IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, SECTION 268 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:

PERTH INSURANCE COMPANY

Applicant

- and -

STATE FARM AUTOMOBILE INSURANCE COMPANY and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO as represented by THE MINISTER OF FINANCE

Respondents

DECISION ON PRELIMINARY ISSUES

COUNSEL:

Helen D. Friedman for the Applicant

Mark K. Donaldson for the Respondent, State Farm

John Friendly for the Respondent, Minister of Finance

PRELIMINARY ISSUES:

Counsel agreed that the following issues would be determined at this hearing:

1. Is Perth the "priority insurer" responsible for the payment of benefits to Mr. Lad under section 268(2) of the *Insurance Act* by virtue of the application of the "other automobile" provisions contained in section 2.2.3 of the OAP 1 Owner's Policy it has with Mr. Vargas?

2. If so, is Perth's late notice to State Farm of its intention to dispute its obligation to pay benefits to Mr. Lad excused by the saving provisions in section 3(2) of *Regulation 283/95* ?

3. If the answer to the first question is no, is the Fund's late notice to State Farm of its intention to dispute its obligation to pay benefits to Mr. Lad excused by the either the saving provisions in section 3(2) of *Regulation 283/95* if applicable, or by section 10 of that regulation?

RESULT:

1. Perth is the priority insurer responsible to pay benefits to Mr. Lad under section 268(2) as it is an "insurer of the automobile" that struck him, by virtue of the application of section 2.2.3 of OAP 1.

2. Perth's late notice of its intention to dispute its obligation to pay benefits to State Farm cannot be excused by the savings provisions in section 3(2) of *Regulation 283/95*, and it is therefore precluded from pursuing State Farm under the regulation.

The result of these findings is that the application for arbitration is dismissed, and Perth's request for reimbursement must fail.

BACKGROUND:

This arbitration arises out of a motor vehicle accident that occurred on July 14, 2006, when Jivanbhai Lad was struck as a pedestrian by an automobile operated by Marcio Vargas. Mr. Lad sustained injuries in the accident, and sent an application for accident benefits to Perth Insurance Company ("Perth"). Perth paid benefits to Mr. Lad, and his claim under the *Statutory Accident Benefits Schedule* has now been resolved on a full and final basis.

Perth claims that it is not the priority insurer responsible to pay the claim under section 268(2) of the *Insurance Act*, as it is not "the insurer of the automobile" that struck Mr. Lad. While Mr. Vargas had a policy in effect with Perth at the time of the accident that covered two of his vehicles, he had requested that coverage be deleted on the GMC pick-up truck that he was driving when he struck Mr. Lad, a few months prior to the date of the accident. After discovering that coverage for the vehicle involved in the accident had been deleted prior to the accident, Perth filed a Notice of Dispute Between Insurers with the Motor Vehicle Accident Claims Fund ("the Fund"), and seeks reimbursement from them for the benefits paid out to Mr. Lad.

The Fund takes the position that the "Other Automobile" provisions in section 2.2.3 of Mr. Vargas' OAP 1 (Owner's Policy) with Perth extend coverage for accident benefits to Mr. Lad in these circumstances, and that Perth is therefore the "insurer of the automobile" and is responsible to pay benefits pursuant to section 268(2) of the Act.

After receiving the above notice from Perth and investigating the matter, the Fund determined that Mr. Lad was a dependant of his daughter, Jayvanti Mistry, who is insured

with State Farm Insurance ("State Farm"). Both the Fund and Perth subsequently filed notices to this effect with State Farm. State Farm takes the position that as the notices were served well beyond the ninety-days provided for in *Regulation 283/95,* both Perth and the Fund are precluded from pursuing them to pay benefits to Mr. Lad.

HEARING:

This arbitration hearing was held on November 4 and 5, 2008, in Toronto, Ontario before me, Shari L. Novick, Arbitrator, pursuant to the provisions of *Regulation 283/95* of the *Insurance Act* and the *Arbitration Act,* S.O. 1991.

THE EVIDENCE:

The parties filed the following Agreed Statement of Facts, prior to the hearing:

1. Jivanbhai Lad ("Lad") was a pedestrian struck by an automobile operated by Marico Vargas ("Vargas") on July 14, 2006 (the "Accident").

2. The striking automobile involved in the accident was a 1990 GMC pickup truck (the "1990 GMC") owned by Vargas.

3. As a result of the injuries and impairments sustained in the Accident, Lad submitted an Application for Accident Benefits to Perth Insurance Company ("Perth").

4. Perth received an Application for Accident Benefits dated November 30, 2006 on December 5, 2006.

5. At the time of the Accident Vargas owned a number of automobiles, in addition to the 1990 GMC.

6. Vargas obtained a policy of motor vehicle liability insurance from Perth in 2005 as policy 3554594 (the "Perth Policy").

7. From time to time to the date of loss, Vargas would add and /or delete various vehicles to or from the Perth Policy.

8. The 1990 GMC was added May 6, 2005. It was deleted February 1, 2006. It was added again February 17, 2006. March 11, 2006 the 1990 GMC was deleted.

9. The 1990 GMC was not listed on the Perth Policy at the time of the Accident.

10. At the time of the Accident , a 1998 Ford Mustang and 1997 Pontiac Grand Prix, both owned by Vargas, were the only vehicles insured under the Perth Policy.

11. On January 9, 2007 Perth sent a Notice of Dispute Between Insurers dated that same date to the Motor Vehicle Accident Claims Fund ("MVAC").

12. On August 8, 2007, CGI Adjusters obtained a statement from Lad which suggested that Lad was dependant of his daughter, a State Farm insured.

13. By letter dated August 8, 2007, MVAC notified State Farm of the priority dispute.

14. On August 13, 2007, Perth received the August 8, 2007 statement from MVAC.

15. Be letter dated September 4, 2007, Perth served a Notice to Applicant of Dispute Between Insurers dated that same date on State Farm.

16. By Notice dated December 19, 2007, Perth submitted the priorities dispute to Arbitration as against State Farm and MVAC.

Two witnesses were also called by the parties to provide *viva voce* evidence on the "ninety day issue". I will highlight the important parts of the evidence of each witness below, under that heading.

RELEVANT PROVISIONS:

OAP 1

2.2.3 Other Automobiles

Automobiles, other than a described automobile, are also covered when driven by you, or driven by your spouse who lives with you.

The following coverages apply to other automobiles if a premium is shown for the coverage on the Certificate of Automobile Insurance for a described automobile:

- Liability,
- Accident Benefits,
- Uninsured Automobile, and
- Direct Compensation - Property Damage.

Special Conditions: For other automobiles to be covered, the following conditions apply:

1. Both the other automobile and a described automobile must not have a manufacturer's gross vehicle weight rating of more than 4,500 kilograms.

2. The named insured is an individual, or if the described automobile is owned by two people, the named insureds are spouses of each other.

3. Neither you nor your spouse is driving the other automobile in connection with the business of selling, repairing, maintaining, storing, servicing or parking automobiles.

4. The other automobile is not being used to carry paying passengers or to make commercial deliveries at the time of any loss.

5. **For all coverages, except Accident Benefits,** the other automobile cannot be an automobile that you or anyone living in your dwelling owns or regularly uses. (For the purposes of this paragraph, we don't consider use of an automobile rented for 30 or fewer days to be regular use.) Nor can the other automobile be owned, hired or leased by your employer or the employer of anyone living in your household. However, if you drive one of these other automobiles while an excluded driver under the policy for that automobile, this policy will provide Liability and Uninsured Automobile Coverages while you drive that automobile

Section 4 – Accident Benefits Coverage

4.1 Who is Covered

For the purposes of Section 4, insured persons are defined in the Statutory Accident Benefits Schedule. In addition, insured persons also include any person who is injured or killed in an automobile accident involving the automobile and is not the named insured, or the spouse or dependant of a named insured, under any other motor vehicle liability policy, and is not covered under the policy of an automobile in which they were an occupant or which struck them.

Insurance Act

Section 239

(1) Subject to section 240, every contract evidenced by an owner's policy insures the person named therein, and every other person who with the named person's consent drives, or is an occupant of, an automobile owned by the insured named in the contract and within the description or definition thereof in the contract, against liability imposed by law upon the insured named in the contract or that other person for loss or damage,

(a) arising from the ownership or directly or indirectly from the use or operation of any such automobile; and

(b) resulting from bodily injury to or the death of any person and damage to property.

Section 244

Any person insured by but not named in a contract to which section 239 or 241 applies may recover indemnity in the same manner and to the same extent as if named therein as the insured, and for that purpose shall be deemed to be a party to the contract and to have given consideration therefor.

Section 268

(2) The following rules apply for determining who is liable to pay no-fault 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 any automobile involved in the incident from which the entitlement to statutory accident 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

Reg 283/95

Section 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.

(2) An insurer may give notice after the 90-day period if,

(a) 90 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; and

(b) the insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90-day period.

ARGUMENTS & ANALYSIS:

I will address the parties' arguments on the section 2.2.3 issue first, followed by an analysis on the "ninety-day issue".

Do the "Other Automobile" provisions in Section 2.2.3 of Mr. Vargas' OAP 1 (Owner's Policy) with Perth extend coverage for Mr. Lad's accident benefits in these circumstances?

As set out above, I have determined that section 2.2.3 does extend coverage to Mr. Lad, in these circumstances. In doing so, I am following an earlier decision of mine in the case of *Economical Insurance Group v. HMQ, Security National Insurance Co. and Kingsway General Insurance Co. ("Shingara")*, released in January 2009 after the conclusion of this case. In that decision, involving facts that are similar to those in the instant case, I found that I was bound by the court's decision in the case of *Co-operators'*

General Insurance v. Pilot Insurance Co. [1998] O.J. No. 5551, which was upheld by the Court of Appeal, at [1999] O.J. No. 3471.

In the *Shingara* case, I determined that the operation of section 2.2.3 of the owner's policy of the spouse of a driver who was driving an uninsured vehicle extended coverage for accident benefits to the uninsured pedestrian who was struck by that driver. Given the similar facts in this case, I find that I am also bound by the court's decision, and make the same finding. However, counsel involved in this matter made very fulsome arguments on this issue, which are worth setting out and which I address below.

Counsel for Perth argued that a plain reading of section 268(2)(2)(ii) of the Act suggests that a non-occupant of a vehicle such as Mr. Lad has recourse against the insurer of the "described automobile" under an owner's policy, but that recourse would not extend to that insurer if the vehicle involved in the accident was not specifically identified on the policy. While she acknowledged that section 2.2.3 of OAP 1 extends coverage to other vehicles driven by a named insured or the spouse of a named insured that are not described on the policy, she noted that section 239 of the *Insurance Act* specifies that coverage under an owner's policy only extends to the named insured, another driver who operates the vehicle with consent, or an occupant of the vehicle, and does not mention non-occupants such as pedestrians. Counsel submitted that the provisions of the OAP 1 should be interpreted in a manner that is consistent with the provisions of the Act, and that coverage should therefore not be extended to pedestrians under section 2.2.3.

Counsel for the Fund took a different view. He submitted that a plain reading of section 2.2.3 clearly leads to the conclusion that coverage for accident benefits should be extended to non-occupants like Mr. Lad in these circumstances. He submitted that if competing interpretations of a provision are put forward, the one that finds insurance coverage should be favoured over the one that denies coverage. He contended that Ms. Friedman's suggestion that the term "described automobile" be read into the relevant part of section 268(2) runs counter to this rule. He argued that the fact that Special Condition #5 of section 2.2.3 specifically excepts accident benefits coverage from the exclusions

makes it clear that Mr. Vargas' "other automobiles", meaning the ones not listed on the policy, are also covered.

In response to counsel for Perth's comment that section 239 of the Act restricts coverage under the OAP 1 to named insureds, drivers with consent and occupants of a vehicle, Mr. Friendly noted that section 244 of the Act deems any person "insured by but not named in" a policy to be parties to the contract as well. He argued that this is indicative of the drafters' intention to extend coverage to parties beyond those specified in section 239.

Counsel for the Fund also noted that the definition of "insured person" under the *SABS* is very broad, and includes any "person who is involved in an accident involving the insured automobile", if the accident takes place in Ontario. He contended that Mr. Lad would fall within this definition, as the GMC truck that struck him was insured on the date of loss through the "other automobile" provisions in section 2.2.3, given counsel for Perth's concession that the section would extend coverage to Mr. Vargas himself for accident benefits while he was driving that vehicle.

Counsel for State Farm supported the Fund's position that section 2.2.3 of OAP 1 extends coverage to pedestrians like Mr. Lad in these circumstances.

Counsel for Perth also made the point that there are strong policy reasons supporting her client's interpretation of the provisions in question. She stated that if the Fund's interpretation is accepted, drivers would not be motivated to insure all of their vehicles if they could 'get away with' paying premiums on only one vehicle, while still enjoying accident benefits coverage for all other vehicles they may own by virtue of the application of section 2.2.3. She noted that the *Compulsory Automobile Insurance Act* requires that all vehicles operated on a highway must be insured, and argued that the Fund's interpretation would undermine the purpose behind this legislation.

As I stated in my earlier decision, I am mindful of the problems created by accepting the interpretation of section 2.2.3 put forward by the Fund. I expressed these concerns in the *Shingara* decision as follows – (at p.13)

> *I also appreciate Economical's argument that this interpretation does not fit neatly within the broader context of the scheme of motor vehicle insurance in the province. Vehicles are required to be insured, and an interpretation that essentially provides a "loophole" that extends coverage to uninsured vehicles should not be sustained. However, the court's pronouncement is clear, and as mentioned, I am bound by it. As well, I find that paragraph 5 of section 2.2.3 and section 4. 1 of the OAP 1 policy send a clear signal that accident benefits coverage under an owner's policy, both for drivers and uninsured pedestrians, should be included whenever possible. I specifically note that in the first section of section 4 – titled Accident Benefits Coverage – under the heading of "Who is Covered", the policy is very clear that beyond those who qualify under the SABS definition of an "insured person", those who are injured in accidents involving* ***the automobile*** *(to be distinguished from the "described automobile") and are not named insureds, spouses, or dependants under other auto policies, and are "not covered under the policy of an automobile in which they were an occupant or which struck them" are also covered under the policy at hand for accident benefits coverage. Ms. Shingara fits within this definition. This, in my view, is clear evidence of an intent to cast the coverage net under the policy as wide as possible, when it comes to accident benefits.*
>
> (emphasis in the original)

In *Co-operators' v. Pilot, supra,* a passenger was injured when the vehicle she was traveling in collided with another vehicle. The passenger had no insurance coverage of her own. The vehicle that she was in, owned by a Mr. Sobka but being driven with his consent by his friend Mr. Huard, was not insured on the date of the accident. Mr. Huard, the driver, had a policy insuring his own vehicle with Co-operators'. The other vehicle involved in the accident was insured by Pilot. In an application to the court to determine priority, which turned on whether or not Co-operators was "the insurer of the automobile" in which the injured passenger was an "occupant", Justice Browne stated – (at para. 5)

> *In an examination of sub-para. ii. I was urged to consider the wording of the policy, the regulations and the scheme of the Act and I have done so. From s. 1 of the Insurance Act…an insurer is defined as one who undertakes or agrees to offer to undertake a contract of insurance, and from the statutory accident benefits schedule "insured automobile" is defined in s. 1, referable to liability policy coverage, as meaning any automobile covered by the policy. As indicated, these considerations of the Act as a whole and regulations assist with reference to the otherwise undefined meaning of "insurer of the automobile". It is clear that from the perspective of Huard other automobiles driven by him are insured automobiles. The wording of the policy from s. 2.2.2 [now 2.2.3] extends accident benefit coverage to Huard for automobiles driven by him. By extension, it is my conclusion that further to the policy as issued, Co-Operators is the "insurer of the automobile" in which Capelazo was an occupant.*

Pursuant to these findings, Justice Browne ordered Co-operators' to pay accident benefits to the occupant, Ms. Capelazo. His decision was upheld by the Court of Appeal on September 10, 1999, with the brief endorsement "the judge below did not err in his conclusion".

Counsel for Perth submits that this decision was wrongly decided and should not be followed. She notes that the court did not engage in any analysis on the priority issue, and contended that in any event, that decision is distinguishable from this case, as the claimant in the *Co-operators'* case was an occupant of the vehicle, notably one of the categories mentioned in section 239 of the *Act*, while Mr. Lad was a pedestrian and not so mentioned.

A similar argument was made by counsel for Economical in the *Shingara* case. I addressed it as follows:

> *I have considered counsel for Economical's comments in this regard, but in my view, the facts in the instant case cannot be distinguished from those in the Co-operators v. Pilot decision. I therefore find that I am bound by the court's determination, and the Court of Appeals' endorsement of it, in that case.*

> *While I agree that it would have been preferable to have had a more detailed analysis from the court on the key issue of how coverage under the policy is extended to the occupant of the uninsured vehicle and not just the driver who was the named insured under the Co-operators policy, I cannot simply ignore the court's finding because it is stated briefly and succinctly. I also do not see any basis for distinguishing the decision simply because the Claimant in that case was an occupant of the vehicle, whereas in the instant case, Ms. Shingara is a non-occupant. Counsel for Economical did not provide any reasons why this was a distinguishing fact, and I note that the language in both branches (ii) of section 268(2) – dealing with occupants and non-occupants – contain the identical phrase "the insurer of the automobile".*

I admit that I remain somewhat troubled by the result of this finding. On some level it does not seem entirely consistent with the overall scheme of insurance coverage, and provides drivers who do not insure all of their vehicles, as they are required by law to do, with a "loophole". It also results in a potentially unworkable scenario in the priority analysis required by section 268(2). As counsel for Perth pointed out, when section 2.2.3 is extended to non-occupants of a vehicle, two insurers would be equally situated on the "priority ladder" with no method provided to choose between them, when a driver with insurance is involved in an accident while driving another person's vehicle that is a "described vehicle" on that owner's policy, given the operation of section 2.2.3. Counsel noted that section 268 addresses how to break a tie in the event that there are insurers on equal rungs in other circumstances, but that no such 'tiebreaking' provision exists in the regulation to address this situation.

I agree that this creates a problem. The priority scheme in section 268(2) of the Act is meant to be a complete code, and yet in this not uncommon situation, there would be two competing insurers on equal rungs of the priority ladder, with no guidance for how to choose between them. If I were not bound by the court's decision in the *Co-operators* case, I would have a hard time reconciling this with the interpretation urged on me by the Fund and accepted by the court, given the rule of statutory interpretation requiring that interpretations which lead to absurdities are to be avoided, whenever possible.

However, given the reasons expressed above, I find that Perth is the "insurer of the automobile" that struck Mr. Lad pursuant to section 268(2)(2)(ii) of the Act. I turn next to the analysis of whether the late notice provided by Perth to State Farm can be excused under section 3(2) of the Regulation.

Is Perth's late notice to State Farm of its intention to dispute its obligation to pay benefits to Mr. Lad excused by the 'saving provisions' in section 3(2) of Regulation 283/95 ?

Joyce Mclean, the Perth adjuster who was assigned to the Lad file, and John Scott, a road adjuster with what was then CGI Adjusters Inc, the adjusting firm used by the Fund to adjust its accident benefits claims, both testified at the hearing about the efforts they made regarding the priority issues in this matter. The relevant parts of their evidence can be summarized as follows:

Joyce McLean

Ms. McLean confirmed that Mr. Lad's Application for Accident Benefits was received by Perth on December 5, 2006, several weeks after the accident took place. She testified that the first task she undertook in her investigation was to call the lawyer who had forwarded the form on Mr. Lad's behalf to ask a few questions. Her log notes for that day indicate "requested call back to determine priority", and the entry for the following day reveals that the lawyer called back and advised that neither Mr. Lad nor his wife "have auto insurance elsewhere, and priority with us, that's why application sent to us".

Part 4 of the application forwarded contains "no" answers in response to all of the questions posed regarding Mr. Lad's coverage under any automobile policies.

Ms. Mclean's log notes also indicate that Mr. Lad's counsel advised during their initial contact that his client was the primary caregiver to his grandchildren, that he lived with his daughter, son-in-law and grandchildren, and that he was not employed.

Ms. Mclean testified that her usual practice is to ask claimants' representatives whether they permit signed statements to be taken from their clients, and if they do not, she requires a statutory declaration to be completed. Ms. Mclean could not recall whether she had specifically requested that Mr. Lad provide a signed statement, and her notes are silent on this point. She did recall that counsel had agreed to provide a statutory declaration, and explained that she decided to "go that route". I conclude from the evidence that she did not press for a signed statement to be taken from Mr. Lad.

The letter subsequently forwarded to Mr. Lad's counsel requesting information in the form of a statutory declaration is three pages long, and very detailed. Only the first six questions are designed to elicit information about potential insurance coverage, and are all prefaced by the phrase "you, your spouse, or any one whom you are dependant on". I note that there is no reference to other family members, or any explanation regarding what would constitute "dependence". The statutory declaration received back from Mr. Lad on December 28, 2006 contains the notation "N/A" next to these questions. Ms. Mclean testified that as some of the requested information was not included in the declaration received, she sent a follow-up letter requesting further information. Notably, the letter did not contain any requests relating to the priority issue.

Ms. Mclean testified that as the vehicle involved in the accident was not covered under Mr. Vargas' policy on the date of the accident, and it appeared that there was no other insurance coverage for Mr. Lad, she provided notice to the Fund of Perth's decision to object to its obligation to pay benefits to Mr. Lad on January 9, 2007, by forwarding a Notice to Applicant of Dispute Between Insurers on that date.

She testified that she subsequently received a report from an in-home assessment that she had requested be conducted on January 17, 2007. She noted that Mr. Lad was described as a "retiree" in the report, and that his pre-accident activities included "cooking, cleaning, laundry, vacuuming and grocery shopping". She explained that she concluded from this report that Mr. Lad had not been dependant for care on his daughter's family prior to the accident.

Ms. Mclean testified that she did not feel the need to independently investigate whether Mr. Lad was dependent on anyone who had insurance coverage, given his lawyer's statement that there was no other applicable insurance policy, the answers provided regarding insurance coverage in the OCF 1 and the statutory declaration, as well as the in-home assessment report she had received. She confirmed that the first piece of information that she received suggesting that Mr. Lad was dependent on his daughter was the statement that the Fund obtained from Mr. Lad on August 13, 2007 and forwarded to her several months after her investigation into priority had been completed.

John Scott

Mr. Scott was the second CGI adjuster assigned to work on Mr. Lad's claim, after the initial adjuster assigned to the file left the firm. Nevertheless, he was able to identify various documents in the file and provided a chronology of the steps taken to investigate priority once the Fund was put on notice by Perth on January 9, 2007.

The evidence indicates that after receiving the Notice of Dispute from Perth, a claims administrator from the Fund responded to Ms. Mclean on January 15, confirming receipt of the notice and requesting a copy of the police report and details of the priority investigation conducted by Perth. No response was received from Ms. Mclean, and a further follow-up letter was sent to her on March 29, 2007. Ms. Mclean replied a few days later advising that the police report had been requested and would be provided when received, and that Mr. Lad's statutory declaration indicated that neither he, his spouse, nor anyone upon whom he was dependent owned a vehicle or had auto insurance.

It appears that the file was then transferred by the Fund to CGI, its outside adjusters, on April 10, 2007, and the initial adjuster, Deepali Shah, was assigned to the file on April 12. Ms. Shah conducted license and insurance searches, requested the police report, and contacted Ms. Mclean by telephone a few times. On April 17, Ms. Shah wrote to Ms. Mclean to request further information, and also advised of the Fund's position, as

advanced at the hearing, that Perth was in priority to pay this claim as Mr. Vargas' policy would extend coverage to Mr. Lad under section 2.2.3 of the OAP 1.

Ms. Shah apparently left CGI at the end of April, and no further actions was taken on the file until it was assigned to Mr. Scott on July 24. Mr. Scott explained that two adjusters in the MVAC unit had left CGI around that time, resulting in some of the files lying dormant for a while. Upon receiving the file, Mr. Scott wrote to Mr. Lad to request further information from him, and to arrange a meeting in order to obtain a signed statement from him. A meeting was arranged for August 8, at Mr. Lad's lawyer's office.

Mr. Scott testified that when he arrived at the lawyer's office, he was advised that insurance coverage "had been found with State Farm" and that Mr. Lad no longer had an interest in involving the Fund in his claim. Counsel did not want to proceed with the statement, but Mr. Scott testified that he was able to persuade Mr. Lad's counsel to permit him to ask questions about the priority issue. Mr. Lad explained that he had no source of income other than a government cheque that he receives every three months in the amount of $112, and that he is financially dependent on his daughter. He further stated that his daughter owns a vehicle that is insured with State Farm.

After receiving this information, Mr. Scott sent a copy of the statement to Ms. Mclean, and advised that the Fund would not be accepting priority of the claim. He also contacted State Farm on August 8, 2007 to provide notice under *Regulation 283/95* of their obligation to pay benefits to Mr. Lad. Ms. Mclean provided a similar notice to State Farm on September 4, 2007

Mr. Scott also testified that an adjuster from State Farm subsequently called him on August 23 to advise that State Farm was prepared to accept priority of Mr. Lad's claim. This was later confirmed in writing. However, later that same day, the adjuster called back and advised that because the notice had not been provided to State Farm within the ninety days stipulated in the regulation, they were not prepared to accept priority.

Findings:

Section 3(2) provides that an insurer will be excused from the requirement to provide notice to another insurer of its decision to deny its obligation to pay accident benefits only if it is able to prove both that the ninety day period was not a sufficient time to determine that another insurer was liable under section 268, and that it made the necessary, reasonable investigations to determine whether or not another insurer was liable within those ninety days. It is a two-pronged test, and the onus rests on the insurer seeking to rely on it to prove that both conditions have been satisfied.

The test is an onerous one to meet, and the courts have sent a consistent message that the saving provisions in section 3(2) are to be applied sparingly. The rationale for this is that as sophisticated litigants regularly involved in these type of disputes, insurance companies should be able to determine their rights and obligations under the regulation, and that "no unfairness would be visited upon them by insisting on strict compliance with notice requirements" *(Kingsway General v. West Wawanosh Insurance Company* 2001 CanLii 28051, Nordheimer, J., at para. 22)

The investigation conducted by Perth in this case must be viewed in this context. The parties agree that having received Mr. Lad's Application for Accident Benefits on December 5, 2006, the ninety-day period would end on March 5, 2007. Notice was in fact provided to State Farm on September 4, 2007, some six months late. My inquiry must then focus on the information that was available to Ms. Mclean, and the actions that she took or failed to take, from the receipt of the OCF 1 until March 5.

Ms. Mclean herself testified that she did not do any independent investigation to determine whether Mr. Lad was dependent on anyone who might have an automobile insurance policy. I find this to be a serious oversight, given the information she received early on in the investigation. She was advised within days of being assigned the file that Mr. Lad was not employed, lived with his daughter and son-in-law in their home, and was a caregiver to their children. While she testified that the information she received

indicating that he was responsible for buying groceries and performing many of the household tasks around the home led her to conclude that he had not been dependent on anyone for care, it should have also led her to question whether he was financially dependent on the family he lived with.

Counsel for Perth argued that none of the information received from the claimant or his representative within the first ninety days pointed toward Mr. Lad being financially dependent on his daughter, and suggested that the information subsequently obtained by the Fund's adjuster in the statement to this effect came "out of the blue". She referred to the lawyer's initial statement that Perth was the priority insurer, the Application for Accident Benefits form that indicates that Mr. Lad had no access to insurance coverage, and the statutory declaration submitted containing the "N/A" notations next to the priority questions. While this information was incorrect, an insurer who is investigating priority cannot merely rely on what it is told by a claimant, especially in a case where the application form indicates that the applicant's language of communication is not English, as it did here, and there are clear inconsistencies in the information provided, as there were in Mr. Lad's application relating to police information.

Both counsel cited Justice Ducharme's comments in the appeal decision of the arbitration award in *Primmun Insurance Company v. Aviva Insurance Company of Canada* [2005] O.J No. 1477, and Justice Perell's decision in *Liberty Mutual Insurance Company v. Zurich Insurance Company* (2007) 88 O.R. (3d) 269, in their submissions on this issue. Justice Ducharme considers the effect of an insurer receiving incorrect information from a claimant, and states as follows (at para.27) -

> *…the only issue under s.3(2)(a) is whether the receipt of the inaccurate information renders the 90 day period insufficient for the investigation of the particular case. It is for the insurer who seeks to rely on 3(2) to demonstrate why, in the particular case, the non-disclosure or misrepresentation made the 90 day period inadequate…the testimony of Mr. Marion demonstrates that he conducted only a superficial investigation into the issue of dependency. He accepted the statements of the unsophisticated insureds because the living situation they described was "common" and he had no reason to disbelieve them. The issue under*

> *section 3(2)(a) is not whether the investigation was done properly within the 90 days. The issue is whether the investigation could be done properly within the 90 days. In this case, the 90-day period was more than enough time to conduct an investigation. The appellant's problem is that they did not do so.*

Justice Perell finds as follows on this issue in the *Liberty Mutual v. Zurich* decision – (at para. 23)

> *…an insurer seeking to deliver a notice after 90 days must show both that it exercised due diligence and also that there was something in all the circumstances that would justify requiring more than 90 days to make a determination about whether to issue a notice to a particular insurer.*

I agree with the principles expressed above, and find that when Ms. Mclean's investigation during the relevant time period is held up to the scrutiny required, it falls short. In my view, her efforts simply did not approach the level of diligence that the cases have established are required to trigger the saving provisions. While her notes show that she was focused on investigating priority, it is evident that once it was determined that coverage for the GMC truck had been deleted from the Perth policy prior to the accident, Ms. Mclean decided that the Fund should respond to the claim, and she did not adequately focus on pursuing other avenues of potential priority.

While adjusters should not be held to a standard of perfection, it would have been useful to obtain a statement from Mr. Lad. Having been advised about his living situation and the fact that he was unemployed or retired, it should have been clear to Ms. Mclean that the answers provided in the statutory declaration regarding dependency created a glaring inconsistency that needed to be resolved. The most effective way to do that is by speaking directly with the claimant. While arbitrators should resist the temptation to review investigations undertaken by insurers with the benefit of hindsight, I note that once Mr. Scott was assigned to the file, he arranged a meeting for that very purpose, and the information regarding Mr. Lad's dependency on his daughter was easily obtained.

Accordingly, for the reasons expressed above, I find that Perth does not meet the test prescribed by section 3(2)(a) of the regulation, and is therefore precluded from pursuing this arbitration against State Farm.

Given my findings, I need not address question 3 posed at the outset of the decision.

Is the Fund entitled to be reimbursed for its costs of investigation?

Counsel for the Fund submitted that if I found that the Perth policy extended coverage to Mr. Lad, and that Perth was not entitled to pursue State Farm, as I have found, that I should order Perth to repay the Fund for the costs it bore in adjusting and investigating this matter. Counsel cited the case of *Kingsway General Ins. Co. v. Ontario (Minister of Finance)* [2007] O.J. No. 290 (C.A.) in support of his argument.

While I agree that an arbitrator has the discretion to make such an award in circumstances where an insurer's lack of investigation has unnecessarily increased the Fund's costs, I do not find this to be an appropriate case in which to do so.

DATED AT TORONTO, ONTARIO this _____ day of MAY, 2009.

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Shari L. Novick
Arbitrator