

**IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990, c. I. 8 as amended, Section 268 AND
REGULATION 283/95 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

B E T W E E N :

MARKEL INSURANCE COMPANY OF CANADA

Applicant

- and -

STATE FARM INSURANCE COMPANIES

Respondent

DECISION WITH RESPECT TO PRELIMINARY ISSUE

COUNSEL

Jamie Pollack/Matt Sutton
Counsel for the Applicant, Markel Insurance Company of Canada

D'arcy McGoey
Counsel for the Respondent, State Farm Mutual Automobile Insurance Company

ISSUES

1. Which insurer was the first to receive a completed Application for Accident Benefits from the claimant, Jasvir Singh Sedha, with respect to a motor vehicle accident which took place on October 22, 2008?
2. If it is found that State Farm was the first insurer to have received a completed application, is it precluded from seeking indemnity from Markel by reason of its failure to provide notice to dispute within 90 days as required by Section 3 of Ontario Regulation 283/95?

PROCEEDINGS

The Arbitration of this preliminary issue proceeded on the basis of a document brief, Examination Under Oath transcript of Anne Lennox (State Farm representative) and both written and oral submissions.

LAW

Section 2 of Ontario Regulation 283/95 provides as follows:

“The first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under Section 268 of the Act.”

Section 3 of Ontario Regulation 283/95 provides as follows:

“(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.”

FACTS

On October 22, 2008, Jasvir Singh Sedha (hereinafter referred to as the “claimant”) was a passenger in a tractor-trailer being driven by Gurman Singh, when they were involved in a single vehicle rollover accident. The tractor was owned by KBT Transport. The claimant and Gurman Singh were employees of KBT Transport at the time of the accident. The tractor-trailer was insured by Markel Insurance Company of Canada (hereinafter referred to as “Markel”) at the time of the accident. The claimant’s father was insured under a standard automobile policy of insurance issued by State Farm Insurance Companies (hereinafter referred to as “State Farm”) at the time of the accident. Both the Markel policy and the State Farm policy were in full force and effect at the time of the accident.

On or about November 15, 2008, the claimant, through his counsel, submitted an Application for Accident Benefits (OCF-1), dated November 14, 2008, to State Farm by way of facsimile and regular mail. Although there is no direct evidence of the mailing of the application, counsel for the Applicant has advised that he has been informed by the claimant’s solicitor that such correspondence was sent by regular mail, as well as by facsimile.

The Application for Accident Benefits (OCF-1), dated November 14, 2008, was faxed to State Farm on November 15, 2008 at the fax number 1-888-633-0405, which was registered to State Farm at the time of the accident.

The facsimile transmission sheet from the claimant’s solicitor, Sangha Law Office, confirms that the Application for Accident Benefits (OCF-1), dated November 14, 2008, was faxed to State Farm at the fax number 1-888-633-0405 at 2:26 p.m. and the faxing was completed at 2:29 p.m. on November 15, 2008.

The State Farm fax number of 1-888-633-0405 was a claims department fax number and was also a commonly used and acceptable fax number for claimants and/or their representatives to submit documentation to State Farm.

State Farm concedes that the claimant’s Application for Accident Benefits (OFC-1), dated November 14, 2008, was sent to it by facsimile on November 15, 2008 by the claimant’s representative. State Farm simply states that it never received the said facsimile.

State Farm does not keep a record of incoming faxes received and State Farm's fax machines are incapable of producing incoming fax transmission receipts.

The Application for Accident Benefits (OCF-1), dated November 14, 2008, submitted to State Farm on behalf of the claimant, contained the claimant's name, the date of the accident, the name of the State Farm policy holder, the State Farm policy number and the details of the automobile insured under the State Farm policy.

The policy number, 0781173-C01-60B, listed on the Application for Accident Benefits (OCF-1), dated November 14, 2008 and the cover letter from Sangha Law Office to State Farm, dated November 15, 2008, was a State Farm policy number at the time of the accident. The named insured on the State Farm policy was Jasvir Sedha.

On receipt of an incoming fax, if not properly addressed, State Farm has the ability to search for the appropriate recipient based upon the claim number, policy number, date of loss, last name and/or VIN number.

State Farm's office at the time of the submission of the claimant's Application for Accident Benefits (OCF-1), dated November 14, 2008, was P.O. Box 5060, Stn. Aurora Main, Aurora, Ontario, L4G 0B4. The cover letter, dated November 15, 2008 from the claimant's counsel to State Farm enclosing the claimant's Applicant for Accident Benefits (OCF-1), dated November 14, 2008, was addressed to State Farm at the above-noted address.

Despite being sent by facsimile and regular mail, State Farm denies receiving the claimant's Application for Accident Benefits (OCF-1), dated November 14, 2008. State Farm concedes that there is no evidence that the claimant's Application for Accident Benefits (OCF-1), dated November 14, 2008, was not sent by fax to State Farm on November 15, 2008.

The joint document brief would indicate that on December 2, 2008, Back to Health faxed a treatment plan (OCF-18) to State Farm on behalf of the claimant. The facsimile transmission sheet from Back to Health confirms that the treatment plan (OCF-18), dated December 2, 2008, was faxed to State Farm at the fax number 1-888-633-0405 at 1:36 p.m. and the faxing was completed at 1:37 p.m..

On April 30, 2009, the claimant, through his counsel, having not received any response from State Farm, submitted his Application for Accident Benefits (OCF-1), dated November 14, 2008, to Markel with a cover letter stating that he had previously submitted the OCF-1 to State Farm.

Markel proceeded to pay statutory accident benefits to and on behalf of the claimant in accordance with its statutory obligations.

On or about April 30, 2009, Markel wrote to State Farm and informed them that they would dispute priority.

State Farm has acknowledged that they are not asserting a limitation period and/or notice period defence in respect of Markel's failure to comply with Section 3 of Ontario Regulation 283/95.

State Farm denies that it is responsible to pay statutory accident benefits to and on behalf of the claimant. Despite this position, State Farm has never delivered a Notice to Applicant of

Dispute Between Insurers form or any document akin to a notice form, either to the claimant or to Markel.

The evidence of State Farm is that facsimile transmissions to the claims department are received in the Central Imaging Operations Services ("CIOS"). There were approximately 20 employees working at the CIOS in November 2008.

When the CIOS receives a facsimile, the facsimile is automatically converted into an electronic copy and an attempt is made to match the facsimile to a claim number or a policy number. If the facsimile is matched to a claim number or a policy number, the facsimile image will be indexed and transferred to the claims system. If there is no such match, the facsimile is sent to the miscellaneous research queue (the "MRQ"). This division will attempt to identify the facsimile by whatever information is provided in the facsimile, including a date of loss, last name, VIN or policy number.

If a representative in the MRQ is unable to match the facsimile with a claim number, the facsimile is then sent to the accident benefits research queue (the "ABRQ") where a CSA will attempt to match the facsimile with a claim number. If the ABRQ cannot match the facsimile with a claim number, the facsimile will be printed and the following will occur:

- (a) The CSA will call the individual/organization that sent the facsimile to request that more information be given;
- (b) If the CSA is unable to reach the individual/organization that sent the facsimile by telephone, the CSA will send that individual/organization a letter requesting that more information be provided in order to match the facsimile with a claim number; and
- (c) If the CSA is unable to call or send a letter to the individual/organization that sent the facsimile, the facsimile is discarded.

Facsimiles that are sent to the claims system are kept for 25 years. Facsimiles that are not able to be matched are not retained; they are discarded.

ANALYSIS AND FINDINGS

Section 2 of Regulation 283/95 provides as follows:

"The first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under Section 268 of the Act."

Markel submits that State Farm was clearly the first insurer to receive a completed application for benefits on behalf of the claimant. State Farm takes the position that the claimant's Application for Accident Benefits (OCF-1) was sent by facsimile and regular mail to State Farm on November 15, 2008. Although State Farm acknowledges that the facsimile was sent, State Farm denies that it ever received the fax. They claim that their activity log does not reflect receipt of the November 15, 2008 fax. The first claim activity in respect of this dispute is at log note #1 on June 9, 2009, a point in time after Markel had received the claimant's application. State Farm argues that Section 2 of Ontario Regulation 283/95 places

obligations on the first insurer to receive a completed application. State Farm indicates that the applicant has confused the words “send” or “submit” and the word “receives”. State Farm argues that the mailroom intake procedures that were in place at the time were thorough and professional. They argue that it is possible for a facsimile transmission not to be received, notwithstanding that the correct facsimile number is typed into the transmitting fax machine.

On the available evidence before me, I find that State Farm was the first insurer to have received a completed application from the claimant. I find that the fax confirmation sheet from the claimant’s representative, Sangha Law Office, is prima facie evidence confirming that the claimant’s Application for Accident Benefits (OCF-1) was sent and received by State Farm on November 15, 2008. State Farm has confirmed that the fax number used by the claimant’s representative was an active and appropriate fax number in the State Farm claims department. In the circumstances, I find that the onus shifts to State Farm to provide proof that it did not receive the Application for Accident Benefits (OCF-1). State Farm has not provided any cogent evidence from an expert in the field as to how a fax confirmation sheet would show that the fax was sent and received, but never received by State Farm. I am also troubled by the fact that one of the service providers, Back to Health, faxed a treatment plan (OCF-18) to State Farm on December 2, 2008. The facsimile transmission sheet from Back to Health confirms that the treatment plan (OCF-18), dated December 2, 2008, was faxed to State Farm at the fax number 1-888-633-0405 at 1:36 p.m. and the faxing was completed at 1:37 p.m.. State Farm has no record of having received this document either. Clearly there was a problem at State Farm’s end. It defies logic that two documents could be faxed to State Farm more than two weeks apart and neither received by State Farm.

The available evidence would indicate that facsimile transmissions to the claims department of State Farm are received in the CIOS. The facsimile is automatically converted into an electronic copy and if the facsimile cannot be matched to a claim number or policy number, it is sent to the MRQ in the BP department. If the facsimile can be matched to a claim number or policy number, the facsimile image is indexed and transferred to the claims system. The digital image in the BP department is not kept indefinitely. Once indexed and transferred to the claims system, it is deleted from the BP system. One cannot help but conclude that some human error occurred. One cannot help but conclude the facsimile transmission was inadvertently deleted before indexing and transfer to the claims system.

As I have indicated previously, I find that the fax confirmation sheet represents prima facie proof that the Application for Accident Benefits (OCF-1) was sent by the Sangha Law Office and received by State Farm on November 15, 2008. The evidentiary burden then shifts to State Farm to prove that it was not received. I am simply not satisfied with the explanations provided by State Farm and make note of the fact that no expert evidence of a technical nature was adduced to explain how a fax confirmation sheet can indicate receipt when the digital image is not actually received in State Farm’s computer system. On the balance of probabilities, I find that the electronic copy of the facsimile was probably inadvertently deleted through human error before it was indexed and transferred to a claims system. I find that State Farm was the first insurer to have received a completed Application for Accident Benefits (OCF-1) and was responsible for paying benefits pending a dispute as to whether it was the priority insurer. State Farm was in breach of Section 2 of Ontario Regulation 283/95.

I must then deal with the issue as to whether State Farm is permanently responsible to pay statutory accident benefits to and on behalf of the claimant, by reason of its failure to give notice of its intention to dispute priority within 90 days of having received the completed application, as per the requirements of Section 3 of Ontario Regulation 283/95.

Section 3 of Ontario Regulation 283/95 provides as follows:

“(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.”

The Applicant has referred me to the decision of Liberty Mutual Insurance Company v. The Commerce Insurance Company (2001) O.J. No.5479 for the proposition that the “deflecting” insurer may be sanctioned with permanent responsibility to pay accident benefits as a result of its breach of Section 2 (ie. the “pay pending” provision) of Ontario Regulation 283/95 and breach of Section 3 (90 day notice requirement) of Ontario Regulation 283/95. This case involves a pedestrian that was struck in a parking lot by a motor vehicle insured by Liberty Mutual. The claimant’s spouse had a motor vehicle liability policy with the Commerce Insurance Company in Massachusetts. An accident benefits claim was presented to the Commerce. The Commerce did not respond to the claimant’s accident benefit claim. The application was then presented to Liberty Mutual, which began making accident benefit payments, who in turn commenced priority dispute proceedings claiming that the Commerce was the priority insurer. Arbitrator Guy Jones found that the Commerce was the first insurer to have received an application for accident benefits and was in breach of Section 2 of Ontario Regulation 283/95. Arbitrator Jones ordered the Commerce to reimburse Liberty Mutual for payments made. The decision of Arbitrator Guy Jones was upheld on appeal by Justice Lissaman on December 19, 2001.

The Applicant Markel has referred me to a second decision of Arbitrator Jones, being Her Majesty the Queen in Right of Ontario as represented by the Minister of Finance v. Royal & SunAlliance, et al. (December 17, 2003), in which he determined that a “deflecting insurer” may be sanctioned with permanent responsibility to pay accident benefits as a result of breaches of Section 2 (pay pending provision) and Section 3 (90 day notice requirement) of Ontario Regulation 283/95. In that decision, Arbitrator Jones writes:

“While I am not unmindful of the equities of this particular case in that Royal will end up paying benefits in a case where CGU was clearly the priority insurer, it is important for the insurers to understand that once they have received the first application for accident benefits, they must make the payments and dispute the issue later, pursuant to Regulation 283/95. Only in the most extreme cases, where the connection with the insurers is totally arbitrary should the insurer refuse to pay.

Counsel for Royal submitted that this would be an appropriate case for the “saving provisions” of Section 3(2) to apply. I think that this argument fails for two reasons. To begin with, in my view, an insurer can only invoke this section if it has complied with Section 2 and commenced paying benefits. Even if this were not the case, Royal can still not bring itself within the requirements of Section 3(2) in that it would appear that it was neither difficult nor time consuming for Royal to determine that CGU was potentially the proper insurer to pay accident benefits.

In conclusion, I find that Royal is precluded from disputing its obligation to pay benefits under Section 268 of the Act. While this may appear to

be a severe result in the circumstances, it must be fully understood by insurers that if they receive an Application for Accident Benefits (OCF-1), unless there is no nexus, they must pay the benefits and dispute their obligations pursuant to Regulation 283/95.”

The same issue that Arbitrator Jones dealt with in the aforementioned two cases, was also dealt with by the Ontario Court of Appeal in Kingsway General Insurance Company v. Ontario (Minister of Finance) (2007) 277 D.L.R. (4d) 711. In that decision, the claimant applied to Kingsway for accident benefits. Kingsway refused to pay, alleging that the claimant was not insured on the date of the accident as the policy had been cancelled two days earlier. The Application for Accident Benefits (OCF-1) was then forwarded to the Motor Vehicle Accident Claims Fund, which commenced payment of accident benefits pending the determination of the priority dispute. The Ontario Court of Appeal, although finding that Kingsway had deflected the initial application, was not prepared to order Kingsway to pay accident benefit permanently as Arbitrator Jones had done in the two earlier decisions that I have referred to. The Ontario Court of Appeal decision makes reference on page 6 to the December 17, 2003 decision of Arbitrator Jones, in Her Majesty the Queen in the Right of Ontario as represented by the Minister of Finance v. Royal & SunAlliance, et al. as referred to above. The Ontario Court of Appeal disagreed with Arbitrator Jones’ decision to saddle the deflecting insurer with an order requiring it to pay the claimant’s accident benefits permanently. The Ontario Court of Appeal writes at page 6 of its decision:

“What remedy should be imposed for Kingsway’s breach? It is tempting to agree with the remedy the arbitrator imposed: Require Kingsway to pay Irene Legarde’s accident benefits regardless of whether it was an insurer at the time of the accident. The arbitrator no doubt considered – with justification – that insurers would not take their obligation under Section 2 seriously unless some penalty was imposed for its breach. As tempting as it is to restore the arbitrator’s award, I think that the appeal court judge was correct in requiring the arbitrator to determine whether Kingsway was an insurer at the time of the accident.”

Although there may be strong policy reasons to adopt the approach used by Arbitrator Jones in saddling the deflecting insurer with an obligation to pay accident benefits on a permanent basis, I nevertheless feel bound by the Ontario Court of Appeal’s decision on similar facts in Kingsway General Insurance Company v. Ontario (Minister of Finance) (supra).

As in the Kingsway case, one of the issues in the present case is whether State Farm was an “insurer” of the claimant. In order to determine whether State Farm was an “insurer” of the claimant, I would have to find that the claimant was “dependent” on his father (insured with State Farm) at the time of the accident. I have heard no evidence on that issue and it will have to be determined at a later date.

ORDER

I order that State Farm shall reimburse and indemnify Markel with respect to all payments, properly the subject matter of indemnification, made by Markel to date. I order that State Farm assume priority pending the ultimate determination of priority. I order that State Farm pay to Markel its costs on a partial indemnity basis with respect to the Arbitration of this

Preliminary Issue. I order that State Farm pay the Arbitrator's costs with respect to the Arbitration of this Preliminary Issue.

DATED at TORONTO this 11th)
day of August, 2011.)

KENNETH J. BIALKOWSKI
Arbitrator