IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, section 275 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:

RBC GENERAL INSURANCE COMPANY OF CANADA

Applicant

- and -

ZURICH INSURANCE COMPANY

Respondent

AWARD

COUNSEL:

Neil Colville-Reeves for the Applicant

Kevin Adams for the Respondent

PRELIMINARY ISSUES:

1. As priority insurer pursuant to section 268(2) of the *Insurance Act*, is Zurich obligated to repay RBC the accident benefits payments they paid to, or on behalf of Mr. Sokhi, subject to the reasonableness of those payments?

2. Given RBC's decision not to pursue a section 31 application to the Workplace Safety Insurance Appeals Tribunal ("WSIAT"), and assuming that the subsequent application brought by the tort insurer (and joined by Zurich) will be successful, is Zurich entitled to deny repayment to RBC of any amounts paid by it in respect of Mr. Sokhi's *SABS* claim?

RESULT:

1. Yes. (agreed by the parties)
2. No, Zurich is not entitled to deny repayment of any benefits paid by RBC as a result of its decision not to pursue a section 31 application to WSIAT.

BACKGROUND:

Ranjit Sokhi sustained injuries as a result of a motor vehicle accident on December 6, 2006. Mr. Sokhi was driving a truck owned by Smurfit Stone Container and insured by Zurich Insurance Company ("Zurich") at the time. He submitted an application for payment of accident benefits to RBC General Insurance Company of Canada ("RBC"), the insurer of his personal vehicle. RBC paid benefits pursuant to the *SABS,* and reached a resolution of Mr. Sokhi's claim on a full and final basis in March 2008.

RBC commenced an arbitration against Zurich under *Regulation 283/95,* contending that Zurich is in higher priority to pay Mr. Sokhi's accident benefits claim pursuant to section 268(2) of the *Insurance Act*. RBC alleged that Mr. Sokhi's employer made the vehicle that he was driving at the time of the accident available for his 'regular use', and that he was therefore a deemed named insured under the Zurich policy, in accordance with section 66 of the *SABS.*

Zurich agreed to accept priority in September 2010, after the arbitration was commenced. It argues, however, that RBC's failure to bring an application under section 31 of the *Workers' Safety Insurance Act* ("*WSIA*") for a declaration that Mr. Sokhi was not entitled to commence an action given that he was an employee in the course of his employment with a Schedule 1 employer at the time of the accident entitles it to deny repayment to RBC for some of the accident benefits paid, on the basis that the payments made were not reasonable.

Counsel agree that as an Arbitrator appointed under *Regulation 283/95,* I have full authority to decide this issue. They are also prepared to stipulate that for the purpose of this proceeding, the section 31 *WSIA* application will be granted, and that the Tribunal will determine that Mr. Sokhi is not permitted to commence an action in court or claim accident benefits under the *SABS*.

FACTS / EVIDENCE:

The parties each filed a Brief of Documents containing various documents upon which they relied. While no Agreed Statement of Facts was filed, the relevant facts are not in dispute and establish the following chronology: The accident in question occurred on December 6, 2006. Mr. Sokhi forwarded an application for payment of accident benefits to RBC, the insurer of his personal vehicle. RBC delivered its Notice to Applicant of Dispute Between Insurers ("DBI Notice") to Zurich on February 13, 2007. Zurich did not respond to the Notice, although it appears that Crawford Adjusters were retained by Zurich in May 2007 to obtain a statement from Mr. Sokhi.

Mr. Sokhi executed a WSIB Assignment on October 12, 2007, which was later approved by the Board.

RBC retained counsel to pursue the priority dispute, and a Notice Demanding Arbitration was forwarded to Zurich on January 7, 2008. Zurich did not respond to this Notice. In March 2008, RBC negotiated a full and final settlement of Mr. Sokhi's accident benefits claim.

A follow-up letter was sent by counsel for RBC to Zurich in July 2008, requesting that the matter be referred to counsel. When no response was received, a Notice of Application to the Superior Court requesting that I be appointed as Arbitrator was served on Zurich on September 3, 2008. Two further letters requesting a response from Zurich were sent and went unanswered. A court Order was obtained by RBC on November 13, 2008 appointing me as Arbitrator under the *Arbitration Act.*

Zurich retained counsel shortly after being served with the court Order. George Wray wrote to Mr. Colville-Reeves on December 1, 2008 advising that he had been retained to defend the matter and would be reviewing the relevant file material shortly. I note that this was twenty-two (22) months after RBC had sent the initial DBI Notice to Zurich. Counsel exchanged further correspondence, and an initial pre-hearing teleconference was convened with me on June 12, 2009. As a result of those discussions, counsel exchanged documentation and discussed convening examinations under oath and/or obtaining copies of the transcripts of examinations for discovery held in the tort action. Further teleconferences were held.

On September 29, 2010 Zurich confirmed that it would accept priority for the payment of Mr. Sokhi's accident benefits claim. Counsel for Zurich advised, however, that Zurich was taking the position that it was not obliged to repay RBC for all of the accident benefits paid out on the claim, in light of RBC's failure to bring an application under section 31 of the *WSIA*.

The insurer defending the tort claim commenced by Mr. Sokhi brought a section 31 application to WSIAT*,* and Zurich was granted standing to participate in that process. The hearing of that application began in October 2010, but had not been completed by the time this matter was heard.

At the outset of the arbitration, counsel for Zurich advised that he intended to file an affidavit from Ramona San Pedro, a Zurich claims adjuster who had been involved in the

matter. Counsel advised that the affidavit addressed the timing of various steps related to the issue to be discussed, as well as Zurich's motivation for assuming priority of the claim. The affidavit was not included in the Document Brief filed by Zurich prior to the hearing, and Ms. San Pedro was not present at the hearing.

Counsel for RBC objected to the filing of the affidavit, on the basis that Ms. San Pedro was not available to be cross-examined on the contents of her affidavit.

I declined to accept the affidavit into evidence. I ruled that the *Arbitration Act* provides an arbitrator with the discretion to exclude evidence that is of minimal probative value, and that as Ms. San Pedro was not available to be cross-examined on the contents of her affidavit, it was unlikely that much weight, if any, would be attributed to it.

RELEVANT STATUTORY & REGULATORY PROVISIONS:

Statutory Accident Benefits Schedule:

Workers' Compensation Benefits

> **59.** *(1) The insurer is not required to pay benefits under this Regulation in respect of any insured person who, as a result of an accident, is entitled to receive benefits under any workers' compensation law or plan.*
>
> *(2) Subsection (1) does not apply in respect of an insured person who elects to bring an action referred to in section 30 of the Workplace Safety and Insurance Act, 1997 so long as the election is not made primarily for the purpose of claiming benefits under this Regulation.*
>
> *(3) If a person is entitled to receive benefits under this Regulation as a result of an election made under section 30 of the Workplace Safety and Insurance Act, 1997, no income replacement, caregiver or non-earner benefit is payable to the person in respect of any period of time before the person makes the election.*
>
> *(5) Despite subsection (1), if there is a dispute about whether subsection (1) applies to a person, the insurer shall pay full benefits to the person under this Regulation pending resolution of the dispute if,*

(a) the person makes an assignment to the insurer of any benefits under any workers' compensation law or plan to which he or she is or may become entitled as a result of the accident; and

(b) the administrator or board responsible for the administration of the workers' compensation law or plan approves the assignment.

Workplace Safety and Insurance Act:

30. *(1) This section applies when a worker or a survivor of a deceased worker is entitled to benefits under the insurance plan with respect to an injury or disease and is also entitled to commence an action against a person in respect of the injury or disease.*

(2) The worker or survivor shall elect whether to claim the benefits or to commence the action and shall notify the Board of the option elected.

31. *(1) A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the Insurance Act may apply to the Appeals Tribunal to determine,*

(a) whether, because of this Act, the right to commence an action is taken away;

(b) whether the amount that a person may be liable to pay in an action is limited by this Act; or

(c) whether the plaintiff is entitled to claim benefits under the insurance plan.

PARTIES' ARGUMENTS:

Applicant's argument

Counsel for RBC noted that section 31 of the *WSIA* provides that an insurer from whom accident benefits are claimed may apply to the Tribunal for a determination that the claimant is entitled to claim benefits under that Act, and is therefore barred from pursuing benefits under the *Schedule.* He submitted that the statutory language is permissive and

not mandatory, and that while RBC had the option to bring an application to the Tribunal, it was entitled to choose not to do so. Counsel candidly acknowledged that RBC's decision not to pursue an application was driven by the fact that the current case law provides that RBC would not be able to recover its costs of proceeding before the Tribunal. He also noted that if RBC's application was successful, that result would ultimately inure to the sole benefit of Zurich, the priority insurer.

Counsel contended that a priority insurer faces a high onus to establish that a claims - handling decision made by a first insurer should result in less than full indemnification for benefits paid. He referred to various cases in which the applicable standard is described as gross negligence or gross mishandling of a claim resulting in decisions made in bad faith, and submitted that RBC's conduct in this case does not fit within that category. (*Commercial Union Assurance Company v. Boreal Property and Casualty Company – Arbitrator Samworth, December 21, 1998; Dominion of Canada v. Royal & SunAlliance – Arbitrator Malach, August 20, 2001; Kingsway General Insurance v. Zurich Insurance - Arbitrator Samis, April 4, 2011)*

Counsel noted that *Regulation 283/95* requires the first insurer who receives a completed application to pay accident benefits and conduct an investigation into priority, despite the fact that in some instances, that insurer may have been chosen in an arbitrary manner. Given that reality, he submitted that it would be unfair to impose the burden of pursuing a WSIAT application on the first insurer receiving an application for benefits. He noted that if a first insurer was required to bring a WSIAT application, the true priority insurer would have an incentive to delay accepting priority for the claim, and would "hold out" as long as possible. He contended that the statutory and regulatory requirements should be interpreted in a manner that provides an incentive to the priority insurer to act quickly and accept priority for the claims that it is responsible to pay, and that it could then bring a section 31 application in the appropriate case.

Mr. Reeves submitted that whether Zurich's delay in accepting priority was intentional or due to inadvertence, it should not benefit from its delay in taking action. He noted that the

independent adjusters retained by Zurich obtained a statement from Mr. Sokhi in May of 2007 that alluded to many of the facts relevant to the priority issue, yet Zurich did not accept priority of Mr. Sokhi's claim until September 2010, more than three years later. He noted the many letters, requests and reminders sent to Zurich in the interim period that went unanswered, requiring that he proceed with a court application seeking my appointment as Arbitrator. He argued that accepting Zurich's argument would send the wrong message to the insurance community, as it would signal approval of the "delay tactic" used by some insurers who resist accepting priority of a claim until the last possible moment.

Respondent's argument

Counsel for Zurich acknowledged that as priority insurer, Zurich is obligated to repay RBC for accident benefits paid to Mr. Sokhi, subject to the reasonableness of those payments. Mr. Adams conceded that while the wording of section 31 of the *WSIA* does not compel RBC to bring an application to the Tribunal, a decision not to do so is made "at its peril". He contended that by choosing not to pursue a viable defense that would likely be a full answer to the Claimant's *SABS* claim, RBC should suffer the consequences and not be entitled to claim full reimbursement of all benefits paid out. He submitted that given that RBC is essentially "spending Zurich's money", their decision in this regard that resulted in the payment of unnecessary benefits should be found to be unreasonable.

Counsel for Zurich denied that his client had intentionally delayed accepting priority for Mr. Sokhi's claim so that it would not have to incur the cost of pursuing a WSIAT application, as suggested by counsel for RBC. He contended that complex facts had to be sorted out both regarding Mr. Sokhi's employment status and the ownership of the vehicle that Mr. Sokhi was driving at the time of the accident, and that the case law surrounding section 66 of the *SABS* was in flux at the time. He also noted that Mr. Colville-Reeves had resisted counsel for Zurich's requests for production of RBC's policy documentation for several months, and contended that those documents were necessary to determine the Claimant's rights in a priority dispute.

Counsel noted that the request for an Assignment of WSIB benefits in favour of RBC was forwarded to Mr. Sokhi in October 2007, and argued that it is clear that RBC was clearly aware of the 'WSIB issue' early on. He also noted that the Assignment was not approved by the Board until May 2009, and that in light of the provision in section 59(5) that an insurer is not required to pay benefits under the *SABS* until the Assignment is executed by the Claimant and approved by the Board, he contended that RBC had paid benefits to Mr. Sokhi when it was not legally required to do so.

Mr. Adams referred to various cases brought under the loss transfer provisions of the *Insurance Act* in which judges have determined that a first insurer can only recover amounts that are 'legally recoverable'. (*Jevco Insurance v. Canadian Home Insurance [1997] 36 O.R. (3d) 249; Jevco Insurance v. Halifax Insurance [1994] O.J. No. 3024*) He contended that the same principles should apply to priority disputes, given that the first insurer is effectively spending another insurer's money. Counsel also made the point that if RBC had pursued a WSIB defense at an early stage, it is likely that Mr. Sokhi's accident benefits claim could have been settled at an earlier point for a lower amount, and that Zurich has suffered prejudice as a result.

ANALYSIS & FINDINGS:

The issue raised in this case highlights the awkward overlap between the WSIB regime and the accident benefits scheme provided in the *SABS*, and has challenged arbitrators over the last few years. When two insurers dispute priority under *Regulation 283/95* and the claimant may be entitled to benefits under the *WSIA* (and is therefore not entitled to collect benefits under the *SABS*), an unavoidable tension is created between the insurer who has received the first completed application for benefits ("the first insurer") and is waiting for the priority insurer to accept priority and take over the handling of the claim, and the insurer who ultimately accepts priority (often some years later) and looks back and asks why the first insurer did not act in a manner that would have limited the benefits paid out by launching an application to WSIAT. Each party's frustration is valid and

understandable: the legal question that must then be determined is – was the first insurer's decision not to pursue the WSIAT application unreasonable?

Arbitrator Cooper recently addressed this issue in *Economical Mutual Insurance v. ACE INA Insurance* (unreported decision, dated December 23, 2011). As in the instant case, the Respondent in that case ultimately accepted priority to pay the claim, but contended that it should not be required to repay all of the benefits paid out to the claimant in view of the Applicant's failure to bring a section 31 application to WSIAT. Arbitrator Cooper concluded that given the permissive language in section 31, and in the circumstances of his case, the Applicant's failure to bring a WSIAT application was not unreasonable.

While he allowed that there may be circumstances in which it would be clear that a claimant's election to pursue a tort claim was made primarily for the purpose of claiming benefits under the *SABS*, and that that might limit the amount of indemnification sought by the Applicant, he found that the evidence before him failed to meet what he described as a "significant evidentiary burden".

In his analysis, Arbitrator Cooper made the following comments –

> *…I believe the principal deficiency which gives rise to the instant arbitration lies with the legislative and regulatory provisions. Unless and until the Legislature imposes a positive obligation on the first insurer receiving a completed application for statutory accident benefits to launch an application to WSIAT, in the appropriate circumstances, the responding insurer is left in the challenging and unenviable position of essentially contesting the reasonableness of the adjustment and adjudication of the claim by the first insurer.*
>
> *…Where the facts and circumstances make it clear to an accident benefits insurer*
> *that a claimant's election to pursue a bodily injury action is made primarily for the purpose of claiming statutory accident benefits, then such insurer should launch an application to WSIAT.*
>
> *…Presumably, an insurer will incur costs and expense in this regard on some occasions and be the benefactor of such efforts on other occasions. Moreover, there is certainly an argument to be made in the context of a priority dispute that the legal costs and expenses of launching and*

> *pursuing a WSIAT hearing and decision can and should be borne by the responding insurer in the context of a priority dispute. There is an argument to be made that those expenses are similar in kind and quality to surveillance, insurer exams, independent adjusting expenses and the like.*

I agree, in general, with the above comments. The simple fact is that neither section 59 of the *SABS* nor section 31 of the *WSIA* compels an insurer to bring an application to *WSIA*, so a first insurer can only be penalized in the manner suggested for not doing so if it has clearly acted unreasonably. Was RBC's ongoing adjustment of Mr. Sokhi's claim and its decision to continue paying benefits unreasonable in the face of a potential WSIB defence? In my view, it was not. There is no evidence to suggest that it was clear that the Claimant's election to receive accident benefits was made primarily for the purposes of claiming benefits under the *SABS* (rather than for the purpose of pursuing a tort claim).

Any assessment of whether payments made by a first insurer are unreasonable must be conducted with the overall structure of the priority scheme in mind. The regulation requires an insurer who receives the first completed application to pay benefits to a claimant (presuming a nexus exists), and to quickly investigate the matter in order to determine whether another insurer is in higher priority to pay the claim. Insurers are expected to make decisions about priority within ninety days of receiving the application. This tight time frame is onerous to comply with and often requires extraordinary efforts on the part of the claims adjuster assigned to the file. While section 3(2) of the regulation operates as a 'saving provision', the ninety-day time limit has been strictly applied by arbitrators and judges in part because of the language employed by the drafters, but also because of the underlying policy reasons, namely that it is desirable for the insurer who is in priority to assume the adjusting of the claim as early in the process as possible.

The regulation also requires the first insurer to initiate arbitration within one year of having provided notice of the dispute. While this gives the parties some time to exchange information and positions on the matter, and potentially conduct further investigation in order to clarify the priority question, the legislators clearly intended the "clock to keep ticking", so that the priority insurer could be identified sooner rather than later.

The facts of this case must be considered against the backdrop of these regulatory requirements, designed to clarify questions of priority at the earliest possible stage. RBC provided notice to Zurich of its intention to dispute priority for payment of Mr. Sokhi's claim in a timely manner. Zurich appears to have acted on the notice by retaining outside adjusters to interview and take a statement from the Claimant approximately three months later. In the statement, Mr. Sokhi sets out that he is a truck driver and was driving a truck owned by Smurfit, Zurich's insured, at the time of the accident. Despite these strong hints that Zurich may be in higher priority by virtue of section 66 of the *SABS*, Zurich did not respond to the DBI notice delivered by RBC, or the several follow-up letters sent.

RBC then initiated the arbitration in accordance with the regulation. It sent further letters requesting that Zurich respond. Ultimately, having not received any form of response to its many queries, RBC proceeded with an application to the court to have an arbitrator appointed. Once served with the court Order, a response is finally received from Zurich approximately twenty-two months after receiving the DBI notice. The arbitration process unfolds, culminating in Zurich accepting priority almost two years after the court Order was obtained. While I acknowledge Mr. Adams' comment that some of this delay should be attributed to counsel for RBC not having produced the policy documents so that it could be determined whether Mr. Sokhi had purchased optional benefits under section 27 of the SABS, which would preclude RBC from pursuing a priority dispute, it is clear that Zurich did not proceed with the dispatch expected of an insurer who is provided notice of a priority dispute under the scheme outlined in *Regulation 283/95.*

Had it done so, Zurich could have obtained the facts relevant to a determination of whether Mr. Sokhi should be barred from bringing a tort claim and applying for accident benefits, in favour of claiming benefits under the WSIA at an early stage, and launched a section 31 application if it saw fit to do so. In my view, that is how the scheme is designed to operate.

As stated above, it is clear that the regulation requires that priority disputes be considered and resolved early, for the benefit of both parties. It is not desirable for a first insurer (who is not the priority insurer) to continue to make claims handling decisions as a claimant's *SABS* claim matures. It is equally undesirable from the perspective of the priority insurer to not be involved in the ultimate resolution of the claim, as occurred in this case. Arbitrator Cooper stated that he was "mildly troubled" by a six-month delay in the respondent insurer's acknowledgement of the applicant's notice, but stated that he was ultimately not concerned with it because nothing turned on that fact. In this case, Zurich's failure to respond to the priority dispute for almost two years despite repeated attempts on RBC's part to get them "into the game" persuades me, along with the permissive language of section 31 of the *WSIA,* that RBC did not act unreasonably when it decided not to launch an application to the Tribunal.

Accordingly, I do not accept Zurich's contention that RBC's failure to launch a section 31 application to WSIAT should result in less than full reimbursement of the benefits it paid out to, or on behalf of, Mr. Sokhi.

I note that both counsel agreed that there was no evidence before me to allow me to quantify the amount that Zurich is obliged to repay to RBC at this juncture, and I accordingly make no findings on the reasonableness of payments made by RBC for any other reason.

As a final matter, while my findings above are predicated on the facts of this particular case, I feel compelled to comment on the larger issue underlying these types of disputes. As acknowledged to be the case here, many insurers who receive the first completed application for benefits choose not to proceed with a WSIAT application because they are concerned that they will not be able to recover the costs they will incur in the course of that proceeding, and that if they succeed in obtaining a declaration that the claimant is entitled to claim benefits under the *WSIA* (and therefore not entitled to benefits under the *SABS*) that finding will inure to the sole benefit of the priority insurer.

I appreciate that in the normal course of business over several years it is likely that an insurer in Ontario will end up on both sides of that 'divide'. However, in my view, it is time to revisit this assumption and redress this unfair result. It is clear that arbitrators have equitable jurisdiction to order priority insurers to reimburse the first insurer who adjusted the claim for legal fees incurred (see Justice Wilson's decision *Zurich Insurance v. Co-operators' Insurance*, unreported decision, dated May 1, 2008, upholding Arbitrator Jones' award dated January 3, 2007). This jurisdiction should extend to making orders relating to the reimbursement of a first insurer's reasonable costs relating to it having brought a meritorious application to WSIAT. As I found in the case of *Motor Vehicle Accident Claims Fund v. Wawanesa* (unreported decision dated June 2010) with respect to section 42 expenses incurred by an insurer in the course of adjusting a claim, any "rule" that operates as a disincentive to insurers to properly adjust the claims that they are presented with at an early stage should be discouraged, as it does not operate to the benefit of any party involved in the system.

I remain seised of this matter in the event that other issues arise between the parties related to the quantum of benefits payable to RBC.

DATED at TORONTO, ONTARIO this _____ DAY OF MARCH, 2012.

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Shari L. Novick
Arbitrator