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:

THE PERSONAL INSURANCE COMPANY

Applicant

- and -

MARKEL INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Ralph D'Angelo for the Applicant

J.C. Rioux for the Respondent

ISSUE:

1. Is the Personal Insurance Company entitled to rely upon the "saving provisions" of section 3 (2) of Regulation 283/95 to extend the time for service of the Notice of Dispute Between Insurers beyond the ninety days required by that Regulation, and thereby be permitted to arbitrate its claim against Markel Insurance Company?

DECISION:

The time for service of the Notice of Dispute is not extended and accordingly the Personal cannot continue with the arbitration.

HEARING:

The hearing in this matter was held in Toronto, Ontario on March 9, 2006, before me, M. Guy Jones, arbitrator. No viva voce evidence was called and the matter proceeded on the basis of an agreed statement of facts and documents filed.

FACTS & ANALYSIS:

This priority dispute arises out of an accident which occurred on November 17, 2002. On that date, Mr. Krzystof Kucharzak was repairing his motor vehicle along the side of Highway 89, near Alliston, Ontario when a Dodge Shadow, driven by a Mr. Michael Dillani collided with the Kucharzak motor vehicle, thereby injuring Mr. Kucharzak. Mr. Kucharzak had previously had a motor vehicle liability policy with Dominion of Canada General Insurance Company, however that policy was cancelled one month prior to the accident. Mr. Dillani had a motor vehicle liability policy with the Personal.

On February 20, 2003, the Personal received a completed application for accident benefits from Mr. Kucharzak's legal representative, Mr. Stephen Werbowyj. Accompanying the application was a letter from Mr. Kucharzak's employer, Marex Transport Inc. advising that he drove vehicles for that company at the time of the accident.

The Personal commenced making accident benefit payments to Mr. Kucharzak and on July 2, 2003, served Markel Insurance Company with a Notice of Dispute Between Insurers, taking the position that Mr. Kucharzak had available to him for his regular use, a motor vehicle owned by his employer, Marex Transport Inc.. If this was so, the insurer of Marex Transport Inc. would be higher in priority for payment of accident benefits and would therefore be responsible for payments of those benefits pursuant to section 66 of the Statutory Accident Benefits Schedule. For the purpose of this arbitration, the parties are in agreement that section 66 would apply, subject to the 90-day notice issue.

Section 3 (1) of Regulation 283/95 states:

> No insurer may dispute its obligation under section 266 of the Act unless it gives written notice within 90 days of receipt of a complete application for benefits to every insurer who did claim is required to pay under that section.

The parties agreed that notice was not given to Markel until July 2, 2003. Since the Personal received the application on February 20, 2003, the ninety-day notice period expired on May 21, 2003. The question then becomes whether the "saving provisions" of section 3 (2) of the Regulation apply to this fact situation. That section states:

> (2) An insurer may give notice after the ninety-day period if,
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> (a) ninety days was not a sufficient time to make a determination that another insurer or insurers is liable under section 268 of the Act; and

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

In order to determine if the ninety-day notice period should be extended, it is necessary to briefly review the efforts made by the Personal to determine whether there might be another insurer in priority in this matter. Ms. April Dearing, an adjuster with the Personal, was primarily responsible for handling the accident benefit claim of Mr. Kucharzak and investigated the priority issue. As previously noted, the completed application for accident benefits was received by the Personal on February 20, 2003. With the application came a letter dated December 2, 2002 from Marex Transport Inc., advising that Mr. Kucharzak was employed by them as a driver and had been so at the time of the accident. The letter gave the address and phone number of the employer. As such, the Personal had to be aware, as of February 20, 2003, that Mr. Kucharzak's employer's insurance company could possibly be in priority to it in this matter.

The next day, February 21, 2003 Ms. Dearing wrote to the claimant's legal representative, Mr. Werbowyj, and requested details of the employer's fleet policy and to confirm if he had access to the same motor vehicle at his workplace. On the same date, Ms. Dearing attempted unsuccessfully to contact Mr. Waszcuk, the controller at Marex Transport Inc. in order to get the insurance particulars for which she left a message for him to call her.

On March 11, 2003 Ms. Dearing called Marex Transport once again and left a message for them to call her.

On March 6, 2003, Mr. Waszcuk of Marex Transport Inc. left a message at Mr. Werbowyj's office that "his wife doesn't want him to release insurance information".

On March 11, 2003, Ms. Dearing repeated her request of Mr. Waszcuk regarding fleet policy insurance particulars of Marex.

On March 18, 2003, Mr. Werbowyj followed up with Mr. Waszcuk of Marex and provided accident details to Mr. Werbowyj. Mr. Waszcuk agreed to speak to his insurance agent and call him back. Mr. Waszcuk also stated that it was his (Mr. Waszcuk's) recollection that Mr. Kucharzak was not employed with him at the time of the accident.

On April 21, 2003 Mr. Werbowyj wrote to Marex asking again for insurance particulars and providing copies of Mr. Kucharzak's pay stubs to prove that Mr. Kucharzak worked there at the time of the accident.

On May 6, 2003, Ms. Dearing spoke to Mr. Werbowyj who stated that he had made several attempts to obtain insurance policy particulars from Mr. Waszcuk who did not cooperate. Mr. Werbowyj suggested that Ms. Dearing try to contact Mr. Waszcuk herself and get the information. On the same date Ms. Dearing called Mr. Waszcuk at Marex. Mr. Waszcuk denied knowing who Mr. Kucharzak was and then asked that Ms. Dearing put the request in writing.

On May 6, 2003, Ms. Dearing wrote to Marex requesting the information. On May 13, 2003, Ms. Dearing received a call from Mr. Werbowyj's office stating that Mr. Waszcuk was still not cooperating.

On an unknown date, between May 6 and June 2, 2003 Ms. Dearing attended at Marex's premises located at 2509 Royal Windsor Drive. While there was a truck at that location, the compound was fenced in and locked and Ms. Dearing was unable to get a license plate number from the truck.

Subsequent to the running of the ninety days, the following was done. On June 4, 2003 Ms. Dearing received a phone call from Mr. Werbowyj's office, at which time Ms. Dearing asked Mr. Werbowyj to take some further action against the employer to obtain the insurance particulars. As a result on June 18, 2003 Mr. Werbowyj sent a registered letter to Mr. Waszcuk demanding the insurance particulars.

On July 2, 2003 Mr. Werbowyj obtained the name of Marex's insurance broker and provided it, along with the broker's phone number to Ms. Dearing.

Ms. Dearing determined that Monnex was the fleet insurer and put them on notice the same day.

As has been noted by many arbitrators and the courts, the decision as to whether or not to extend the ninety day notice provision is a very factual driven matter. The Ontario Court of Appeal in Kingsway General Insurance Company vs. West Wawanosh Insurance Company (2002) 58 O.R.

(3rd) 251, made it clear that the notice period was to be extended only in exceptional circumstances. Mr. Justice Sharp stated:

> The Regulation sets out in precise and specific terms a scheme for resolving disputes between insurers. Insurers are entitled to assume and rely upon the requirement for compliance with those provisions. Insurers subject to this Regulation are sophisticated litigants who deal with these disputes on a daily basis. The scheme applies to a specific type of dispute involving a limited number of parties who find themselves regularly involved in dispute with each other. In this context, it seems to me that clarity and certainty of applications are of primary concern. Insurers need to make appropriate decisions with regard to conducting investigations, establishing reserves and maintaining records. Given this regulatory setting there is little room for creative interpretations or carving out judicial exceptions designed to deal with the equities of particular cases.

I am in full agreement with this statement. In applying it, however, one must keep in mind that the legislature did include the provision to extend the time frame so that it could be applied in the appropriate circumstances. As has been stated in earlier decisions, insurance adjusters are extremely busy individuals. Accident benefit adjusters in particular, work with numerous very tight timelines. They are expected to provide benefits to injured parties within very short periods of time as well as investigate other possible sources of insurance, etcetera. In assessing whether or not to extend the notice period, we must look at what was reasonable in the circumstances. Very few investigations, with the benefit of hindsight, could not be improved upon but that is not the test.

In this particular case it is clear that the employer was not cooperative with either the claimant's representative or with Ms. Dearing. Mr. Werbowyj of Marex Transport went beyond simple lack of cooperation to attempt to actively mislead by suggesting that the claimant did not work there. Such conduct can and should be taken into account when determining if the notice period should be extended.

Counsel for Markel suggested that any efforts made by the claimant's legal representative ought not to be included in considering what efforts were made to obtain the insurance particulars. I do not agree. The objective is to obtain the insurance information as quickly and efficiently as possible. If the insurance adjuster is able to get the claimant, or his representative, to attempt to obtain the information, then this is to be encouraged. In this particular case, one would have thought that the employee, or his representative, would have had a better chance at getting the information from the employer rather than an insurance adjuster who has no relationship with the employer. Indeed, the claimant has recourse to section 269 of the Insurance Act which states:

> (1) a person who is entitled to statutory accident benefits or his or her personal representative is entitled to particulars as to whether the owner or operator of any automobile against whom the person may have a claim has insurance that provides for statutory accident benefits and the name of the insurer, if any.
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> (2) The person or his or her personal representative may demand the particulars described in sub section (1) by registered mail from the owner or operator of the automobile or the insurer, if any, of either of them.
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> (3) Every owner, operator, and insurer shall comply with a demand under sub section (2) within 10 days of receiving the demand.

Indeed, the claimant's legal representative made such a demand by registered letter on June 18, 2002 which would seem to have produced results.

Counsel for Markel suggested that the Personal simply made four telephone calls and two letters during the ninety-day time frame. This is an over simplification which does not take into account the efforts made by the claimant's representative, at Ms. Dearing's request.

Counsel for Markel also notes that while Ms. Dearing attended at the office of Marex Transportation in an effort to observe the license number on the truck, in order to get insurance particulars, she could not say exactly what date she did this, although she was able to say that it was between May 6 and June 2, 2003.

The test set out in section 3(2) of the Regulation is a two-part test. The onus is on the applicant to show (a) ninety days was not a sufficient to make a determination that another insurer was liable and (b) the insurer made reasonable investigations to determine if another insurer was liable within the ninety day period.

Counsel for Markel filed an affidavit of Mr. John Vos, an adjuster with Markel Insurance. On October 20, 2005, he hired an independent adjuster, Mr. Jack Fox to attend at the Marex compound to photograph the license numbers on the trucks located in the compound. Mr. Fox did so and Mr. Vos then did a license plate history search on the license number. He then obtained the vehicle identification number from the plate history search. He then conducted a vehicle identification number search which identified Markel as the insurer at the time of the

accident. The entire search process took approximately seven days and cost roughly three hundred dollars. Counsel for Markel argues that this shows that ninety days was sufficient time to obtain the information. With respect, I do not agree. With the benefit of hindsight, and in isolation, it is relatively easy to show that something could have been done with in ninety days. This, however, ignores the fact that the adjusters have many other duties and there are many potential ways to obtain the necessary information. Just because it could be done, after the fact, in a particular way in a limited period of time does not mean that ninety days was a sufficient time frame to obtain the information. One has to take into account all the circumstances as they existed at the time.

In this case, I am somewhat troubled by the lack of investigation undertaking during the ninety days, as required by part (b) of the test. Between March 11 and May 6, 2003 it does not appear that Ms. Dearing was actively pursuing the insurance information. For instance, on March 11, 2003 Ms. Dearing had asked the claimant's legal representative to obtain the insurance particulars from the employer and she could rightly wait for some period of time to see if that produced the desired results, and indeed Mr. Webowyj did attempt to obtain the information during that time frame.

Counsel for Markel also argues that since the Personal cannot say for certain that Ms. Dearing's visit to the employer's compound was within the ninety days it should not be included the efforts.

I do note, however, that that attempt was unsuccessful so if it was done before or after the ninety day period would not have changed the results of that particular investigation.

After reviewing all the circumstances of this case, I am not prepared to extend the time of service of the Notice. While the Personal was undoubtedly met with an uncooperative employer, they should have made greater efforts between March 11 and May 6, to the identity of the insurer. With regard to the efforts by Ms. Dearing to obtain the license plate number by attending at the employer's compound, the onus is on the Personal to prove that it was done within the ninety day period and they have not been able to satisfy that onus.

As the notice period is not extended, then pursuant to section 3 (1) of Regulation 283/95 the arbitration cannot proceed.

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

Dated in Toronto, this _____ day of July, 2006.

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M. Guy Jones
Arbitrator