

**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:

ALLSTATE INSURANCE COMPANY

Applicant

- and -

SECURITY NATIONAL INSURANCE COMPANY

Respondent

PRELIMINARY ISSUE - AWARD

COUNSEL:

Ryan N. Naimark for the Applicant

Tessie Kalogeras and Amanda Lennox for the Respondent

ISSUE:

1. Can Allstate pursue Security National for priority, having provided written notice of its intent to dispute its obligation to pay benefits to the Claimant to Security National beyond the ninety days provided in section 3(1) of *Regulation 283/95*?

RESULT:

1. No, Allstate is precluded from pursuing Security National for priority as its notice was provided beyond the ninety days permitted in section 3(1), and it has not satisfied the criteria required to invoke the ‘savings provisions’ in section 3(2).

BACKGROUND:

1. Winston Richards alleges that he was injured as a result of an accident on September 29, 2007, while driving a vehicle owned by his girlfriend Krystana Darrall and insured by Security National Insurance Company (“Security National”). Mr. Richards was a named insured on an auto policy issued by Allstate Insurance Company (“Allstate”) covering his 1994 Chevrolet at the time. He applied to Allstate for payment of accident benefits, and they have paid benefits to him and on his behalf.

2. Allstate contends that Mr. Richards was principally dependent for financial support upon Ms. Darrall, and is therefore an “insured person” under her policy with Security National. It submits that as he was an occupant of her vehicle at the time of the accident, section 268(5.2) of the *Insurance Act* dictates that Security National is in priority to pay his claim.

3. Security National disputes the allegation that Mr. Richards was principally dependent upon its insured for financial support. It also contends that Allstate should not be permitted to proceed with the priority dispute, as it provided notice of its intention to dispute its obligation to pay benefits to the Claimant beyond the ninety-day period permitted by section 3(1) of the regulation, and its delay cannot be excused by the ‘savings provisions’ in section 3(2).

4. Allstate argues that section 3(2) does apply in these circumstances, as a result of a misrepresentation on the part of Mr. Richards and the lack of co-operation on the part of his representative. The parties agreed that this question should be addressed as a preliminary matter, and a hearing was convened to determine the issue.

THE EVIDENCE:

5. Three witnesses were called to testify at the hearing – Yevette Stewart, an Accident Records clerk with the Peel Regional Police, Allan Chan, a junior accident benefits adjuster with Allstate who was initially assigned to adjust Mr. Richards’ claim, and Lisa Alcaro, a senior claims advisor with the Special Investigations Unit at Allstate who took over adjusting the claim from Mr. Chan two weeks after it was opened.

6. Both Mr. Chan and Ms. Alcaro were also examined under oath by counsel prior to the arbitration. The transcripts of the evidence they provided were filed and relied on by the parties at the hearing. Many documents, including various letters between Allstate (and its counsel) and Mr. Richards’ representative, the adjusters’ notes, Police MVA Report and the Application for Accident Benefits (OCF 1) submitted to Allstate were also filed and relied on.

7. The information provided by Mr. Richards (or his representative) on the Application for Accident Benefits (OCF1) form was reviewed in detail at the hearing. In the section asking for his “marital status”, he indicated that he was “separated”. The details of his Allstate policy and the vehicle it covers are provided, but it also indicates that he was not an occupant of that vehicle at the time of the accident. His employment status is indicated as “unemployed” and it is noted that he was receiving Social Assistance benefits at that time.

8. Of further note is the information provided in Part 4 of the document, in which claimants are asked to indicate whether they are covered under any other insurance policies, such as that of a spouse, employer or long-term rental. One of the questions asked is whether there is coverage under “the policy of any person on whom you are dependent (e.g. a parent””, to which Mr. Richards answered “no”.

Allan Chan

9. Mr. Richards' claim was initially assigned to Mr. Chan to adjust. He testified that he first became aware that Mr. Richards was involved in the accident when he received a Treatment Plan addressed to Allstate on October 4, 2007. He testified that he forwarded this to head office and a claim was opened on that day. An Application /OCF 1 form was subsequently submitted to Allstate on October 11, 2007, that Mr. Chan received on October 15, 2007.

10. While nothing turns on this fact, the parties agree that the ninety-day period would have started to run on October 4, 2007, the date that Mr. Chan received the Treatment Plan. It would have therefore expired on January 2, 2008.

11. Mr. Chan stated that he sent Mr. Richards the usual form letter enclosing the Application for Accident Benefits package on October 5, and that he subsequently attempted to contact him by telephone on two occasions. He then received a phone call from Carla Barcelo, the Claimant's representative, who advised him of Mr. Richards' correct address. Subsequent communication with Ms. Barcelo followed, and upon receiving a further Treatment Plan, Mr. Chan was advised to transfer the file to Lisa Alcaro in Allstate's Special Investigation Unit on October 19, 2007.

12. Mr. Chan testified that he had noted some "red flags" in his review of the information received on Mr. Richards' claim, which led him to arrange for surveillance to be conducted on October 9, a few days after receiving the initial Treatment Plan. He cited a lack of information on how the accident occurred, and that Mr. Richards had sought treatment at a clinic known to submit numerous treatment plans as suspicious factors.

13. Mr. Chan also instructed a clerk in his department to request a copy of the MVA Report from the police. A request was sent to the Peel Regional Police on October 16, 2007 indicating an accident date of September 30, 2007, rather than September 29, 2007, the accurate date. It indicated that the vehicle involved in the accident was Mr. Richards' Chevrolet Corsica, which was also inaccurate. The police responded on October 25,

2007, advising that they were unable to process the request because incomplete information was provided.

14. Mr. Chan noted that the initial Treatment Plan he had received from the Claimant indicated that the accident had occurred on September 30, and speculated that that was the reason why the clerk's request had noted that date as the date of loss. He testified, however, that he had not expected to receive the MVA Report from the police in any event, as he understood that the police will only provide copies of a report to an insurer if it insures one of the vehicles involved in the accident.

15. When asked whether any of the information received on Mr. Richard's claim suggested that a priority investigation was warranted, Mr. Chan stated that it did not. He explained that Mr. Richards was 58 years old, and was a named insured under the Allstate policy. He testified that he had not diarized the ninety-day deadline for serving notice on another insurer, stating that he does not generally do so if no priority issues have been identified. He also stated that he understood that the 'ninety-day clock' only starts to run when an insurer receives information to suggest that there is a priority issue.

Lisa Alcaro

16. Ms. Alcaro is a Senior Claims Advisor with Allstate, working in the Special Investigations Unit ("SIU"). She testified that Mr. Richards' claim was transferred to her on October 19, 2007, shortly after the application was received, as a result of an "automatic transfer". She explained that Allstate had identified certain clinics to be regular abusers of the assessment process, and that when a Treatment Plan is submitted by one of these clinics, the claim is automatically transferred to an adjuster in the SIU so that the clinic can be investigated while the claim is being adjusted.

17. Ms. Alcaro explained the various steps that she took in adjusting Mr. Richards' file. After reviewing the information that was on file, she called Ms. Barcelo, his representative, to request that an appointment be scheduled for the purpose of obtaining a signed statement. She also requested that Ms. Barcelo provide a copy of the police report.

Ms. Alcaro testified that she spoke to the Claimant's representative on October 30, 2007, and was advised that she would not permit a statement to be taken from Mr. Richards. At that point, Ms. Alcaro sought and received her manager's consent to retain counsel for the purpose of conducting an Examination under Oath.

18. Mr. Richards did not attend an in-home Occupational Therapy assessment that had been scheduled by Allstate on October 29, 2007. Ms. Alcaro wrote to Ms. Barcelo the next day, and advised that her client was non-compliant. Ms. Barcelo subsequently wrote to Ms. Alcaro on November 7, 2007 asking that the assessment be rescheduled, and offering to provide a Statutory Declaration from Mr. Richards. Ms. Alcaro rejected that offer, explaining that her department did not "use" Statutory Declarations in these circumstances, as they do not provide any information on the clinic that is being investigated.

19. Ms. Alcaro retained the law firm of Zarek Taylor Grossman Hanrahan to conduct the Examination under Oath. Counsel contacted the Claimant's representative on November 12, 2007, advising that he had been instructed to schedule an Examination Under Oath of Mr. Richards, and asking for available dates. Ms. Barcelo replied by asking for a clarification of the specific benefits to be assessed. Various letters were then exchanged between counsel and Ms. Barcelo over the next few weeks regarding the scope of the examination. On December 3, 2007, Ms. Barcelo wrote to advise that her client was available for an examination on any Wednesday, at their office in Mississauga. A date of January 23, 2008 was confirmed a few days later.

20. When asked why the examination was scheduled that far off into the future, Ms. Alcaro explained that several factors contributed to the delay, including the intervening Christmas holidays, her scheduled two-week vacation, and the fact that her counsel's wife was expected to deliver their first child in mid-December. She also referred to the fact that the Claimant had advised that he was only available to attend the examination on Wednesdays.

21. Ms. Alcaro testified that she was aware that a prior request had been made to obtain the MVA Report from the Peel Regional police, and that it was returned due to insufficient information having been provided. She explained that she did not send a follow-up request even though further information became available, as she understood that the police will not provide an insurer that is not identified on the report as insuring one of the vehicles involved with a copy of the report, unless an authorisation from one of the drivers of the vehicles is forwarded with the request. Ms. Alcaro stated under cross-examination that despite the above, police officers will occasionally share insurance information with adjusters in the SIU at their discretion.

22. Ultimately, Ms. Alcaro was provided with a copy of the police report by the Claimant's representative on January 21, 2008. She stated that the information in the report did not raise any priority issues in her mind, noting that Mr. Richard's address on the report is different than that of Ms. Darrall's, the owner of the vehicle that he was driving at the time.

23. An Examination Under Oath was conducted on January 23, 2008, as scheduled. Ms. Alcaro testified that she then heard for the first time at the examination that the Claimant was living with Ms. Darrall, the Security National insured, and that he was financially dependent upon her. She testified that upon returning to her office after the examination, she prepared the Notice to Applicant of Dispute Between Insurers. After experiencing some initial difficulties faxing the Notice to Security National, she was able to do so on January 29, 2008.

24. As noted above, it is not disputed that the ninety-day deadline for providing notice under section 3 of the regulation expired on January 2, 2008, and that the above notice was consequently a few weeks late.

25. Ms. Alcaro's log notes from October 19, 2007, the day the claim was transferred to her, indicate that she did a thorough review and summary of all the information that had been obtained to that point. Her notes indicate that Mr. Richards was in an "unknown

vehicle” at the time of the accident, and that he was “unemployed”. Under the heading of “Priority”, she wrote “named – Allstate”. She stated that she had not identified any priority issues in her initial review of the file, noting that Mr. Richards was 58 years old, and that he had indicated in Part 4 of his Application that he was not covered under any other insurance policies. She also noted that he was receiving income in the form of social assistance payments.

26. Ms. Alcaro testified that because she had not identified any priority issues, she did not diarize the ninety-day deadline for providing notice to another insurer. She explained that she will generally do so in cases involving pedestrians, cyclists, minors or passengers in an Allstate-insured vehicle who submit a claim for benefits to Allstate but who are not listed drivers or insureds under the Allstate policy. When asked under cross-examination whether the fact that the Claimant was not in an Allstate-insured vehicle, and had indicated on his application that he was “separated”, “unemployed” and receiving social assistance payments triggered any priority concerns, Ms. Alcaro answered that it had not.

27. Finally, Ms. Alcaro acknowledged that her main concern with regard to Mr. Richards’ claim was the investigation of the clinic that had triggered the transfer to the SIU. She testified that until Mr. Richards testified at the Examination Under Oath that he was living with Ms. Darrall, she had been operating with the understanding that there were no priority issue to investigate.

Yvette Stewart

28. Ms. Stewart is an Accident Records clerk with the Peel Regional Police, and was one of three such clerks in October 2007. The main focus of her testimony was the circumstances in which she and her co-workers provide or reject requests for copies of Police MVA Reports. I will not set out the details of her evidence, as I did not find it to be persuasive or particularly relevant, given Ms. Alcaro’s statement that the information on the police report, once she obtained a copy from the Claimant’s representative, did not suggest that there were any priority issues to investigate.

RELEVANT PROVISIONS:

Insurance Act - Section 268

(5) Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant, as defined in the *Statutory Accident Benefits Schedule*, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy.

(5.2) If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant.

Ontario Regulation 283/95

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:

29. Both the language of section 3(2) of the regulation and the case law interpreting it create a significant hurdle for any insurer seeking to excuse its late provision of notice of its intent to dispute the obligation to pay benefits. As has been stated by various arbitrators and the courts, the underlying rationale for this strict interpretation is that an

insurer is entitled to know at an early stage whether it will be adjusting a claim and paying benefits, and the “system” can only operate efficiently if this is the case.

30. The courts have also expressed the view that as sophisticated litigants regularly involved in disputes of this sort, insurance companies should be well able to determine their rights and obligations under the prevailing regime, and that “no unfairness would be visited upon them by insisting on strict compliance with the notice requirements.” (*Kingsway General Insurance Company v. West Wawanosh Insurance Company*, 2001 CanLII 28051, Nordheimer, J. at para. 22)

31. While many arbitration and appeal decisions have addressed the question of whether or not the ‘saving provisions’ in section 3(2) should be applied, each case turns on its own facts. That being said, some general principles have emerged from the jurisprudence. An insurer’s investigation should not be held to a standard of perfection, and an arbitrator or a court should resist the temptation to review the relevant events through the lens of hindsight. Insurers should also not issue notices indiscriminately, on the off chance that an insurer in higher priority will be identified.

32. Both parties in this case referred me to Justice Perell’s decision in the *Liberty Mutual Insurance Company v. Zurich Insurance Company* case (2007) Can LII 54 54080 Ont. S.C. He sums up the test to apply under section 3(2) as follows:

...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.

(at para.23)

33. In this case, the relevant facts are largely not in dispute. Both Allstate adjusters involved in Mr. Richards’ claim candidly admitted that they did not identify any potential priority issues that required investigation, and, as a result, neither of them diarized the ninety-day deadline. Mr. Chan expressed the mistaken view that the ninety-day period

does not begin until an insurer receives information to suggest that there is a priority issue to investigate. Ms. Alcaro acknowledged that the first time she came to appreciate that another insurer might be in higher priority to pay the claim was at Mr. Richards' examination under oath, when he advised that he was living with Ms. Darrall at the time of the accident and that she was providing financial support to him.

34. Allstate argues that the combination of the misrepresentation in Part 4 of the Claimant's Application form, his representative's resistance to Allstate's efforts to obtain a signed statement and to schedule a timely Examination under Oath, and the unusual facts surrounding the dependency issue should trigger the application of the 'savings provisions' in section 3(2). After reviewing the facts and parties' arguments carefully, I cannot agree with this submission.

35. The "misrepresentation argument" arises from the fact that the Claimant ticked off all of the "no" boxes to the question posed in Part 4 of the Application for Accident Benefits regarding whether he was covered under any other automobile insurance policies. One of the five options listed (other than "your own policy", to which he indicated he was covered) is "the policy of any person on whom you are dependent (e.g. a parent)". Counsel for Allstate submitted that Mr. Richards' representative ought to have canvassed this issue with him before completing the form. He also contended that while Mr. Richards may not have meant to mislead Allstate with this answer, the case law establishes that a claimant's misrepresentation need not be intentional to be considered in the analysis of whether section 3(2) should apply.

36. Ideally, the questions appearing in this part of Part 4 of the OCF 1 form would contain more explicit instructions, and provide further circumstances in which they may apply. If the dependency question referenced not just a parent but other examples of potential dependency such as a cohabitee or family member one might be living with or obtaining support from, I might be more sympathetic to this argument. Given the vague wording of the question, and the fact that the only example provided is one a parent, I cannot agree with Allstate's contention that the Claimant's failure to answer "yes" to that

question constitutes a misrepresentation that would invoke the savings provisions in section 3(2). To find otherwise would be to relieve an insurer of the obligation of doing any investigation into priority, beyond simply reviewing the ‘tick marks’ in Part 4 of the form.

37. It is clear from the exchange of correspondence between the Allstate adjusters (and counsel) and Ms. Barcelo, the Claimant’s representative, that she was staunchly asserting her client’s rights under the *Schedule*. Whether her resistance to having Mr. Richards provide a signed statement or her failure to ensure his presence at the time an in-home assessment was scheduled when the benefits being assessed had not been clarified, can be characterized as a lack of co-operation, or construed as a diligent effort to ensure that the provisions in the *Schedule* are being adhered to is an interesting question. I find, however, that in light of the clear admission by both Allstate adjusters that they had not identified any priority concerns within the ninety-day period, and were singularly focused on investigating one of the clinics that had proposed treatment to the Claimant, that this argument carries little weight.

38. Ultimately, the fact that neither of the Allstate adjusters were live to any priority concerns after reviewing the information provided on the Claimant’s Application for Benefits form is fatal to Allstate’s position that the savings provisions should be applied. While a 58 year-old man who is a named insured under a policy may not be the “classic” profile of a claimant who is financially dependent upon someone else, I find that there was enough information provided on Mr. Richard’s OCF 1 form to merit investigation into potential priority issues. It is clearly indicated at the top of the first page that he was “separated”, and the second page indicates that he was not an occupant of his insured vehicle (with Allstate) at the time of the accident. These facts alone should have raised the question of whether a spouse’s policy might be in priority.

39. The form also indicates that Mr. Richards was unemployed, and had not worked 26 of the prior 52 weeks. He also indicated that he was in receipt of social assistance

payments. In my view, the combination of these answers should have raised the “dependency question” in the adjusters’ mind.

40. As stated by Justice Nordheimer in the *West Wawanosh, supra*, case, insurers are sophisticated litigants who are regularly involved in disputes of this sort, and should be well able to determine their rights and obligations in this context. Accordingly, adjusters who operate under the assumption that a middle-aged man who is a named insured under a policy will not be dependent upon someone else, do so at their peril. It is clear that both Mr. Chan, who arranged for surveillance to be undertaken of the Claimant before he even received the OCF 1 form, and Ms. Alcaro, who retained counsel within three weeks of having been assigned the file so that an EUO could be conducted, approached this claim in a diligent fashion. While I appreciate that the focus of the SIU unit is on investigating certain clinics that are suspected of abusing the system, that singular focus in this case apparently blinded the adjusters from assessing other aspects of the claim, such as whether another insurer might be in higher priority.

41. On the evidence before me, I find that Allstate has not satisfied either branch of the test set out in section 3(2) of the regulation. Given that its notice to Security National was provided beyond the ninety days permitted by section 3(1), it is accordingly precluded from pursuing Security National for priority in this case.

ORDER:

For the reasons cited above, the Application for Arbitration is hereby dismissed.

COSTS:

42. In accordance with the parties’ Arbitration Agreement, Allstate shall pay the legal costs incurred by Security National in this matter, on a partial indemnity basis. If counsel cannot agree on the amount of costs payable, I invite the parties to contact me and I will review submissions on the issue.

Allstate is also responsible to pay all arbitration fees and disbursements incurred.

DATED at TORONTO, ONTARIO this ____ DAY OF OCTOBER, 2013.

Shari L. Novick
Arbitrator