IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, 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:

COSECO INSURANCE COMPANY

Applicant

- and -

LOMBARD INSURANCE COMPANY

Respondent

DECISION

APPEARANCES:

Alex Voudouris for the Applicant

Tracy L. Brooks for the Respondent

ISSUE:

Is Coseco barred from disputing its' obligation to pay accident benefits under section 268 of the Insurance Act for failure to give written notice within ninety days of receipt of the completed application for accident benefits?

ORDER:

Coseco is not precluded from disputing its' obligation to pay accident benefits under section 268 of the Insurance Act.

HEARING:

This matter was heard before me, M. Guy Jones, arbitrator, on May 25, 2004 in the city of Toronto in the province of Ontario.

FACTS:

The preliminary issue in this matter arises of out of an accident that occurred on April 18, 2001 when a 1995 Chevrolet Blazer driven by Mr. Adam Buchanen struck and killed two pedestrians, Abdool Adam and Margaret Ambler. At the time of the accident the motor vehicle was leased by Mr. Lloyd Fraser from Ross Wemp Leasing Inc. Mr. Fraser had taken an assignment of the 1995 Chevrolet Blazer lease from a Mrs. Greaves, and had obtained a motor vehicle liability policy from Coseco, being policy number 01260687. Policy named Ross Wemp Leasing Inc. as the lessor and Mr. Fraser as the insured.

An application for death and funeral benefits with regard to Ms. Ambler was received by Coseco on or about May 28, 2001. After making a number of inquiries with regard to priority, Coseco paid death benefits and funeral expenses.

On December 7, 2001 Ms. Anne Farrar, an accident benefits adjuster at Coseco received a telephone call from Mr. Paul Fagan, an adjuster at Lombard who inquired about the status of the accident benefits file in this matter. As a result of this conversation, Ms. Farrar became aware of the existence of a comprehensive general liability policy issued by Lombard to Ross Wemp Leasing Inc. which Coseco now maintains should be responsible for paying the death and funeral benefits in this matter. As a result of this telephone call, Coseco served a Notice of Dispute Between Insurers upon Lombard on December 12, 2001.

Lombard has responded that pursuant to section 3 (1) of Regulation 283/95, Coseco is barred from disputing its' obligation to pay accident benefits under section 268 of the Insurance Act as it did not provide written notice to Lombard within ninety days of receipt of the completed application. As the application was received on May 28, 2001, the ninety days expired on or about August 28, 2001 and it is agreed by the parties that the notice was not served until December 12, 2001 or approximately three and a half months after the ninety-day deadline.

Coseco, while conceding that it missed the ninety-day deadline, argues that the saving provisions of section 3(2) should apply and that it should be allowed to proceed with the arbitration. Section 3 (2) of Regulation 283/95 allows the insurer to give late notice if it shows:

(1) that the ninety days was not a sufficient period of time to make a determination that another insurer was liable, and

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

Did the Insurer Make Reasonable Investigations to Determine if Another Insurer Was Liable Within Ninety-Days of Receiving the Application?

Ms. Anne Farrar testified on behalf of Coseco. Ms. Farrar was the accident benefit adjuster on the file from approximately October 10, 2001 onwards. Prior to that time the file had been handled primarily by Mr. Bailey who is no longer with the company. Accordingly, we are only able to learn what efforts were made by Coseco to find out if there were other possible insurers by reviewing the accident benefit file and the log notes of Mr. Bailey. From this, I conclude that Mr. Bailey did contact representatives of both deceased's families and the legal counsel for Ms. Ambler in an effort to find out if there were any other insurers potentially responsible for payment of the accident benefits. Lombard argues that Coseco failed to follow up with the owner of the car, Ross Wemp Leasing Inc. in order to determine if it had other applicable insurance other than the Coseco policy. Had it done so, Lombard argues it would have discovered the existence of a comprehensive general liability or comprehensive business policy issued by Lombard to Ross Wemp Leasing Inc. Forming part of that policy was a standard garage automobile policy for which Ross Wemp Leasing Inc. paid a premium for accident benefits, which arguable may apply in this case.

Ms. Farrar testified that Coseco had obtained a copy of the police report regarding the accident, which indicated that Ross Wemp Leasing Inc. was the owner of the car in question and that

Coseco was the insurer. As such, they saw no need to explore this further. Counsel for Coseco argued that Coseco does not write comprehensive general liability policies and therefore it was not necessarily reasonable that its' adjuster would be expected to know that such a policy might include accident benefit coverage. I do not agree with this proposition. The test is an objective one. That is, what would a reasonably trained accident benefit adjuster do in this situation?

In my view, once the adjuster became aware, by way of the police report, that a leasing company was apparently the owner of the car, then it would be reasonable to review the lease agreement between the owner (Lessor) and the lessee (Mr. Fraser). There is no indication that the adjuster, Mr. Bailey, did this, however, the lease agreement and the associated documents were filed as exhibits at the hearing. A review of the leasing agreement indicates that Ross Wemp Leasing Inc. was to be responsible for the motor vehicle liability insurance unless otherwise specified in schedule "A" of the leasing agreement. Schedule "A" in fact specifies that the lessee is to obtain the insurance.

A review of the Coseco policy number 01260687 indicates that this is precisely what happened. Mr. Fraser obtained the insurance, as required, which is referred to in the police report. In light of the fact that the leasing agreement indicates that the lessee is to carry the insurance, and that this was done, it is not necessary, in my view, for the adjuster to have then contacted the leasing company to find out if there was any additional accident benefit coverage pursuant to a garage policy in a comprehensive general liability policy or comprehensive business policy. It would seem unusual for a company to pay a premium for accident benefits in a comprehensive general

liability policy which were already being provided by the lessee in another policy. While such an occurrence is possible, it strikes me as very unusual.

That being the case, I am of the view it was not reasonable to expect the adjuster to contact Ross Wemp Leasing Inc. and inquire of the availability of further accident benefit coverage. One must realize that what is required to be done is what is reasonable in the circumstances, not perfection. It is relatively easy, in hindsight, to say that something further should have been done. If Regulation 283/95 is to work effectively there must be some realization that insurance adjusters are extremely busy individuals working on many complex matters at the same time. While I recognize and accept the comments of Mr. Justice Nordheimer as well as the Court of Appeal in Kingsway vs. West Wawanosh Insurance Company 58 O.R. (3rd) 251, to the effect that insurers are sophisticated entities and that there is a need for certainty and predictability, there must also be a recognition that insurance adjusters are extremely busy and that the standard is not one of perfection but of reasonableness.

In this particular case it would have been unreasonable to expect the adjuster to have made the further inquiries for the reasons that I have expressed above.

Counsel for Lombard has also suggested that the adjuster for Coseco, Mr. Bailey, should have conducted an "auto plus" search to determine the existence of the CGL policy. There was no evidence before me that such a search would have led to the discovery of the policy and

accordingly I am not prepared to conclude that the adjuster should have conducted the search in this instance. I wish to make it clear, however, that my decision in this regard is based on the facts on this particular case and that one should not conclude that the failure to conduct an "auto plus" search is acceptable in all priority matters.

I will deal briefly with the issue of Coseco's denial of coverage because of a material misrepresentation since it was raised by counsel. Despite the fact that the death benefits were paid, Coseco, on May 10, 2001 advised Mr. Fraser that they were taking the position that the insurance policy was void ab initio due to a material misrepresentation. In addition, in its' Notice of Intention to Dispute, dated December 12, 2001, Coseco advised that

> "policy number 01206867 was cancelled 'ab initio' see attached letter. Since the application (O.C.F. 4) was submitted on behalf of Margaret Ambler for death and funeral benefits, these were paid under the S.A.B.S. We now look to Lombard for recovery of the monies paid."

Lombard has pointed out that Coseco had decided back in May of 2001 that the policy was void ab initio and it was not until December of 2001 the Notice of Dispute was given. While this is so, it is not particularly relevant to the notice issue. The real question to be addressed is what efforts were made to locate another possible insurer. Accordingly I find that this argument is not determinative of the issue.

Was the Ninety-Day Period a Sufficient Time to Make the Determination that Another Insurer was Liable?

In the initial ninety days following the receipt of the application for accident benefits there was no reasonable expectation that there would be another policy of insurance available. It was only after passage of the ninety days that circumstances developed that led to the coming to light of the other possible insurance. Accordingly I am satisfied, on the facts of this case, that Coseco has satisfied the onus in this regard.

The Second Application

Counsel for Coseco argued that counsel for the deceased, Margaret Ambler, submitted a second application, this time for $2,557.30 for further funeral benefits. The application was submitted by way of a letter dated October 5, 2001. Counsel for Coseco takes the position that this was a separate application for the tombstone and that even if they failed to provide notice within ninety days for the first application, they certainly complied with regard to the second application. Counsel for Lombard takes the position that it was simply an additional invoice relating to funeral benefits applied for in the original application.

Since I have found that the saving provisions apply to the first application, this issue is somewhat academic. However I do note that section 32(4) of Bill 59 does talk of additional applications. As such I find that the October 5, 2001 letter would constitute a separate application.

In light of all the above, I find that the saving provisions as set out in section 3 (2) of Regulation 283/95 apply.

COSTS:

In the event that the parties are not able to agree as to the costs in this matter, I may be spoken to.

Dated this _____ day of June, 2004.

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M. Guy Jones
Arbitrator