

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990,
c. I.8, Section 268 and Regulation 283/95
under the *Insurance Act*

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

AND IN THE MATTER of an Arbitration

BETWEEN:

TD GENERAL INSURANCE COMPANY

Applicant

- and -

SOVEREIGN GENERAL INSURANCE COMPANY

Respondent

AWARD

Counsel:

TD General Insurance Company (TD) Applicant: Christopher L. Girardo

Sovereign General Insurance Company (Sovereign) Respondent: Miriam Tepperman

Introduction:

This matter came before me pursuant to the *Arbitrations Act*, 1991, to arbitrate an issue between the above-noted insurers with respect to a priority dispute pursuant to the *Insurance Act* and its regulations. Specifically this claim is with respect to a motor vehicle accident that occurred on October 2, 2011 and a claim for Statutory Accident Benefits that was advanced by Asim Afzal.

The parties selected me as their Arbitrator on consent and this matter proceeded to a hearing with documentary evidence only for one day in Toronto on January 23, 2015.

Exhibits:

The following documents were made exhibits at the arbitration hearing:

Exhibit 1: Arbitration Agreement

Exhibit 2: Joint Brief of Documents (including an Agreed Statement of Facts at Tab 1 dated January 21, 2015)

The Issue in Dispute:

TD General Insurance Company (hereinafter called "TD") seeks a finding that it has complied with the provisions of Section 3 (2) (a) and (b) of Regulation 283/95 of the *Insurance Act*, R.S.O., 1990 c.1.8 in serving Sovereign General Insurance Company (hereinafter called "Sovereign") with a Notice of Dispute Between Insurers and is therefore entitled to proceed with an arbitration to determine whether Sovereign ranks in priority to TD with respect to benefits payable to Asim Afzal in accordance with Section 268 of the *Insurance Act*.

Therefore the preliminary issue to be determined by me is whether under Regulation 283/95 Section 3 (2) 90 days was:

1. Not a sufficient period of time to make a determination that another insurer or insurers were liable under Section 268 of the *Act*;
2. And that TD made reasonable investigations necessary to determine if another insurer was liable within the 90 day period.

Result

90 days was a sufficient time in which to determine there was another insurance company that may be liable to pay benefits and that TD failed to make reasonable investigations to determine if another insurer was liable within the 90 day period. Consequently TD is not entitled to dispute its obligation to pay benefits to Asim Afzal pursuant to Section 268 of the *Insurance Act*.

Facts

Having carefully reviewed the Agreed Statement of Facts, Factums of counsel and the documents submitted I find the following are the relevant facts:

1. On October 2, 2011 Asim Afzal was struck by a taxi cab while a pedestrian crossing though a parking lot/street at or near Pearson International Airport;

2. On the date of loss Mr. Afzal was working as a taxi driver operating a 2008 Dodge Grand Caravan insured by Sovereign under policy number TCA9801467-48128;
3. Mr. Afzal sustained significant injuries in the accident. He was an inpatient at St. Michael's Hospital/Rouge Valley and West Park respectively between October 2, 2011 through to January 7, 2012 when he was discharged home. He was initially in a coma for 14 days;
4. TD insured Mr. Afzal's personal automobile under policy number 71391813;
5. On October 31, 2011, on behalf of Sovereign, an accident benefit application package was forwarded to Thomson Rogers, counsel for Asim Afzal. Counsel for Mr. Afzal advised that Mr. Afzal was proceeding to claim accident benefits from TD;
6. Mr. Afzal applied to TD for accident benefits by way of an OCF-1 dated October 24, 2011 completed by his wife, Aisha, and received by TD on November 3, 2011. There is no dispute that TD received the first completed Application for Accident Benefits;
7. The 90 day period pursuant to Regulation 283/95 Section 3 runs from November 3, 2011 to January 31, 2012;
8. TD sent a Notice to Applicant of Dispute Between Insurers dated March 19, 2012 to Sovereign 137 days after it received the completed Application for Accident Benefits;
9. The Application for Accident Benefits indicated under Part 4 (a) that the only available policy coverage to Mr. Afzal was TD Insurance. Specifically the answer was no to the question "Are you covered under your employer's policy (eg. company car)?";
10. On November 2, 2011 TD was advised that Mr. Afzal was represented by Thomson Rogers;
11. Betty Levinson, an experienced claims handler, was assigned responsibility for Mr. Afzal's file at TD as the major claims consultant in or around October 27, 2011. Ms. Marinkovic was an adjuster at TD with day to day carriage of the file;
12. By October 26, 2011 the documents show that TD was aware that Mr. Afzal was a taxi driver;

13. TD requested a copy of the police report relating to this loss on October 26, November 7 and November 9, 2011. It was received on November 25, 2011. The report did not disclose what car Mr. Afzal had in his possession prior to the accident on the date of loss;
14. On November 16, 2011 the log notes and documents of TD show that Ms. Levinson was aware (it seems from Mr. Afzal's wife) that on the date of loss he was a taxi driver who may have been at work at the time. He had however decided to go to the temple and pray and while crossing the street to get to the temple he was struck. This information triggered an inquiry by TD as to whether a WSIB claim could be made.
15. On November 17, 2011 TD assigned the AB file to H&A Accounting to complete an income replacement benefit calculation as Mr. Afzal was self employed. This information did not appear to trigger at that stage any concerns or inquiries with respect to priority.
16. The log notes of TD indicate that on November 30, 2011 Ms. Levinson noted that 2 matters had been discussed one of which was "priority as it is believed that he parked his taxi to walk over to the temple". The note goes on to indicate that it was agreed to obtain the insurance information of the taxi that the insured was driving that day and/or the plate numbers.
17. In a log note of December 12, 2011 Ms. Levinson notes that priority was again discussed and that TD clearly noted that as the OCF-1 had been received on November 3, 2011 that the 90 day period would run to February 3, 2011. In fact the 90 day period would run to January 31, 2012. Further Ms. Levinson noted that there may be some difficulty as TD did not have information on the limo which the claimant was driving or may even own, they did not have an OCF-3, did not know who the employer was, that the insured was in hospital and that he was self employed. Therefore as of December 12, 2011 almost 30 days into the 90 day period TD recognizes the difficulty it may have to get the information needed to identify possible other insurers.
18. On December 2, 2011 TD sends a letter to Mr. Afzal (copied to Thomson Rogers) requesting under Section 33 the following:
 - a) Detailed information of your company vehicle back at Airport Limousine including but not limited to insurance and policy number, plate number and ownership information;
 - b) Confirmation in writing that you are not listed on any other valid insurance policy as a named insured, listed driver, spouse of insured or dependent of a named insured;

- c) The make, model, plate number, insurer and policy number and ownership information of any vehicle that may be made available to you for use or employment purposes.
19. The records seem to suggest that it was contemplated that a driver's license search would be done but there is no evidence of that. An auto plus search was completed by TD in December which showed only TD as Mr. Afzal's insurer.
 20. In the log note of December 1, 2011 TD contemplated making a referral of the priority/WSIB issue to counsel but that did not take place until January 3, 2012.
 21. By letter dated January 13, 2012 Mr. Neil, counsel at Thomson Rogers for Mr. Afzal advised TD that in his view the claim did not involve a WSIB or priority dispute. On January 13, 2012 by way of a conversation with H&A Accounting TD became aware that Mr. Afzal leased a limousine from one Ghassan Gharib and that that gentleman rents space from Airlift Limousine Services. It was also determined that one Kaleed Halabi was the owner of the taxi plate. This information had been secured by H&A by speaking to Mr. Afzal's counsel at Thomson Rogers. There is no evidence that anybody from TD ever phoned and spoke directly to counsel for Mr. Afzal.
 22. On her examination under oath Ms. Levinson confirmed that by January 13, 2012 TD had written only one letter to Mr. Afzal's counsel, had not made any telephone calls to him to request insurance information and had not sent any emails to him to request insurance information.
 23. On January 20, 2012 TD assigned an investigator from Crawford & Company to secure a statement from Ghassan Gharib on a rush basis. The accident benefit assignment sheet for Crawford notes that they are investigating priority/WSIB. However the document also indicates that the seeking of the signed statement should be done after the investigator calls "legal Dr. Brian Murphy" to discuss issues. The evidence also suggests that TD seemed to be under the impression that a statement could not be taken from Mr. Gharib unless the consent of Mr. Afzal was secured. While the investigation was noted to be on a rush basis there was no deadline given and specifically there was no request that the statement be made prior to or well before January 31, 2012.
 24. On January 18, 2012 there was a large loss meeting at TD. The notes suggest that priority was discussed at that meeting. However the notes also suggest that the next large loss meeting would not take place until April of 2012, well past the 90 day limit. Ms. Levinson admitted in her examination under oath that they were planning to bring back the WSIB and priority issues in a couple of months: they

were waiting for legal opinions. She acknowledged there was no urgency to hold another meeting before the expiry of the 90 days of the priority issue.

25. By letter dated January 20, 2012 TD wrote to Mr. Afzal (copied to Thomson Rogers) noting that amongst other things that in order to confirm priority rests with TD that certain additional information is required. The letter does not refer to the insurance information that had been previously referenced in the TD letter but rather suggests the information required is "an authorization to speak to Mr. Ghassan Gharib".
26. There are no further communications with the insured or his counsel by email, letter or phone prior to the end of the 90 day period on January 31, 2012.
27. On January 25, 2012 TD requested an investigator from Burloak to attend at Ghassan Gharib's house/place of business and to see what cars/limos were in the driveway. The investigator was to get the plate number, do plate searches and secure insurance information. As a result of this investigation TD found 2 vehicles parked at Gharib's house, one insured by Lombard Insurance Company and one insured by Wawanesa Mutual Insurance Company. On January 27, 2012 a Notice of Dispute Between Insurers was faxed and mailed to Lombard and Wawanesa. The investigator was not sent to Mr. Halabi's home who owned the plate of the taxi that Mr. Afzal was operating on the date of loss.
28. A statement was ultimately secured from Mr. Gharib dated February 9, 2012 and received by Crawford & Company on February 13, 2012. In this statement while Mr. Gharib confirmed that Mr. Afzal is a driver for his company (Airlift Services) and has been since September 20, 2010 he declined to provide any information about Mr. Afzal's vehicle. He stated "The vehicle that Mr. Afzal was driving is fully insured but I do not want to release the policy information at this time. I have the supporting documents for this vehicle and its policy." This statement was received by TD on March 2, 2012.
29. On March 19, 2012 TD received a letter from Northbridge Insurance dated March 9, 2012 (insurer of one of the vehicles seen in Mr. Gharib's driveway). In that letter Northbridge noted that they had been able to determine that Mr. Afzal was driving a 2008 Dodge Caravan insured by Sovereign General Insurance Company and provided the policy number and the certificate of insurance.
30. At some point subsequent to the passing of the 90 day period TD became aware that Mr. David Neil, counsel for Thomson Rogers, had been given a pink slip by his client, Mr. Afzal, and that pink slip was later provided to TD.

31. I also find it is a fact that prior to the expiry of the 90 day period TD while having completed the investigations noted above did not do the following:
- a) Seek an examination under oath for Mr. Afzal;
 - b) Attempt to contact Mr. Afzal's wife and take a statement or secure information from her;
 - c) To contact counsel for Mr. Afzal directly by phone and to specifically request the information needed in relationship to priority;
 - d) TD did not write to Mr. Afzal and his counsel and explain with clarity the information specifically that they needed for the purposes of the priority dispute and the importance of receiving it within the 90 day period.
32. Finally I find that even after TD learned Sovereign was a potential insurer in terms of priority (this was identified on March 9, 2012) that TD did not serve the Notice to Applicant of Dispute Between Insurers until March 19, 2012 some 10 days later.

The Law

Section 3 of Regulation 283/95 of the *Insurance Act* R.S.O. 1990, c. I.8 provides as follows:

“(1) No insurer may dispute its obligations 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.”

The case law relating to the 90 day issue establishes a number of principles which counsel agreed upon and I note as follows:

1. Regulation 283/95 of the *Insurance Act* sets out in precise and specific terms the scheme for the resolution of disputes between insurers. Insurers are entitled to assume and rely on the requirements for compliance set out therein. The insurers who are subject to this Regulation are sophisticated litigants who deal with these disputes on a daily basis. In this context it is important that there be clarity and

certainty of application and that is of primary concern. Insurers need to make prompt and appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records. Given this regulatory setting, there is little room for creative interpretation or for carving out judicial exceptions to these rules.

Kingsway General Insurance Co. v West Wawanosh Insurance (2002) O.J. No. 528 (Court of Appeal)

2. Counsel agree that the onus on this case is on the insurer seeking to give notice after the 90 day period to establish that the period of 90 days was not sufficient time to make a determination that another insurer was liable and that it made reasonable investigations within the 90 day period to determine if another insurer was liable. Therefore TD has the onus to prove that they meet both aspects of that test.

Liberty Mutual Insurance Co. v Zurich Insurance Co. (2007) 88 O.R. (3d) 629

3. The onus is on the party relying on the late notice provisions of Section 3 (2) to show that 90 days was not a sufficient period of time for determination.

Liberty Mutual Insurance Co. v Zurich Insurance Co. (2007) 88 O.R. (3d) 629 supra (paragraph 18)

4. In making an assessment of whether an insurer has made a reasonable investigation within the time period it is appropriate to consider both what was done to investigate the claim as well as what was not done.

Primum Insurance Co. v Aviva Insurance Co. of Canada (2005) O.J. No 1477 (S.C.J.)

5. The assessment of the sufficiency of time must be premised on the accurate and complete reporting of material information by the insured to the insurer. Incomplete or inaccurate reporting of material facts may adversely affect the ability of an insurer to gather the requisite facts needed to assess the liability of those insurers potentially involved and can render the 90 day period insufficient.

Primum Insurance Co. v Aviva Insurance Co. of Canada (2005) O.J. No 1477 (S.C.J.)

6. An insurer may have a more difficult time meeting the onus to justify an extension when it did not employ obvious or readily available means that had a reasonable likelihood of finding the information it needed, even when the insurer satisfies the onus of showing that it otherwise made reasonable inquiries.

Liberty Mutual Insurance Co. v Zurich Insurance Co. (2007) 88 O.R. (3d) 629

7. The cooperation or non cooperation of the accident victim or the insured and any advertent or inadvertent misrepresentations or information are relevant but not in and of themselves determinative of whether the insurer had sufficient time.

Liberty Mutual Insurance Co. v Zurich Insurance Co. (2007) 88 O.R. (3d) 629

8. Relevant factors as to the determination of whether the insurer had sufficient time to make the determination include:
 - a) What the insurer did or did not do;
 - b) What the insurer could have done and did not do;
 - c) The completeness and accuracy of the Application for Accident Benefits;
 - d) The cooperation given by various interested parties;
 - e) The number of potential insurers;
 - f) The press of other demands on the adjuster's time.

Liberty Mutual Insurance Co. v Zurich Insurance Co. (2007) 88 O.R. (3d) 629

Analysis

TD argues in this case that the following factors contributed to the difficulty in tracking down that Sovereign was a potential insurer in this matter:

1. Lack of cooperation from the insured's counsel;
2. The insured himself was hospitalized for some period of time;
3. There was no response to Section 33 notices;
4. Mr. Gharib did not cooperate and did not provide the information with respect to insurance in his statement (which was provided after the 90 day period);
5. That TD could not get a statement from Mr. Gharib unless authorized by Mr. Afzal and that was not received until after the 90 day period had expired.

Sovereign on the other hand argues that it is more about what TD did not do than what TD did in investigating this priority dispute. Sovereign submits that TD was well aware early on that Mr. Afzal was a taxi driver and that that would be a source of "other insurance" particularly as Mr. Afzal had been in that vehicle on the date of loss. Sovereign also submits that the sequence

of events suggests that there was no sense of urgency on the part of TD and that they were somewhat lackadaisical in their approach to the whole priority dispute. I agree with that.

In addition Sovereign points to the following things that TD did not do and could have done within the 90 day period:

1. Once Mr. Afzal was out of hospital (January 7, 2012) to try to take a statement or an examination under oath or even meet with him to try to collect the information with respect to other insurance;
2. No telephone calls were made to Mr. Afzal or his counsel to request this information. While a couple of letters were sent, only one specifically outlined what information was needed with respect to the priority dispute and no deadlines were given, no explanation of why this information was important and there was little follow up;
3. No efforts were made to speak to the insured's wife to see what information she may have;
4. They failed to assign counsel at an early stage despite having identified on November 16th that this was a case which may pose some hurdles to getting the information required;
5. They did not assign an investigator to seek statements from anyone other than Mr. Gharib. They did not assign an investigator to attend at Mr. Afzal's home and see what vehicles were in his driveway or to try to take a statement from the owner of the taxi plate;
6. As evidence of "no urgency" on the part of TD even after they were aware of Sovereign's involvement on March 9, 2012 the Notice to Dispute was not served until March 19, 2012.

I appreciate that Mr. Afzal had significant injuries in this accident. However I also note as an important fact that Mr. Afzal had provided his Sovereign General pink slip to his counsel and that if he was capable of providing that to his counsel then arguably he would be capable of providing similar information to TD subsequent to his discharge from hospital. He possessed the necessary documentation, his counsel possessed the necessary documentation and insufficient efforts, in my view, were made to get that information via those sources.

I accept Sovereign's submissions and I conclude that TD did not make reasonable investigations within the 90 day period. I also conclude that 90 days was a sufficient period for TD to determine that Sovereign General was an insurer who should be put on notice. Looking at TD's investigation as a whole and as outlined above there really did not seem to be any recognition by them of the urgency in their investigation especially considering the

relatively short period of time that is prescribed under the Regulation. TD did not even identify priority as a dispute until 27 days after it received the original Application for Accident Benefits despite the fact that within that time they were aware that he was a taxi driver who had been struck at Pearson Airport. TD failed to communicate the time constraints it was under to obtain this information to any of the individuals from which they sought help or from which they sought information. There were reasonable investigative tools available to TD that it could have used including examinations under oath, phone calls to the insured or his wife or his lawyer, hiring investigators at an early stage none of which was done. Of some considerable importance in my view is the fact that H&A, the forensic accountants hired by TD, were able to get information about the owner of the taxi cab and the owner of the license by simply calling counsel for Mr. Afzal while TD never chose to do that.

While certainly there was some difficulty (which was clearly contemplated by TD at an early stage) in getting this information I am satisfied it could have been done within the 90 days if sufficient investigative work had been done. I do not find that Mr. Gharib's refusal to provide relevant insurance information in a statement provided after the 90 day period had passed has any relevance. I also find that while the insured's Application for Accident Benefits did not disclose the existence of any other insurance that that is not unusual and TD clearly noted the need to pursue priority investigations at the 27 day mark despite the lack of information in the Application for Accident Benefits.

I appreciate that the Regulation only requires a reasonable investigation and not a perfect one and that some reasonable investigative steps were taken but they were too little and too late. I find that reasonable investigations were not fully made within the necessary time period.

For these reasons I conclude that TD has not met the onus of establishing that it made the required reasonable investigations pursuant to Section 3 (2) (b) and has also failed to establish under Section 3 (2) (a) that 90 days was not a sufficient period of time to make a determination that another insurer was liable.

Order

TD does not have the right to pursue a priority dispute against Sovereign due to its failure to comply with Regulation 283/95.

Costs

The Arbitration Agreement provides at paragraph 10 that the costs of the arbitration including the Arbitrator's fees, expenses and disbursements shall be in the sole discretion of the Arbitrator.

As Sovereign has been successful in this preliminary issue hearing I order that TD pay both the costs of Sovereign with respect to this arbitration and as well the Arbitrator's fees, expenses and disbursements.

Dated this day of , 2015 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP