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

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

MOTORS INSURANCE COMPANY

Applicant

- and -

THE CO-OPERATORS INSURANCE COMPANY

Respondent

DECISION ON PRELIMINARY ISSUE

COUNSEL:

J. Claude Blouin for the applicant

Philippa G. Samworth for the respondent

ISSUE:

1. Was there a settlement of the priority dispute between Motors Insurance Company and the Co-operators Insurance Company that precludes this matter from proceeding to arbitration pursuant to Regulation 283/95?

DECISION:

1. There was a settlement of the priority dispute Motors Insurance Company and Co-operators Insurance Company and accordingly the arbitration cannot proceed. Motors Insurance Company is responsible to pay accident benefits to or on behalf of Robert Martin Jr.

HEARING:

1. This arbitration was held on July 21, 2004 in the city of Toronto, in the province of Ontario.

FACTS:

This dispute arises out of a tragic motor vehicle accident that occurred on August 18, 2002. At that time, Mr. Robert Martin Jr. was an occupant in a motor vehicle insured by Motors Insurance Company ("Motor"). Robert Martin Jr. did not have a motor vehicle liability policy, however, his father Robert Martin Sr. did have such a policy in effect at the time of the accident.

On or about September 20, 2002 a completed application for accident benefits was submitted on Robert Martin Jr.'s behalf to Co-operators Insurance Company ("Co-operators"), on a basis that Robert Martin Jr. was financially dependent upon his father at the time of the accident. Co-operators commenced payment of the accident benefits to and on behalf of Martin Robert Jr. as required by the Statutory Accident Benefits Schedule, however they took the position that Robert Martin Jr. was not financially dependent upon his father.

Section 268 (2) of the Insurance Act provides that first recourse for accident benefits is against the insurer of an automobile in respect to which the occupant is an insured. If recovery is unavailable from that source, the occupant next turns to the insurer of the automobile in which they were an occupant. As Mr. Robert Martin Jr. did not have his own policy of insurance, he could only be considered a named insured if he were financially dependent upon his father pursuant to section 2 of the Statutory Accident Benefits Schedule.

On or about October 22, 2002 Co-operators served Robert Martin Sr. (as Robert Martin Jr. was comatose at the time) and Motors with a Notice of Intent to Dispute Between Insurers, pursuant to Regulation 283/95.

Both prior to after the service of the Notice of Intent to Dispute, both Motors and Co-operators conducted investigations with regard to the priority issue and more particularly whether Robert Martin Jr. was financially dependent upon his father within the meaning of the Statutory Accident Benefits Schedule. Co-operators took two statements from Robert Martin Sr., dated September 20 and September 27, 2002 as well as a statement from Mr. John Piersanti who employed Robert Marin Sr., dated September 12, 2002. Motors used an independent adjuster to obtain a statement from Robert Martin Sr. which report was forwarded to Motors on October 6, 2002.

Co-operators then made a number of efforts to have Motors agree to the appointment of an arbitrator for the purpose of a private arbitration to resolve the priority dispute pursuant to

Regulation 283/95. Co-operators finally served a Notice of Application for the appointment of an arbitrator returnable on April 1, 2003. In response to this, by way of a letter dated March 31, 2003, Ms. Cindy Termini, an accident benefit adjuster with Motors, wrote to Mr. Mark Donaldson, the solicitor representing Co-operators, stating "please be advised that we accept priority of Mr. Robert Martin Jr.'s accident benefit claim. Please have the up to date file forwarded to my attention at your earliest convenience".

Subsequent to the sending of this letter, on or about April 25, 2003, Motors received a letter from Mr. Art Lefebvre, representing Mr. Robert Martin Jr. advising that as a result of his investigation, Mr. Lefebvre was of the view that Robert Martin Jr. was a dependent of his father at the time of the accident. On May 9, 2003 Ms. Termini of Motors wrote to Co-operators stating:

> "It has come to our attention that the information we received on the above-noted claim was not complete and incorrect. If we had been provided with all of the information that we now have, we would not have accepted priority under these circumstances."
>
> "Please be advised that we are withdrawing our acceptance of priority on this claim and ask that you reconsider your position".

Counsel for Motors takes the position that it can withdraw from the agreement to take over the accident benefit claim based on:

(i) new information received or,

(ii) that Co-operators had acted in bad faith and had failed to provide Motors with information which Co-operators possessed with regard to the dependency issue.

I will deal with both these issues.

The first matter to be dealt with is the right of an insurer to withdraw from an agreement to take over an accident benefit file based simply on new facts coming to light, absent any bad faith or misleading by the other insurer.

Regulation 283/95, which governs disputes between insurers as it relates to priorities, is silent with regard to parties withdrawing from an agreement to take over an accident benefit claim. The Regulation does, however, set down some fairly strict timelines for insurers disputing priority (section 3) and for insureds to object to a transfer (section 5). Section 5 (3) does provide that no agreement between insurers as to which insurer should pay the claim is binding unless the insured person consents to the agreement or fourteen days have passed since the insured person was notified in writing of an agreement and the insured person has not initiated an arbitration under the Arbitration Act, 1991.

There is no such provision for the insurer, and the courts have stated on a number of occasions that the purpose of Regulation 283/95 is to provide a simple and efficient scheme to resolve disputes between insurers.

As the Ontario Court or Appeal in Kingsway General vs. West Wawanosh (unreported decision dated February 15, 2002) 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 disputes with each other. In this context, it seems to me that clarity and certainty are of primary concern. Insurers need to make appropriate decisions with respect 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.

While this decision involved an interpretation of the section 3 notice provisions of Regulation 283/95, I am of the opinion that the same principles apply to the matter that we are dealing with at this time. The parties have entered into an agreement as to who is to pay the accident benefits. While I accept that in the proper circumstances, an arbitrator can exercise his equitable powers to

intervene and allow a party to withdraw from an agreement, this should only occur in the most extreme cases. In a scheme where certainty, simplicity and efficiency are important, allowing one party to revoke a previous agreement simply because they may later become aware of new facts is not desirable. To allow such an approach would be to encourage parties to change their positions each time they obtained new facts, something which is clearly contrary to the intent of the Regulation.

In this particular case, the only new fact that came to light between the March 31, 2003 acceptance of the priority and the April 22, 2003 purported withdrawal of the agreement was the receipt by Motors of a letter from the claimant's lawyer that in his view Robert Martin Jr. was dependent upon his father. This is not sufficient reason to invoke my equitable powers and allow Motors to withdraw from the agreement.

Counsel for Motors also argues that the agreement ought to be set aside because the adjuster for Co-operators failed to provide copies of the signed statements of Robert Martin Sr. to the Motors adjuster prior to Motors agreeing to take over the file. He argues that there was an obligation on the part of the Co-operators adjuster to provide the statements, or alternatively, Co-operators adjuster wrongly denied having a statement from Robert Martin Sr. and therefore the agreement should be set aside as Co-operators adjuster was acting in bad faith. As the facts as they relate to both arguments are similar, I will deal with them at the same time.

Ms. Cindy Termini testified on behalf of Motors. She has been an adjuster for approximately eighteen years with approximately 5 years as an accident benefits adjuster at the time of the

accident in question. On or about August 27, 2002 she was assigned the file. From a review of her log notes it is clear that she was aware as early as August 27, 2002 that there might be a priority issue based on whether or not Robert Martin Jr. was a dependent upon his father. She commenced an investigation with regard to the issue of dependency which included hiring, on August 29, 2002, an independent adjusting firm, Shumka Craig and Moore to obtain a statement from Robert Martin Sr. The adjusting firm obtained a signed statement from Robert Martin Sr. on September 5, 2002 which was faxed to Ms. Termini on September 6, 2002. In his closing report to Ms. Termini, the independent adjuster who obtained the statement expressed the view that "the claimant is financially dependent upon both parents". On October 1, 2002 Ms. Termini testified that she had a phone call from Dorothy Hicks, the accident benefit adjuster from Co-operators who advised her that Co-operators was of the view that Robert Martin Jr. was not a dependent of his father. Ms. Termini testified that she had no recollection of Ms. Hicks mentioning that she had any statements from Mr. Robert Martin Sr.. Ms. Termini indicated that Ms. Hicks advised that Co-operators was paying accident benefits and they would likely be disputing priority.

On November 29, 2002 Ms. Termini had a discussion with Mr. Mark Donaldson, solicitor for Co-operators with regard to, among other things, the dependency issue and whether Robert Martin Jr. had a pre-existing head injury. There were subsequent phone calls between Ms. Termini and Mr. Donaldson regarding the question of a previous head injury which proved not to be the case.

On February 10, 2003 Ms. Termini reviewed the statement of Robert Martin Sr. that her independent adjuster had obtained as well as a statement she had obtained from Crystal Martin, aunt of Robert Martin Jr.. Ms. Termini noted that Robert Martin Sr.'s statement indicated that he worked for John Persanti Plastering and that Robert Martin Jr. worked with him. She called Mr. Persanti in order to clarify Robert Martin Jr.'s employment situation and also called Mr. Donaldson to obtain a copy of the Employer's Confirmation of Income.

On February 11, 2003, Ms. Termini spoke to Ms. Hicks who told her that Robert Martin Sr. had filled out the employer's form and that Robert Martin Sr. worked for Persanti and that Robert Martin Jr. worked for the father. Ms. Hicks provided information regarding Robert Martin Jr.'s pay and other issues.

There is a sentence in Ms. Termini's log notes of February 11, 2003 which states:

> "only have employer's stmt. from Persanti".

Counsel for Motors takes the position that this indicates that Ms. Hicks told Ms. Termini that she had only that information and nothing else regarding the dependency issue. He further argues that since Ms. Hicks had statements from Robert Martin Sr. dated September 20 and 27, 2002 that Ms. Hicks had not been forthright about what information she had regarding the dependency issue. I do not interpret the above statement in the same way as counsel for Motors. For reasons that I will deal with later in this decision, I interpret this statement to mean that Ms. Hicks only had the employment statement from Persanti and nothing further from Persanti. This makes

sense, as the Employer's Confirmation of Income is signed by Mr. Robert Martin Sr. and there is only a signed statement from Mr. Persanti.

In any event, on February 11, 2003 Ms. Hicks faxed to Ms. Termini copies of the Employer's Confirmation of Income and statement of Mr. Persanti. She did not forward the statements from Mr. Martin because, as will later be set out, they were not asked for.

Between February 11 and March 31, 2003 Ms. Termini continued her investigation regarding, among other things, the priority issue. On March 31, 2003 Ms. Termini reviewed the priority issue and after discussing the matter internally, decided that Robert Martin Jr. was not a dependent of Robert Martin Sr. and therefore Motors was higher in priority and should take over the payment of accident benefits. She then left a message on Ms. Hicks' voicemail indicating that Motors was taking over the accident benefit file and followed this up with a letter to Mr. Donaldson indicating that Motors was accepting priority and asking that the accident benefit file be forwarded to Motors.

Mr. Donaldson responded to Ms. Termini's letter on April 1, 2003, confirming that Motors would take over the accident benefit file and attempted to make arrangements for the transfer of the file. On April 25, 2003 Ms. Termini received a letter from Mr. Art Lefebvre, solicitor for Robert Martin Jr. indicating that Mr. Lefebvre believed that Robert Martin Jr. was a dependent of his father. Ms. Termini also notes in her log notes that Marlene, a co-worker of Ms. Termini's had received a call from Mr. Lefebvre indicating that he wanted to dispute the transfer of the

claim to Motors. Based on the above, on May 9, 2003 Motors wrote to Co-operators advising that they were withdrawing their acceptance of priority.

Counsel for Motors argues that Co-operators had an obligation to advise Motors that it had the two statements from Robert Martin Sr. and that if it had been provided with those statements, especially the September 27 statement, it would not have accepted priority.

I have a number of difficulties with this position. To begin with, it is far from clear that Ms. Termini was not told by Ms. Hicks that Co-operators had statements from Robert Martin Sr. As indicated above, Ms. Termini testified that she had no recollection of Ms. Hicks advising her of the existence of the statements. She did not categorically state that she had not been told of their existence. Ms. Hicks testified at the hearing on behalf of Co-operators. She stated that on October 10, 2002 she spoke to Ms. Termini and Ms. Termini told her of the statement that her independent adjuster had received from Robert Martin Sr. although she had not yet had time to review it. Ms. Hicks advised that she told Ms. Termini of the existence of the statements from Robert Martin Sr. but there was no request from Ms. Termini for copies of the statements. Both Ms. Termini and Ms. Hicks testified and in an open and forthright fashion. Ms. Termini did not say that Ms. Hicks did not advise her of the existence of the statements and Ms. Hicks testified that she did advise her of them. The testimony of the two witnesses is therefore not necessarily inconsistent.

Counsel for Motors points to the sentence in Ms. Termini's log notes of February 11, 2003 which states "only have employer's stmt. from Persanti" as proof that Ms. Hicks did not reveal the

existence of the statements from Robert Martin Sr. For reasons set out above, I interpret this statement to mean that that was all the information they had from Persanti, rather than that they had no other information at all.

While I do not accept that Co-operators did not advise Motors of the existence of Robert Martin Sr.'s statements, even if I did accept this, I do not accept that Co-operators had the obligation to produce the statements even though they were not asked for. While I accept that it is desirable that the parties in a priority dispute provide information and documentation to each other, I do not accept that there is an obligation to provide the documentation even if it is not requested. I note that Motors did not provide Co-operators with its' statement from Robert Martin Sr., although Ms. Termini testified quite honestly and forthrightly that she would have provided it if requested. Similarly Ms. Hicks indicated that if requested, she would have provided the statements subject to any authorizations that she might have had to obtain. While co-operation between insurers in priority disputes is desirable, there is an obligation on both sides to investigate the claims and to do what is necessary to advance their positions. They cannot simply take the position that it is up to the other insurer to do the investigation and provide the documentation even if not requested.

Counsel for Motors also argues that Co-operators acted in bad faith by not only failing to tell Motors of the existence of the statements, but also actually telling Ms. Termini that they had no other statements. In this regard counsel relied on Ms. Termini's recollection of the conversation of February 11, 2003. For reasons already set out above, I do not accept that Ms. Hicks failed to reveal the existence of the statements.

I am prepared to accept that I do have the equitable power to allow Motors to withdraw the acceptance of priority, if Co-operators had acted in bad faith. I do not, however, accept that Co-operators acted in such a manner in this case. Indeed, I find that Ms. Hicks did advise Ms. Termini of the existence of the statements. Had she denied their existence or misstated what they said, I would be prepared to allow for the withdrawal of the acceptance of priority, however, that is not the case.

In light of the above, I find that there was a binding agreement between Motors and Co-operators whereby Motors agreed to take over the accident benefit file and accordingly the arbitration cannot proceed. Motors Insurance is therefore responsible to pay accident benefits to or on behalf of Robert Martin Jr.

Before closing, I will deal with one final point. Counsel for the respondent, after the hearing had been completed, moved to reopen the matter in order to allow a question to be put to Dorothy Hicks with regard to a note made by Ms. Termini in her log note of February 11, 2003. I heard submissions in this regard on August 11, 2004. After considering the matter, I declined to make the order. Counsel for the respondent had closed her case. While she may not have been aware, until closing argument, of what use opposing counsel was going to make of the entry in the log note, she was aware of opposing counsel's general position on the issue, as it was set out in his factum. Accordingly, I found that it was not appropriate to reopen the case.

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

Dated this _____ day of August, 2004.

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M. Guy Jones
Arbitrator