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

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

RBC INSURANCE COMPANY

Applicant

- and -

ACE INA INSURANCE COMPANY

Respondent

DECISION ON PRELIMINARY ISSUES

COUNSEL:

Andy Smith for the Applicant

Ruth A. Henneberry for the Respondent

PRELIMINARY ISSUES:

1. Is RBC barred from pursuing ACE for priority because it did not provide written notice of its intention to dispute its obligation to pay benefits to the Claimant within ninety days of receiving a completed application for benefits, as required by section 3 of *Regulation 283/95* ?

To answer the above question, these sub-issues must be determined:

a. Should the ninety-day notice requirement in section 3 be suspended if a claimant is receiving benefits under the *Workplace Safety Insurance Act* ?

b. If not, was the application received by RBC in January 2014 a "completed application" as referred to in the Regulation?

BACKGROUND:

1. Mohamed Abdullahi was seriously injured when the car that he was driving collided with a transport truck on January 5, 2014. Mr. Abdullahi worked as a 'car jockey' for Hertz Canada at the time, and he was delivering an item for a customer in the Collingwood area at the time of the accident. It was snowing and the roads were slippery. The car he was driving was owned by the Hertz Corporation in the United States, and was plated in Illinois. It was self insured by the Hertz Corporation.

2. The Claimant's father was a named insured under an automobile policy issued by RBC Insurance ("RBC") on the date of the accident. ACE INA Insurance Company ("ACE") was the insurer of a fleet of rental vehicles owned by Hertz Canada in Ontario. None of these vehicles were involved in the accident.

3. RBC received two Application for Accident Benefits (OCF 1) forms from the Claimant. The first was received on January 29, 2014. Two boxes in Part 3 of that form were left blank. One was the box next to the question – "did the accident occur while you were at work?" and the other was the box next to the question of whether a claim was filed with the Workplace Safety and Insurance Board ("WSIB"). The RBC adjuster

requested the missing information, and a second Application was subsequently received on April 21, 2014, containing answers to the above questions. It confirms that the accident did occur while the Claimant was at work, but indicates that a claim was not filed with the WSIB.

4. The RBC adjuster then received a copy of a letter addressed to the WSIB from the Claimant's legal representative on May 6, 2014, advising that Mr. Abdullahi "has elected to pursue a claim for motor vehicle accident compensation and not workplace safety and insurance benefits", and that counsel was in the process of completing the Assignment of Workplace Safety & Insurance Benefits form. The Claimant received WSIB benefits between January 6 and May 14, 2014 in the approximate amount of $6,000.

5. A Notice to Applicant of Dispute Between Insurers was sent by RBC to ACE on May 12, 2014, more than ninety days after the first Application was received, but less than ninety days after the second one was received. Arbitration was subsequently commenced against both ACE and Co-operators in August 2014. Co-operators was let out of the proceeding in March 2015.

THE EVIDENCE:

6. The parties filed an Agreed Statement of Facts consisting of thirty short paragraphs, which I append to this decision. In addition to the basic facts outlined above, I will summarise the agreed facts below. Various documents were also filed by the parties, including the two Applications for benefits received by RBC, correspondence between the parties and the WSIB, and a transcript of the evidence provided by Johnny Fragnelli, the RBC adjuster, at his Examination Under Oath in September 2017. No oral evidence was tendered at the hearing.

7. The Statement of Agreed Facts and the EUO evidence of Mr. Fragnelli provide that he was assigned to adjust the claim on January 14, 2014, after RBC received a call from the Claimant's father advising that his son had been involved in an accident, and was in the hospital. The father also advised that the Claimant was working as a car jockey

for Hertz at the time of the accident, and provided the phone number of his manager there. Mr. Fragnelli spoke with the manager at Hertz, who advised that the Claimant was in the course of his employment at the time of the accident. He then spoke to a representative in Human Resources, who advised that a claim had been reported to the WSIB.

8. Mr. Fragnelli sent a letter to Mr. Abdullahi enclosing an Accident Benefits package the next day, as required. It states "we understand that you have been injured in a motor vehicle accident in the course of your employment", and refers to the provisions in the *SABS* (section 61) that state that an insurer is not required to pay benefits to anyone who is entitled to receive benefits under the *Workplace Safety Insurance Act ("WSIA")*. It asks Mr. Abdullahi to report the accident to the WSIB and "request an election form from them, if applicable, in order to (sic) that you may exercise your choice to claim benefits from them or opt out and elect to sue a third party".

9. The letter also encloses an Assignment of Workplace Safety & Insurance Benefits form and an Authorisation permitting the WSIB to release information to RBC, and requests that those be signed and returned within ten days. It states "please be advised that we require this information in order to assess your eligibility for benefits under the *Statutory Accident Benefits Schedule.*

The letter ends with the following paragraph:

> *As you are required to initiate preliminary claims proceedings to WSIB, we will follow up on the status of your WSIB claim and we will continue the efforts to determine whether you are entitled to elect benefits under the Statutory Accident Benefits Schedule.*

10. Mr. Fragnelli advised at his Examination Under Oath that he had a discussion with someone at Crawford Canada on January 21, 2014, who was retained by Hertz Canada "for the accident benefits portion of the claim". She confirmed that the Claimant

was in the course of his employment at the time of the accident, and that it "appeared that the file was going to WSIB as the Claimant had been deemed at fault for the accident."

11. As set out above, an Application for Accident Benefits form was received by RBC on January 29, 2014. It was sent by counsel for the Claimant at the time, Neinstein & Associates. As noted above, the two boxes in Part 3 of the form asking whether the accident occurred while the Claimant was at work, and whether a claim was filed with the WSIB were left blank. The parties agree that the application is otherwise complete. Mr. Fragnelli testified that based on the information that he had previously received, he considered the application to be incomplete. He sent an Explanation for Benefits form to the Claimant indicating that the application received was incomplete, and requesting the missing information.

12. A second Application was subsequently received by RBC a few months later, on April 21, 2014. It was forwarded by Campisi Law, the Claimant's new lawyers. No claims were submitted by Mr. Abdullahi or on his behalf between January 29, the date that the first application was received, and that date. Mr. Fragnelli testified that he believed at that time that "the file was with WSIB". He stated that he considered this second application to be complete, as it checked off the "yes" box to the question of whether the accident occurred at work, and "no" to the question of whether a claim was filed with the Workplace Safety Insurance Board.

13. Mr. Fragnelli explained that he responded to this application by sending a further Explanation of Benefits form. He noted on that form that it was RBC's understanding that the Claimant was in the course of his employment at the time of the accident, and that he was at fault for the accident, based on the police report received. He also sent a copy of the letter he had forwarded earlier to Mr. Abdullahi enclosing the WSIB assignment, and advised that RBC would be retaining counsel to conduct an examination under section 33 of the *SABS*.

14. Mr. Fragnelli testified that he believed that the Claimant had been collecting WSIB benefits through February, March and April 2014. He subsequently received a copy of the May 6 letter that Mr. Abdullahi's counsel had sent to the WSIB, referenced above, confirming that Mr. Abdullahi "has elected to pursue a claim for motor vehicle compensation and not workplace safety and insurance benefits", and advising that the Assignment of Workplace Safety & Insurance Benefits Form would be forwarded once completed.

15. Mr. Fragnelli stated that this was the first time that he understood that the Claimant had elected to receive accident benefits rather than benefits under the *WSIA*. Later correspondence received from the WSIB confirmed that the Claimant received Loss of Earnings Benefits under the *WSIA* between January 6 and May 13, 2014 in the amount of $6,138.

16. As noted above, Mr. Fragnelli forwarded a Notice of Dispute Between Insurers form to ACE and to Co-operators on or about May 12, 2014.

17. Finally, I note that the Agreed Statement of Facts filed also provides that the Claimant commenced a tort action against the Town of Collingwood and the Regional Municipality for negligence, due to the conditions of the roads at the time of the accident.

RELEVANT PROVISIONS :

Counsel referred to the following provisions in their submissions:

Ontario Regulation 283/95

> *In this Regulation,*
>
> *"completed application" means a completed and signed application;*
>
> *1. All disputes as to which insurer is required to pay benefits under section 268 of the Act shall be settled in accordance with this Regulation.*

2.1 (6) The first insurer that receives a completed application for benefits from the applicant shall commence paying the benefits in accordance with the provisions of the Schedule pending the resolution of any dispute as to which insurer is required to pay the benefits.

c. (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.

Statutory Accident Benefits Schedule

***61.** (1) The insurer is not required to pay benefits described in this Regulation in respect of any insured person who, as a result of an accident, is entitled to receive benefits under the Workplace Safety and Insurance Act, 1997 or any other 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 if 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, non-earner or caregiver benefit is payable under this Regulation 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 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.*
>
> *(4) The election must be made within three months after the accident occurs or, if the accident results in death, within three months after the date of death.*
>
> *(5) The Board may permit the election to be made within a longer period if, in the opinion of the Board, it is just to do so.*

PARTIES' SUBMISSIONS:

RBC's submissions:

18. Mr. Smith urged me to dismiss ACE's preliminary objection, and permit RBC to proceed with the dispute. The main thrust of his argument was that RBC's obligation to provide notice of a dispute to another insurer pursuant to section 3 of the regulation was not triggered until early May 2014, when RBC was made aware that Mr. Abdullahi was electing to receive accident benefits rather than benefits under the *WSIA*.

19. Counsel noted that Mr. Abdullahi was in the course of his employment at the time of the accident, and was therefore eligible to receive benefits under the *WSIA*. He noted that a claimant who is eligible to receive benefits under the *WSIA* is mandated to seek these benefits, and can only opt out of that system in limited circumstances. He also noted that section 61 of the *SABS* provides that an insurer is not required to pay accident benefits to a claimant who is eligible to receive benefits under the *WSIA*, unless a valid election is made.

20. Counsel referred to section 1 of *Regulation 283/95*, which states that "all disputes as to which insurer is required to pay benefits under section 268 of the Act shall be settled in accordance with this Regulation". He contended that if a claimant is receiving benefits from the WSIB, there is no requirement on an insurer to pay benefits under section 268 of the Act, and there is therefore no dispute about which insurer is to pay the benefits. Put another way, RBC contends that a condition precedent to applying the priorities regulation is a requirement to pay accident benefits to a claimant, and if no such obligation exists, the provisions of the regulation do not apply.

21. Mr. Smith argued that *Regulation 283/95* would only be engaged once the Claimant elected to sue in tort and claim accident benefits, as there was simply no obligation for RBC to pay benefits while Mr. Abdullahi was receiving benefits through the WSIB. He submitted that the ninety-day period in section 3 of the regulation would therefore not begin until RBC was notified of the election on May 6, 2014. Given that the Notice of Dispute was sent to ACE six days later on May 12, 2014, the obligation to provide timely notice was met.

22. Counsel for RBC argued alternatively that if I do not accept that the Claimant's receipt of WSIB benefits suspended the operation of *Regulation 283/95*, the ninety day period provided in section 3 did not begin until Mr. Fragnelli received the second application in April 2014, as the first application received on January 29, 2014 was not complete. He cited the test set out in the Court of Appeal's decision in *Ontario (Minister of Finance) v. Pilot Insurance Co.* 2012 ONCA 33 that a completed application for the purpose of section 3 is one that is either genuinely complete, functionally adequate for the legislated purpose, or treated as complete based on the conduct of the first insurer.

23. Mr. Smith submitted that the application was not genuinely complete, as the two boxes referred to above were left blank. He noted that the test set out by the Court of Appeal was a strict one, and suggested that the omissions in the January 29 application were material.

24. Counsel further contended that the application received in January was also not "functionally adequate". He noted the Court of Appeal's comments that an application is functionally complete when "the insurer has sufficient information to notify another insurer that it is disputing liability to pay benefits", and submitted that this only occurred when the Claimant informed RBC that he was electing to opt out of the *WSIA* scheme.

25. Finally, counsel contended that it was clear from the facts that RBC had not treated the application as being complete, given that Mr. Fragnelli had sent an Explanation of Benefits form to the Claimant advising that "the application is incomplete" and seeking the missing information.

ACE's submissions:

26. In response to the argument that *Regulation 283/95* was not engaged until RBC became aware of the Claimant's intention to elect accident benefits in May 2014, counsel noted that nothing in the Regulation supports this contention. She argued that once a completed application is received by an insurer, the regulation mandates that the ninety day notice period begins. Failure to provide notice to another insurer can only be overcome if the requirements in subsection 3(2) are met.

27. Ms. Henneberry submitted that *Regulation 283/95* provides a complete scheme for addressing priority disputes between insurers. She noted the Court of Appeal's comments in *Kingsway General v. West Wawanosh Insurance* [2002] 58 O.R.(3d) 251 that given the regulatory setting there is little room for creative interpretations, or for carving out judicial exceptions, and suggested that RBC's submissions on this point fall into the category of "creative interpretation".

28. Counsel argued that the real question to consider is whether a completed application has been received by an insurer, rather than whether or not an insurer is paying benefits to a claimant. She suggested that there can be various reasons for benefits not being paid - such as a claimant's entitlement to collateral benefits from another source, a claimant deciding to change his or her mind about having submitted a

claim, or an insurer disputing a claimant's entitlement to the benefit sought. She submitted that in any of these circumstances, a first insurer who received a completed application is still obliged to comply with the time limit set out in section 3.

29. Counsel for ACE contended that the first application received by RBC in January 2014 was "complete", and that as notice was not provided to ACE until May 12, 2014, RBC should be barred from proceeding with this dispute. Ms. Henneberry submitted that the application was "functionally adequate", and therefore complete, in accordance with the Court of Appeal's findings in *Ontario v. Pilot, supra.* She noted that even though the question relating to whether the accident occurred while the Claimant was at work was not answered, Mr. Fragnelli knew from his conversations with the Claimant's father and the Hertz representatives on January 14 that Mr. Abdullahi was in the course of his employment at the time of the accident.

30. Counsel cited various cases in which courts and arbitrators have found that that if an insurer has information that is not contained in an application received, the insurer cannot argue that the application is incomplete (*Primmum Insurance v. Aviva Insurance (*2005) CanLII 11975 (ONSC), *ACE v. Security National o/a TD Meloche Monnex and ING Insurance (2011) (Bialkowski), Ontario v. Pilot, supra).*

31. Ms. Henneberry suggested that an experienced adjuster would know that a claimant's legal representative would likely advise a client to elect out of the WSIB system, given that more compensation is available if claims are pursued through tort actions and AB claims. She noted that a tort action may be pursued if a claimant is at fault for the accident, if a negligence claim can be made against a municipality for poor road conditions or other factors. She noted that Mr. Fragnelli did not contact the Claimant, his father (the RBC insured) or the WSIB at any point between receiving the first and second applications, and that he could easily have done so to clarify the only missing piece of information regarding whether a claim was made to WSIB.

32. Finally, Ms. Henneberry noted the Court of Appeal's comments in *Ontario v Pilot, supra,* that once an insurer has sufficient information to notify another insurer that it is disputing liability to pay benefits, the ninety-day notice period starts running. She submitted that this should not be interpreted to mean that an insurer can wait until it receives all possible information on all potential questions arising in a case, as that would render the savings provisions in section 3(2) redundant. She submitted that the ninety-day period is triggered once sufficient information is obtained that permits a priority investigation to begin, and contended that this occurred on January 29, 2014, when the first Application was received.

ANALYSIS & FINDINGS:

33. RBC contends that the preliminary objection raised does not just call for a determination of whether the first Application received by Mr. Fragnelli was "complete", but also raises the larger question of whether *Regulation 283/95* is engaged at all, in cases where claimants injured in automobile accidents are eligible to receive benefits through the WSIB system. The main focus of Mr. Smith's submissions was the interplay between the *SABS* and the *WSIA* provisions in these circumstances, and the effect of those on priority disputes between insurers.

34. Having considered the issue carefully, I find that on the particular facts of this case, these two issues are related, being "two sides of the same coin". The statutory and regulatory provisions relevant to these questions are set out above. Section 61 of the *SABS* provides that an insurer is not required to pay accident benefits to a claimant who is entitled to receive benefits under the *WSIA.* The insurer does not get to make that determination, however - it is the applicant who may elect to bring a tort action and claim accident benefits instead of collecting benefits through the WSIB, as long as the election is not made "primarily for the purpose of claiming benefits under the Regulation". The interplay between these provisions can be awkward and lead to various potential problems.

35. The claimant must act by making an election. The *WSIA* provides that the election must be made within three months of the accident, but that period may be extended if the Board feels that "it is just to do so". Section 61(3) of the *SABS* also provides that if a claimant elects to sue and makes a claim for accident benefits, no weekly benefits are payable for the period before the election is made. Subsection (5) states that if there is a dispute about whether an insurer is required to pay benefits to a claimant under the SABS, the insurer must 'pay pending dispute' as long as an assignment of any WSIB benefits is made to the insurer. This leaves open the question, however, of what an insurer is required to do if it is unclear whether an election has been made.

36. Counsel for RBC contends that unless there is a "requirement to pay benefits under section 268 of the Act" as provided in sections 1 and 3 of the regulation, *Regulation 283/95* is not engaged, and an insurer who receives an application for benefits is not required to provide notice to another insurer within ninety days. Counsel for ACE disagrees, and argues that the notice obligations under regulation are triggered as soon as an insurer receives an Application for benefits.

37. In my view, section 2.1(6) of the regulation addresses this question. It provides that the first insurer that receives a completed application for benefits "*shall commence paying the benefits in accordance with the provisions of the Schedule*". The language used is mandatory, and I interpret this to mean that the receipt of a completed application is the triggering event that engages the regulation. The reference to benefits being paid "in accordance with the provisions of the Schedule" may allow an insurer to rely on section 61(1) to deny entitlement to SABS if a claimant is eligible for WSIB benefits (subject to the right to elect), and if need be, bring an application under section 31 of the *WSIA* to the Appeals Tribunal for a determination of the issue. These are two different things, however – an insurer can determine an applicant's entitlement to benefits under the *Schedule* "in accordance with its provisions", but once it receives a completed application, its obligations under *Regulation 283/95* begin.

38. In this case, RBC did not have to consider whether Mr. Abdullahi was entitled to SABS benefits during the initial period, as no claims for benefits or treatment were submitted. Mr. Fragnelli's challenge was to determine whether the Claimant would be seeking accident benefits from RBC or benefits under the *WSIA*. The initial information received from Mr. Abdullahi's father and from Hertz provided that the accident occurred in the course of his employment. The Hertz HR representative advised that a claim was filed with the WSIB, and an adjuster at Crawford stated that "it appeared that the file was going to WSIB as the Claimant was deemed at fault for the accident". Mr. Fragnelli sent a letter to the Claimant on January 15 enclosing the required documents, advising both that he should forward a claim to the WSIB, and that RBC would be assessing his eligibility for benefits under the SABS.

39. The January 29 Application for benefits was received two weeks later. It does not provide any clarification on where the claim is headed, with the boxes noted above left blank. While Mr. Fragnelli was aware by then that the accident did occur in the course of Mr. Abdullahi's employment, he required confirmation of whether a WSIB claim was filed and whether the Claimant was electing to sue and receive benefits under the *SABS*. He promptly sent an Explanation of Benefits payable form to the Claimant on the same day, advising that the application was incomplete, and requesting the missing information.

40. No response was received to this request. Mr. Fragnelli testified that "there was no activity on the file" for a few months following that correspondence, and that he assumed that the file was "with WSIB". It is unclear what was going on with the Claimant at that time, although the documents subsequently received indicate that new counsel was being retained. The documents also show that Loss of Earnings benefits were paid by the WSIB beginning January 6, 2014.

41. Counsel for ACE submitted that Mr. Fragnelli should have reached out to various people during that period, in order to confirm whether Mr. Abdullahi was receiving WSIB benefits or whether he intended to elect out of that system and claim benefits

under the *SABS*. I agree that these efforts should ideally have been made, but having sent out the Explanation of Benefits in late January and not having received a response, I find that it was not unreasonable for Mr. Fragnelli to assume that the Claimant was receiving WSIB benefits.

42. Mr. Fragnelli's actions or inaction may be relevant in a section 3(2) analysis, but having determined that *Regulation 283/95* is engaged once a completed application for benefits is received, the real question here is whether the January 29 application received by RBC was complete. Having reviewed the parties' submissions on this point and the cases they cited, I find that it was not.

43. In *Ontario (Minister of Finance) v. Pilot Insurance, supra,* the Court of Appeal outlined the test for a "completed application" for the purposes of section 3 of the regulation as one that is either genuinely complete, functionally adequate for its legislated purpose, or treated as complete based on the conduct of the first insurer. The focus here is on the second branch, as the two blank 'check boxes' and Mr. Fragnelli's actions outlined above eliminate the first and third possibilities.

44. In its discussion of a "functionally adequate application" for the purpose of section 3, the Court of Appeal states that the ninety-day notice period starts to run "as soon as the insurer has enough information to notify another insurer that it is disputing liability to pay benefits". In that case, once information from a 911 call was obtained which provided the identity of the driver of a car that struck the claimant, the court determined that the application was functionally complete for the purpose of section 3.

45. While the factual context here is different, in that RBC did not need further information in order to identify the insurer that it intended to pursue, it did need to know whether a claim was filed with the WSIB. If no WSIB claim was filed, it would be clear that Mr. Abdullahi would be pursuing accident benefits from RBC. Given the fact that he was an occupant in a vehicle that was not insured by RBC at the time of the accident, priority issues would arise. If a claim was filed with WSIB, and benefits paid under the

WSIA, there may not have been any exposure to pay benefits under the *SABS* (subject to an election under section 30 of *WSIA)* and consequently no need to consider priority for payment of benefits.

46. I agree with ACE's submissions that as Mr. Fragnelli was aware from his earlier conversations on January 14 that the accident occurred while the Claimant was in the course of his employment, the fact that this box was left blank on the OCF1 would not be sufficient to claim that the application was incomplete. I find, however, that the lack of information regarding the filing of a WSIB claim was enough to render the application received not "functionally adequate" and therefore not complete.

47. Given my findings above, the ninety-day period in section 3 of the regulation did not begin on January 29 with the receipt of the first Application, but rather on April 21, 2014, once the second and admittedly complete Application was received by RBC. As the DBI notice was received by ACE on May 12, 2014, proper notice was delivered within ninety days of that date. ACE's preliminary objection is therefore dismissed.

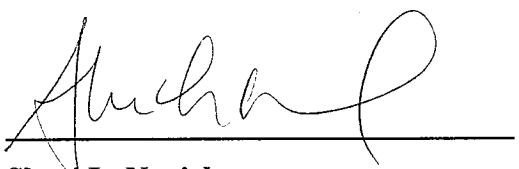
48. Consequently, RBC is not barred from proceeding with this dispute.

COSTS:

As RBC was successful in its efforts to have the preliminary objection dismissed, it is entitled to its legal costs of this proceeding, on a partial indemnity basis. If counsel cannot agree on the quantum of costs payable, they should contact me and arrangements will be made for submissions to be exchanged.

I will contact the parties shortly in order to arrange a further teleconference so that we can proceed to a determination on the merits of the dipsute.

DATED at TORONTO, ONTARIO this 12th DAY OF APRIL, 2018.



Shari L. Novick

Arbitrator

Appendix

IN THE MATTER of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended, and Ontario Regulation 283/95 as amended, made under the *Insurance Act*;

AND IN THE MATTER of the *Arbitration Act*, S.O. 1991, c. 17;

AND IN THE MATTER of an Arbitration;

BETWEEN:

RBC INSURANCE COMPANY

Applicant

- and -

ACE INA INSURANCE COMPANY

Respondent

AGREED STATEMENT OF FACTS FOR THE PRELIMINARY ISSUES HEARING

Background of the Accident

1. The claimant, Mr. Mohamed Abdullahi, worked as a car jockey for Hertz in Toronto.

2. Mr. Abdullahi was delivering an item for a Hertz customer on January 5, 2014 and was operating a 2013 Cadillac bearing Illinois license plate number N442046 (hereinafter referred to as the "Hertz vehicle").

3. The Hertz vehicle was plated in Illinois, U.S.A. and was self-insured by the Hertz Corporation.

4. Mr. Abdullahi was operating the Hertz vehicle in the Collingwood, Ontario area on January 5, 2014. At that time, it was snowing heavily and the roads were slippery. The claimant collided with a 2014 Volvo transport truck and sustained significant injuries.

   Reference **Motor Vehicle Collision Report, dated January 5, 2014**
   Agreed Statement of Facts, Tab 1

5. Mr. Abdullahi subsequently commenced a tort action against the Town of Collingwood and the Regional Municipality for negligence due to the condition of the roads at the time of the accident.

6. Mr. Abdullahi remained in hospital for approximately three weeks due to the injuries he sustained in the accident.

7. RBC insurance is the insurer of the claimant's father, Ahmad Ismail, under a valid motor vehicle liability policy.

8. ACE/INA is the insurer of the fleet of Hertz rental vehicles in Ontario, none of which were involved in this accident.

Adjusting of Claim

9. The RBC claims adjuster assigned to this file was Mr. Johnny Fragnelli. He has been and remains the only adjuster on this file.

Reference **Transcript of Examination of Johnny Fragnelli, dated September 22, 2017 at para 4**
Agreed Statement of Facts, Tab 6

10. On January 14, 2014, Mr. Frangnelli was assigned this claim.

11. On January 14, 2014, Mr. Frangelli spoke with Cynthia, a manager with Hertz who informed him that the claimant was in the course of his employment at the time of the accident and that the claim had been reported to WSIB.

Reference **Transcript of Examination of Johnny Fragnelli, dated September 22, 2017 at para 15**
Agreed Statement of Facts, Tab 6

12. Mr. Fragnelli sent an Accident Benefits package and a letter to the claimant dated January 15, 2014, which states in part "[we] understand that you have been injured in a motor vehicle accident while in the course of your employment".

Reference **Letter to Claimant, dated January 15, 2014**
Agreed Statement of Facts, Tab 3

13. In his letter at Tab 3 herein, Mr. Fragnelli provides detail about the WSIB requirements under the Statutory Accident Benefits Schedule, including how Mr. Abdullahi can claim WSIB benefits. Mr. Fragnelli encloses blank Notice of Assignment of Benefits and Authorization for Work Place Safety Board forms with his January 15, 2014 letter.

14. A signed Application for Accident Benefits OCF-1 form dated January 16, 2014 was sent to RBC (hereinafter referred to as the "First Application").

Reference **Applicant for Accident Benefits, OCF-1, dated January 16, 2014**
Agreed Statement of Facts, Tab 2

15. The First Application was received by RBC on January 29, 2014.

Reference **Transcript of Examination of Johnny Fragnelli, dated September 22, 2017 at para 20**

Agreed Statement of Facts, Tab 6

16. The First Application contained the RBC Claim Number at the top right portion of the OCF-1 form.

17. The First Application had two boxes left blank on Part 3 of that OCF-1 form.

18. The first box not checked off asked whether the accident occurred while the claimant was at work. A "yes" or "no" box was to have been checked off.

19. The second box not checked off asked whether the claimant filed a claim with the Workplace Safety and Insurance Board. Again, a "yes" or "no" box was to have been checked off.

20. The First Application is otherwise complete.

21. The claimant's counsel at this time was Neinstein's and Associates

22. On January 29, 2014, Mr. Fragnelli sent the claimant an OCF-9 Explanation of Benefits indicating it was his belief that the First Applicant was incomplete. The letter requested the missing information.

    Reference **Explanation of Benefits OCF-9, dated January 29, 2014**
    Agreed Statement of Facts, Tab 7

23. RBC subsequently received another OCF-1 form (hereinafter referred to as the "Second Application") from the claimant on or about April 14, 2014.

    Reference **Applicant for Accident Benefits, OCF-1, dated April 14, 2014**
    Agreed Statement of Facts, Tab 4

24. The claimant's counsel was Campisi Law at this time.

25. There was no relevant activity on this file between January 29, 2014 and April 15, 2014.

26. It was Mr. Fragnelli's belief that the claimant was claiming WSIB benefits at this time.

    Reference **Transcript of Examination of Johnny Fragnelli, dated September 22, 2017 at para 32**
    Agreed Statement of Facts, Tab 6

27. On May 6, 2014, Mr. Fragnelli received a letter from the claimant's counsel enclosing an Election for Accident Benefits.

    Reference **Transcript of Examination of Johnny Fragnelli, dated September 22, 2017 at para 41**
    Agreed Statement of Facts, Tab 6

28. RBC sent a Notice to Applicant of Dispute Between Insurers form to ACE INA on or about May 12, 2014.

Reference **Notice to Applicant of Dispute Between Insurers, dated May 12, 2014**
Agreed Statement of Facts, Tab 5

29. Between January 6, 2014 and May 13, 2014 the claimant received benefits from WSIB in the amount of $6,138.31.

Reference **Letter from WSIB dated August 19, 2014**
Agreed Statement of Facts, Tab 8

30. At all material times the claimant was eligible for WSIB benefits.