnudurai completed this and returned it to Commerce on November 19, 1996.

Mrs. Ponnudurai's solicitors followed this up with a further letter to Commerce on November 25, 1996, clearly setting out that Mrs. Ponnudurai was the primary caregiver for her two year old son, she was disabled from the accident, and that she was seeking replacement services benefits from Commerce. The lawyers also reiterated that under Ontario law they were looking to her own no-fault insurer for the benefits.

If this were not clear enough for Commerce to respond, the letter of December 26, 1996 from Mrs.Ponnudurai's lawyers to Commerce certainly made it so. They enclosed a copy of the Ontario Statutory Accident Benefits Schedule and advised Commerce that under Ontario law it was Commerce's responsibility to provide the no-fault benefits. Her lawyers also advised that they had asked Mrs. Ponnudurai to provide them with the confirmation of her need for replacement services from her doctor as well as receipts for any replacement services which may have been obtained.

On that same date, Mrs. Ponnudurai's solicitors forwarded medical bills in the amount of $1,005.00 to Commerce for their attention.

Subsequent to this, on June 3, 1997, Mrs. Ponnudurai's solicitors wrote to Commerce, advising that Mrs. Ponnudurai had medical bills that were approximately $22,000.00 to date, and were ongoing. They advised that it was their understanding that under Ontario law, it was Commerce's obligation to pay these bills.

While I accept that Commerce, as an out of province insurer, was not familiar with the Ontario Statutory Accident Benefits Scheme, this does not excuse them from accurately and efficiently processing a claim for accident benefits in Ontario. The Court of Appeal in Healy vs. Interborough Mutual Indemnity Insurance Company et al., (1999), 44 O.R. (3rd) 404, and E. MacDonald, J., in Brooks vs. Auto Club Insurance Association [2001] O.J.No. 240 (S.C.) made it very clear that once the insurer signs a Power of Attorney and Undertaking they have the same responsibilities for dealing with a claim as does an Ontario insurer. Accordingly, pursuant to section 59 (2) of the Schedule, Commerce was required to promptly provide Mrs. Ponnudurai with an appropriate application form, a written explanation of the benefits available under the Regulation and written information to assist her in applying for benefits, including information to assist her in making any possible elections. All these things, Commerce failed to do.

As Arbitrator Sampliner, in Prosser vs. Progressive Casualty Insurance Company [1997] O.I.C.D. No. 69 stated:

> Without basic information about potential accident benefits, the insured person is unable to make the reasonably informed decision contemplated by the legislators. Insurers who fail to comply with the statutory standard do so at their peril.

The case law is quite clear that one must look at the particular facts of each case when determining whether or not a completed application for accident benefits will be considered to have been received.

In H'ng vs. Allstate Insurance Company [1997] O.I.C.D. No. 34, Arbitrator Friendly stated:

> An application for benefits, if it is to be useful and meet the requirements of section 59, must provide sufficient particulars to assist the insurer to identify the benefits that an applicant may be entitled to. An application is not limited to a particular form. It may include additional information contained in a covering letter and documentation enclosed or appended.

The Divisional Court upheld the decision of Arbitrator Friendly.

In Lopez vs. Canadian General Insurance Group [1997] O.I.C.D. No. 83, Arbitrator Seife held that an application for accident benefits meets the requirements of the legislation if it provides sufficient particulars to reasonably assist the insurer to process the application and assess the claim fairly and expeditiously.

I also note that Arbitrator Joachim, in Pooler vs. Guardian Insurance Company of Canada, [1999] O.I.C.D. No. 233 found that merely receiving an invoice from a treatment provider containing the name of the injured party, the date of the accident and the insurance policy number should provide sufficient information to an insurer to know that a claim for accident benefits is being made. I note that this is very similar to our own situation in that in December 1996, Mrs. Ponnudurai's solicitor forwarded medical bills to Commerce for their attention.

Arbitrator Makepeace in Ready vs. Progressive [1994] O.I.C.D. No. 32, dealt with a situation where the applicant approached Progressive Insurance about claiming statutory accident benefits and the insurer forwarded an Application for Accident Benefits form to him. A representative of Progressive then contacted the insured and advised him that he was not entitled to accident benefits from Progressive but should instead apply to the Zurich Insurance Company for accident benefits. As a result, the insured applied to Zurich first. Arbitrator Makepeace in deciding that the Applicant had intended to apply first to Progressive stated:

> It appears that Progressive denied benefits before Mr. Ready had a chance to complete the application forms. The Statutory Accident Benefits scheme was intended to provide for speedy and informed adjudication of claims. It would contravene the remedial nature of the legislation to allow Progressive to frustrate Mr. Ready's election under subsection 268 (5) simply by denying benefits before Mr. Ready filed a written application form.

Applying the facts of Mrs. Ponnudurai's case to the case law that has been developed, there is no doubt in my mind that Mrs. Ponnudurai intended to make an application for accident benefits to Commerce Insurance Company and that by the end of December, 1996 she had provided all the information Commerce needed to proceed to process the Application. As such, I find that Commerce did receive the first Application for Accident Benefits and should have paid the accident benefits to her. Having decided that Commerce received the first completed application for accident benefits, the question then arises as to what follows from this. Section 2 of Regulation 283/95 states:

> "The first insurer that receives a completed application for benefits is responsible for paying benefits to an insure person pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act".

As such, Commerce undoubtedly was responsible to pay the accident benefits, and had ninety days pursuant to section 3 of Regulation 283/95 to serve Liberty Mutual or any other insurer with a "Notice of Dispute" advising Liberty that it was holding Liberty responsible for the payments. Instead, Commerce chose to ignore the claim and not serve Liberty with a Notice of Dispute. As such, normally Commerce would be responsible to pay the accident benefits.

Having not complied with the requirements of section 268 of the Insurance Act, or Regulation 283/95, Commerce argues that since Liberty received a later completed Application for Accident Benefits in July 1998, and didn't serve a Notice of Dispute until December 1999, and paid Mrs. Ponnudurai "under protest and without prejudice" in November 2000, Liberty ought not to be able to recover from Commerce as it failed to comply with section 3 of Regulation 283/95 which states:

> (1) no insurer may dispute its obligation to pay benefits under section 268 of the Act unless it gives written notice within ninety days of receipt of a completed application for benefits to every insurer who it claims is required to pay under that section.
>
> (2) an insurer may give notice after the ninety day period if,
>
> (a) ninety 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;
>
> (b) the insurer made the reasonable investigation necessary to determine if another insurer was liable to pay within the ninety day period.

In analysing Commerce's right to use section 3 to defend its position, I think that it is particularly important to look at the wording of section 3(1) of the Regulation. What Commerce is in essence doing is disputing its own obligation to pay benefits under section 268 without having itself complied with the notice provisions of section 3. Commerce received the first completed

application for accident benefits in December 1996, and instead of paying and serving a Notice of Dispute, it simply refused to pay. As such, Commerce itself has not complied with the section 3 notice provisions.

I have considerable difficulty with Commerce, having failed to comply with the law, and having acted in such a way as to unnecessarily delay the payment of accident benefits to an injured party, to now turn around and argue that they still ought not to pay, due at very best to a technical argument that they themselves have ignored. To accept Commerce's position would be to violate both the spirit and the intent of the Regulation. It would simply encourage insurers to refuse to comply with the law in hope that the injured party would go elsewhere to get the benefits. In this regard, Commerce's position is similar to that of Progressive Insurance Company in Ready vs. Progressive, cited above, where arbitrator Makepeace noted that it would contravene the remedial nature of the legislation to allow an insurer to frustrate an injured party's election by simply denying the benefits.

I would also note that this is not a case where Commerce received no notice of Liberty's position that Commerce was responsible for the payments. As early as December 26, 1996 Liberty had forwared to Mrs. Ponnudurai's lawyer a copy of the Ontario Statutory Accident Benefit Schedule that was then forwarded to Commerce along with an explanation as to why Commerce was responsible for payment of the benefits. This was followed by a further letter on June 3, 1997 to Commerce from Mrs. Ponnudurai's solicitor, again setting out that it was Commerce's responsibility to pay and not Liberty's. Commerce was even provided with the name and phone number of the Liberty Mutual representative if they wished to dispute or discuss the matter.

In light of the above, to the extent that it was necessary, in light of Commerce's actions and it's awareness of the issues, I find that Liberty did give sufficient notice of the dispute to Commerce. I would emphasize, however, that it was Commerce who received the first application and failed to notify Liberty, and it is on this basis that I find that they are responsible to pay the benefits.

ORDER:

1. Commerce Insurance Company is responsible to pay Mrs. Ponnudurai's benefits and reimburse Liberty Mutual for Accident Benefits already paid by Liberty Mutual.

COSTS:

In the event that the parties are unable to agree upon the issue of costs, I may be spoken to.

Dated at Toronto this 6th day of July, 2001.

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M. Guy Jones
Arbitrator