

**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:

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO,
as represented by the Minister of Finance, referred to as the
MOTOR VEHICLE ACCIDENT CLAIMS FUND**

Applicant

- and -

STATE FARM INSURANCE COMPANIES

Respondent

DECISION ON A PRELIMINARY ISSUE

COUNSEL:

Robert W. Kerkmann for the Applicant

Mark K. Donaldson for the Respondent

ISSUE:

1. Did the Fund provide State Farm with written notice of its intention to dispute its obligation to pay benefits within ninety days of receiving Ms. Nogueira's application, as required by subsection 3(1) of Regulation 283/95 ?

RESULT:

1. The Fund did provide the requisite notice to State Farm within ninety days of receiving the application. As State Farm is in higher priority to pay Ms. Nogueira's benefits under section 268(2) of the *Insurance Act*, it must reimburse the Fund for all benefits paid to date and take over adjusting the claim.

BACKGROUND:

Melanie Nogueira was injured when the vehicle in which she was a passenger was involved in a single vehicle accident on December 2, 2006. The vehicle was owned by Christopher Heinecke and insured by State Farm Insurance ("State Farm") at the relevant time. State Farm initially contended that its policy had been cancelled prior to the date of the accident, but counsel for State Farm acknowledged prior to the hearing that the policy was in effect on that date.

Ms. Nogueira submitted an application for accident benefits to the Motor Vehicle Accident Claims Fund ("the Fund") on February 5, 2007. The Fund claims that it sent a notice to State Farm advising of its intention to dispute its obligation to pay benefits pursuant to Regulation 283/95 on February 16, 2007. State Farm contends that it never received this notice.

The sole dispute between the parties revolves around this narrow, factual issue – was the notice letter sent as alleged by the Fund on February 16, 2007? If I find that it was not, the Fund concedes that it did not comply with the ninety-day limit set out in section 3(1) of the regulation, and does not rely on the ‘saving provisions’ in subsection 3(2). If I find that it was sent, State Farm concedes that it is in higher priority to pay benefits to Ms. Nogueira.

HEARING:

The arbitration hearing was held on April 16, 2009, in Toronto, Ontario pursuant to the provisions of *Regulation 283/95* of the *Insurance Act* and the *Arbitration Act*, S.O. 1991.

Post hearing correspondence relating to a key issue raised at the hearing was received on June 8, 2009.

RELEVANT PROVISIONS:

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.

EVIDENCE:

Counsel for the Fund called three witnesses – Richard Nicolle, the adjuster at Claims Pro Inc. retained by the Fund to adjust Ms. Nogueiro’s claim, Suzanne Natale, the supervisor who oversees the mailroom at Claims Pro, and Lisa Marsh, an administrative assistant at the law firm of Loudon & Sterling LLP.

A brief of all of the relevant documents was also filed by the Fund.

Counsel for State Farm did not call any witnesses. I will set out the relevant parts of each witnesses' testimony below.

Richard Nicolle

Mr. Nicolle's evidence was the focus of the hearing. He testified that shortly after being assigned to adjust Ms. Nogueira's claim, he ran a license plate search and was able to confirm that Christopher Heinecke was the owner of the vehicle involved in the accident. He explained that a subsequent Autoplus insurance search revealed that Mr. Heinecke was a listed driver on two policies, but that he was also a named insured on a State Farm policy insuring the Pontiac van noted on the police report to have been involved in the accident.

Mr. Nicolle testified that this information suggested that State Farm, and possibly another insurer, was in priority to the Fund to pay Ms. Nogueira's claim. He stated that he drafted a letter to State Farm advising that an application for benefits had been submitted to the Fund, and that he was handling the matter on their behalf. He requested confirmation that the policy in question was valid on the date of the accident, and advised that if State Farm disputed the validity of the policy, they should provide him with all cancellation and underwriting documents. He recalled that he enclosed the Autoplus search results, as well as the police report, with the letter.

A copy of this letter, dated February 16, 2007, was filed at the hearing. It is addressed to State Farm Insurance at "P.O. Box 5020 postal station Aurora L4G 0A9", and begins with the salutation "Dear Claims Department". It appears that the subject lines at the top of the letter refer to a State Farm policy under which Mr. Heinecke was a listed driver, as opposed to the policy identified in the Autoplus search as having been issued in Mr. Heinecke's name. I find this to be of no consequence, as State Farm does not assert that the form of the notice was improper, but only that it was never received.

When asked about the steps that he took to prepare and send this letter, Mr. Nicolle explained that he typed the letter out on his computer, printed it, and placed it with the

search results and police report in an envelope. He stated that he would have gone down the hall to the mailroom where the photocopiers are located to copy the enclosures, and that he would have then likely placed the envelope in the ICS bin, as he did with all mail addressed to an insurance company.

Mr. Nicolle stated that he had obtained this address from someone at State Farm. Counsel filed the adjusting log notes kept by Mr. Nicolle. They contain an entry on February 16 noting both a call to State Farm and a discussion about whether or not Mr. Heinecke was a listed driver on one of the policies, as well as a discussion with a State Farm agent about whether the Pontiac van appeared on the policy. Mr. Nicolle testified that he would have likely requested the address to forward his letter to during the course of these conversations. The log notes do not contain any reference to the letter having been drafted or sent to State Farm.

Mr. Nicolle testified that he never received a response from State Farm to this letter. He also stated that the letter was never returned to him as being 'undeliverable'.

The document brief filed at the hearing contains copies of three subsequent letters addressed to State Farm at the same address, from Mr. Nicolle. He explained that he forwarded two letters on July 5, 2007 - one containing a copy of his February 16th letter advising that no response had been received regarding the status of the policy and requesting State Farm to review the correspondence and "provide your final opinion on this priority dispute", and a second letter that referred to a different policy number. Mr. Nicolle also referred to a copy of a letter dated September 18, 2007, and explained that this was a further follow up letter that he sent to State Farm. He testified that he never received a response from State Farm to any of these three letters.

Mr. Nicolle explained that he was required to provide regular written reports to a supervisor at the Fund regarding his progress on the files that he was assigned. His report of March 30, 2007 to Marva Harriet-Stewart at the Fund is also contained in the document brief filed at the hearing. In addition to outlining the different steps he had

taken on the file up to that point, Mr. Nicolle attached a list of twenty-four documents he had either sent or received relating to Ms. Nogueira's claim. I note that the February 16th notice letter in question appears on this list.

Mr. Nicolle acknowledged under cross-examination that there was no reference in the log notes produced to his having sent the letter, but testified that it was not his practice to log written correspondence that he sent in the notes. He also admitted that there was no indication that a Notice to Applicant of a Dispute Between Insurers was sent to Ms. Noguiera , but stated that it was not the Fund's policy to do so at the time. Finally, he confirmed that despite a reference in the notes to a phone call from State Farm, he had not received any phone calls from anyone at State Farm subsequent to February 16, 2007, that would have suggested that they had received the letter in question.

It appears that the Fund subsequently appointed counsel to pursue this priority dispute against State Farm. The brief filed at the hearing contains a letter from Mr. Kerkmann, counsel for the Fund at the hearing, addressed to Victoria Cooper at State Farm, dated January 29, 2008, referring to an earlier phone discussion. This letter was faxed to Ms. Cooper, but is addressed to State Farm at "P.O. Box 5070 Stn.Aurora Main Aurora, Ontario L4G 0B5". I note both that this is a different post office box number and slightly different address than the one that Mr. Nicolle used, and that this letter triggered a response from State Farm within a few days.

Suzanne Natale

Ms. Natale holds the position of Supervisor of Shared Services at Claims Pro. Her duties include, among other things, the supervision of mailroom staff and procedures.

Ms. Natale described the mailroom procedures in effect at the relevant time. She explained that there were two plastic bins set up to receive the office's outgoing mail – one for letters to be sent by Canada Post, and one for letters addressed to insurance companies and financial services companies that were delivered through the ICS courier system. Ms. Natale testified that the mailroom staff goes through the ICS bin and logs

each piece of mail, but as the ICS couriers will not deliver letters to a post office box number, any letter addressed to a post office box will be removed and placed in the Canada Post bin. She stated that the Canada Post letters are weighed and stamped by machine, and are then delivered to a local post office outlet at the end of each day.

Ms. Natale testified that unlike the letters sent through ICS, which are all listed in a log, there is no record or list kept of the letters sent by Canada Post. She also stated that any letter that is returned by Canada Post would be delivered to the adjuster who had sent it.

Lisa Marsh

Ms. Marsh is Mr. Kerkmann's assistant at the law firm of Loudon & Sterling LLP. She testified about her involvement in this matter once Mr. Kerkmann was retained by the Fund. She recalled compiling a brief of documents at Mr. Kerkmann's request and mailing it out to Katharine Brown, a Claims Representative at State Farm's offices, on March 19, 2009. The cover letter accompanying this mailing was also faxed out, and a copy of it was filed at the hearing. It is addressed to "P.O. Box 5060" at the main postal station in Aurora. I note that this is a different box number than is indicated on both Mr. Nicolle's letter and the earlier letter sent by Mr. Kerkmann, referred to above.

Ms. Marsh stated that she was subsequently advised that State Farm claimed to have not received this brief of documents. She testified that she was certain that she had mailed it out, and filed a list that she kept of all postage charges incurred on files during the relevant period. She pointed out a notation on the list that indicated that a charge of \$3.10 was billed to the Fund for the postage incurred for this mailing.

Post-hearing correspondence

Finally, counsel had some off the record discussions during the hearing regarding information they had each received regarding whether or not the post office box that Mr. Nicolle had addressed the February 16th letter to was a valid State Farm post office box at the relevant time. It was agreed at the conclusion of the evidence called at the hearing

that counsel for State Farm would attempt to clarify this point, and set out his findings in writing after the hearing.

On June 8, 2009 I received a letter from counsel for State Farm advising that the “P.O. Box 5020 Postal Station Aurora L4G 0A9” address that Mr. Nicolle had addressed his correspondence to, was a valid State Farm address and was used by the SIU department at the relevant time.

PARTIES’ ARGUMENTS:

Counsel for the Fund submitted that there was no reason to doubt that Mr. Nicolle had sent the notice letter to State Farm on February 16, 2007, as alleged. He referred to the log notes that tracked Mr. Nicolle’s activities in the days following his assignment to the file, and noted that he had immediately requested the usual searches to determine whether there was an insurer in higher priority to the Fund. When the search results were received, he initiated contact with State Farm and another insurer that was identified to request further information. Mr. Kerkmann submitted that when Mr. Nicolle did not receive the assurance that he sought that they would assume priority for the claim, he would have concluded that he had all of the required information, and in view of the ninety-day time limit in section 3 of the regulation, would have promptly sent the notice to State Farm on February 16, 2007.

Mr. Kerkmann suggested that it would not have made sense for Mr. Nicolle to have made the inquiries that he did relating to priority, and to then not have sent the letter. He contended that the reference to the letter having been sent in his March 30, 2007 report to the supervisor at the Fund, and the attachment of the letter to the report, corroborated his claim that it had been forwarded to State Farm, as alleged.

Mr. Kerkmann noted Ms. Natale’s evidence that letters placed in the ICS bin that are addressed to post office boxes are transferred to the Canada Post bin, and contended that that explained why there was no record of the letter in question in the ICS logs. He also noted that State Farm claimed to have not received three further follow-up letters sent by

Mr. Nicolle to the same address, and suggested that that pointed to a flaw in their office procedures and mail tracking system.

Counsel for the Fund referred to two cases in support of his argument. He noted that in the case of *Royal Bank of Canada v. A.C.I.C. Ltd.* [2007] O.J. No. 4481, Justice Sproat held that judicial notice can be taken of the fact that “letters sent by ordinary mail are received in the vast majority of cases” (at para.13).

Mr. Kerkmann also referred to the case of *Skyrise Developments Limited vs. Abrahams* 29 O.R. (3d) 451(Gen. Div.). In that case, Justice Davidson refers to the 1916 decision in *Watts v. Vickers Ltd.* in which the following statement was made – “No doubt a letter properly addressed and posted raises a presumption that it was received. It is only a presumption which may be easily be rebutted”. Counsel contended that as State Farm did not call any evidence at the hearing, they did not rebut the presumption that the February 16th notice letter was sent, as alleged by Mr. Nicolle.

Mr. Kerkmann argued that I should draw an adverse inference from State Farm’s failure to call evidence, and urged me to conclude that they had either received the letter in question, or that they could not state with any certainty that adequate efforts had been made to confirm whether or not this letter had been received. He submitted that there was similarly no evidence offered by State Farm to counter Mr. Nicolle’s statements that three further follow-up letters were sent and not responded to, and contended that it was simply not plausible that Canada Post would have lost all four letters.

Counsel for State Farm contended that the letter in question was never received at the State Farm offices. He disputed the Fund’s argument that an adverse inference should be drawn from the fact that State Farm did not call any evidence, and submitted that the Fund bore the onus of proving that the letter was received, as it was not possible for State Farm to “prove” that it was not received.

Mr. Donaldson noted that Mr. Nicolle chose not to send the letter by fax or registered mail, each of which would provide a manner of confirming its receipt, and contended that that approach was indicative of the lack of attention to detail that characterised his investigation. He submitted that there were many opportunities for the letter to have gone astray, as the Claims Pro office was a busy place, and the evidence indicated that the letter would have been removed from the ICS bin and placed in the Canada Post mail bin.

Counsel for State Farm also noted that Mr. Nicolle's log notes do not contain any reference to the February 16th letter having been sent, or even that Mr. Nicolle had received the address he sent it to from someone at State Farm, as he alleged. He contended that given how important it was for Mr. Nicolle to have provided written notice within the ninety-day period, it did not make sense for him not to have either noted that the letter had been sent, or diarised a date in the log notes on which he should follow up if no response was received.

Finally, Mr. Donaldson referred to the decision of Arbitrator Samis in *Economical Mutual Insurance vs. Belair Insurance* (unreported decision of May 2, 2006), in which it was determined that section 3 of the regulation focused on the notice having been received within ninety days, as opposed to merely being sent.

FINDINGS:

As stated above, State Farm does not take issue with the propriety of the notice that the Fund alleges was sent; it simply contends that the letter in question was never received. The Fund does not assert that its late provision of notice to State Farm of its intention to dispute its obligation to pay benefits should be excused pursuant to section 3(2) of the regulation. The issue in this case therefore boils down to a simple question of fact – did State Farm receive the letter that the Fund alleges Mr. Nicolle sent on February 16, 2007, advising State Farm that the Fund was pursuing them to take over payment of accident benefits owing to Ms. Nogueira?

Having carefully reviewed the evidence, I have concluded on a balance of probabilities that the letter was sent as alleged by the Fund. While there is no way to be absolutely certain that the letter physically arrived in the State Farm office, the evidence before me suggests that it is more likely than not that it did reach the address that it was forwarded to by Mr. Nicolle.

Much was made at the hearing about the various State Farm post office boxes that different letters were sent to, and how it was that Mr. Nicolle obtained the P.O box number 5020 that he addressed the four letters to. In light of counsel for State Farm's confirmation after the hearing that that address was used by State Farm at the relevant time, and belonged to the SIU department, that evidence is immaterial. State Farm did not argue that a letter addressed to its claims department but delivered to its SIU department would not constitute valid notice, and even if it had, I would not accept that argument. The regulation simply requires that the notice be provided in writing, and that it be delivered to the insurer.

The question then becomes whether Mr. Nicolle actually put the letter in the mail, as he claims he did. It would clearly be preferable for adjusters to send notices of this type either by facsimile, which provides confirmation of transmission, or by registered mail, which requires the recipient to confirm its receipt. It would also be preferable to send this type of notice to a specific address directed to the attention of a particular individual, as opposed to forwarding it to a post office box. However, as stated above, there is no formal requirement in the regulation to send the notice in this manner. In the end, I have no reason to doubt Mr. Nicolle's evidence that he prepared the letter as described, and placed it in the ICS bin in the office mailroom. He testified in a forthright and straightforward manner, and while his investigation may have been less than perfect, I accept his evidence on the threshold question in this case.

I also have no reason to doubt Ms. Natale's evidence that any letter placed in the ICS bin that is addressed to a post office box is taken out of the ICS bin and put into the Canada

Post bin of letters to be delivered to the post office. I am satisfied that this explains why there is no written record of the letter having been sent on the day in question.

It is certainly possible that a letter is lost or misdirected by Canada Post. It is much less likely, however, that four letters sent to the same State Farm address were lost or misdirected. The evidence clearly suggests that the post office box that these letters were addressed to was either not monitored, or that whoever did pick up the mail that arrived there did not pass it on to the part of the organisation that it was meant for. Without the benefit of any evidence from State Farm as to what practise was in place at that time for forwarding mail received by the SIU department to the claims department, or to any other part of the organisation for that matter, I am left to speculate about what may have happened. In the absence of any other explanation, I can only conclude that the practices for directing mail around State Farm's Aurora office at that time were unreliable, and that the letters sent by Mr. Nicolle were received but not forwarded to the appropriate person or department.

Accordingly, I find that the Fund's notice letter was sent on February 16, 2007 as alleged, and that the Fund has therefore complied with section 3 of the regulation to provide notice within ninety days of receiving Ms. Nogueira's application. Given State Farm's concession that the Heinecke policy was in effect on the date of the accident, I find that State Farm is the priority insurer under section 268(2) of the *Insurance Act*.

Consequently, I order State Farm to reimburse the Fund for any benefits paid out to Ms. Nogueira to date, and to take over the adjusting of her claim if it remains open.

DATED at TORONTO, ONTARIO this _____ DAY OF NOVEMBER, 2009.

Shari L. Novick

Arbitrator.