IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, as amended, section 268 and REGULATION 283/95;

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

AND IN THE MATTER OF AN ARBITRATION:

BETWEEN:

YORK FIRE & CASUALTY INSURANCE COMPANY

Applicant

- and -

THE CO-OPERATORS

Respondent

DECISION

COUNSEL:

Jamie R. Pollack for the Applicant, York Fire & Casualty Insurance Company

Mark K. Donaldson for the Respondent, The Co-operators

ISSUES:

1. Is York Fire entitled to proceed with its' priority arbitration or is it precluded from proceeding for non compliance with the notice provisions set out in section 3 of Regulation 283/95?

DECISION:

1. York Fire has complied with the notice provisions of Regulation 283/95 and is not precluded from proceeding with the arbitration.

HEARING:

This hearing was held on May 25, 2005 in the city of Toronto before me, M. Guy Jones.

FACTS & ANALYSIS:

This priority dispute arises out of an accident that occurred on July 16, 2000. On that date, Mr. Denni Jensen was severely injured when a vehicle, owned by Mr. Gary Baverstock, fell from a car hoist while on the premises of U.S.A. Auto Parts Garage. The Co-operators was the insurer of U.S.A. Auto Parts Garage and York Fire was the insurer of the vehicle which fell upon Mr. Jensen.

After a great deal of delay, caused by various reasons which will be discussed later in this decision, York Fire commenced payment of accident benefits to Mr. Jensen in or about November 2001. York Fire delivered a Notice of Dispute Between Insurers upon the claimant on or about November 12, 2001 and upon the Co-operators on or about January 18, 2002. York Fire proceeded to arbitration on this matter and Co-operators takes the position that York Fire can not proceed, submitting that York Fire has not complied with the ninety-day notice provision as set out in section 3 of Ontario Regulation 289/95 which states:

> 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.

Co-operators takes the position that York Fire in essence, received the first completed application on or about August 23, 2000, and since Co-operators did not receive the Notice of Dispute until January 2002, York Fire is precluded from proceeding pursuant to section 3 (1) of Regulation 283/95.

In order to determine if Co-operator's position is correct, it is necessary to review the facts of this case in some detail. In doing so, it will become apparent that both parties in this dispute became involved in attempting to determine which insurer was responsible for ultimately paying accident benefits, rather than simply paying the benefits to the insured and fighting out the priority dispute between themselves at a later date. Nothing that I say in this decision should be taken to condone the actions of the parties. This matter was not handled in an expeditious manner, nor as injured parties have a right to expect in this jurisdiction.

The essence of Co-operator's position, as I understand it, is that York Fire spent a great deal of time attempting to deflect the accident benefits application towards Co-operators and that York Fire actually received the first completed application for accident benefits by way of a letter from Mr. Jensen's lawyer on August 23, 2000. It is undoubtedly true that York Fire did not respond to

this matter in a timely fashion. As early as July 18, 2000, or two days after the accident, York Fire hired Mr. Chris Maitland, of Maitland Insurance Adjusters to investigate the accident including any accident benefit issues. Shortly after the accident Mr. Jensen retained an experienced personal injury lawyer, Mr. Robert Durante, of the law firm Oatley, Purser, to represent him. On August 1, 2000, Mr. Durante wrote to Ms. Jennifer Mousley of Co-operators, confirming a conversation that he had with her on that date, requesting an application for accident benefits package from Co-operators. He noted that Co-operators had agreed to provide the application for accident benefits but were taking the position that Mr. Jensen was not entitled to accident benefits. Mr. Durante advised Co-operators of the requirement under the Insurance Act to pay accident benefits pending the resolution of the dispute between the insurers.

Ms. Mousley provided the application to Mr. Durante by way of a letter on August 15, 2000, wherein she reinterated that the application should be directed to York Fire. Mr. Durante then sent a letter to Mr. Maitland dated August 23, 2000, stating:

> Please consider this letter as Mr. Jensen's formal application for accident benefits with your principal. Upon further investigation we have concluded that your principal is liable for payment of accident benefits to Mr. Jensen. Would you kindly provide us with a complete accident benefit application package.

What then transpired was a series of phone calls and letters as Mr. Durante attempted to obtain accident benefits for his client.

Mr. Maitland testified at the hearing on behalf of York Fire. A review of his correspondence in this matter reveals that he requested instructions on a number of occasions as to whether or not to provide an accident benefits package to Mr. Durante, as requested. There were a number of reasons as to why no application was forwarded to Mr. Durante. At very best, these delays can be explained as an attempt to clarify who the proper insurer was.

Mr. Randy Walters, the claims supervisor at York Fire during this time also testified at the hearing. It was Mr. Walters' position that York Fire never intended to deflect the accident benefit application and that once it was received they would pay it and pursue the other insurer. It was Mr. Walters' position that he instructed Mr. Maitland on a number of occasions to forward the application to Mr. Durante. Unfortunately, Mr. Walters did not have the documentation to support his position in that regard, and the reports sent by Mr. Maitland to York Fire tend to support Mr. Maitland's position that he repeatedly requested instruction as to whether or not to send the application. It may be that there was a misunderstanding between Mr. Maitland and Mr. Walters as to what was to be done, however the correspondence strongly supports Mr. Maitland's position.

York Fire, at the hearing, pointed out that Mr. Durante had an accident benefit package from Co-operators as early as August 2000 and this could have been forwarded to either York Fire or Co-operators. They further submit that the fact that such an application had already been sent

explains in part why York Fire did not provide an application package earlier than it did. It is undoubtedly true that Mr. Durante did have the Co-operators' application package and it could have been sent to either company. It is worthy of note, however, that York Fire, based on the documentation filed at the hearing, was not aware of the Co-operators application package until early February of 2001. Accordingly any delay before that time can not be explained on that basis. In any event it was not until September 25, 2001 that York Fire finally provided the application package to Mr. Durante. This was done only after repeated requests by Mr. Durante and threatening to apply for mediation at the Financial Services Commission of Ontario.

I am not in agreement with Co-operators' position that Mr. Durante's letter of August 23, 2000, quoted in its' entirety, above, constitutes a completed application for accident benefits. Each case must, of course, be determined on its own particular set of facts. In this case, the letter must be considered in the context of the other facts of this case. The letter is undoubtedly a request for the application package and it, along with the other correspondence in this matter, reflect Mr. Durante's frustration in not being able to get one insurer or the other to provide the benefits. The letter does not, however, come anywhere close to providing the information required to constitute a completed application for accident benefits. I am prepared to accept that an application does not need to be submitted on the approved form, but certainty information should be provided, and in this case it was not.

Co-operators has submitted that York Fire's actions were similar to those of Commerce in Liberty Mutual Insurance Company vs. Commerce Insurance Company (an unreported decision of myself released July 6, 2001 and upheld on appeal [2001] O.J. 5479) In that case, the insured

party made repeated requests to Commerce for accident benefits which Commerce ignored or wrongfully denied. Finally, in frustration, the applicant applied to Liberty Mutual who paid the benefits, but failed to provide the notice of dispute between insurers within the required ninety days. Commerce took the position that Liberty could not proceed as Liberty Mutual had not complied with the ninety-day notice provisions. I held in that case that Commerce could not rely upon section 3 of Regulation 283/95 when they themselves had not complied with the Regulation or the Insurance Act.

There are a number of important distinctions between that case and this case. The most important distinction is that in that case I found that the fact that Commerce had received the first completed application and rejected it. In this case, I found that that in fact York Fire received the first completed application form for accident benefits but not until October 2001 and that the notice of dispute was within the required timeframe as set out in section 3 of Regulation 283/95.

With regard to the issue of deflection, I find that both parties attempted to convince the injured party's solicitor that the application should be sent to the other company rather than simply paying it and proceeding a claim against the other. York Fire is certainly the primary offender in this regard and nothing I say should be taken to endorse their conduct. I am cognizant of the fact, however, that the injured party's solicitor did have an application package early on which could have been sent to either insurer and this entire unfortunate episode could have been avoided.

Despite York Fire's conduct in this matter, they did pay the accident benefits and served the Notice of Dispute in the required timeframe and accordingly they may proceed with the arbitration.

Dated this _____ day of August, 2005.

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M. Guy Jones
Arbitrator