

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

COACHMAN INSURANCE COMPANY

Applicant

-and-

ING INSURANCE COMPANY OF CANADA

Respondent

A W A R D

COUNSEL

Jamie R. Pollack, Esq.
Counsel for the Applicant

K. Bruce B. Chambers, Esq.
Counsel for the Respondent

The issue in this Arbitration is to determine which of the parties is the insurer liable to pay Statutory Accident Benefits to Jeffrey Walters, by reason of injuries sustained by Jeffrey Walters in a motor vehicle accident which occurred on October 5, 2002.

At the time of the accident, Jeffrey Walters was a passenger in a taxi-cab operated by Janice Hubbard. That taxi-cab was insured by Coachman Insurance Company at the time of the accident.

Ultimately, Coachman discovered that Jeffrey Walters drove a company vehicle for his employer, Solda Pools. The insurer of vehicles owned by Solda Pools was ultimately identified as Halifax Insurance Company, which, by the time that that company was identified, had been taken over by ING Insurance Company of Canada.

The issue to be dealt with firstly in this Arbitration is the “Notice” issue.

Coachman did not give written notice to ING within 90 days of receipt of a completed Application for Benefits. The issue in the preliminary stage of this Arbitration is whether Coachman may give notice to ING after the 90-day period.

Section 3(1) of Ontario Regulation 283/95 provides as follows:

“No insurer may dispute its obligation to pay benefits under s. 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.”

Section 3(2) of Regulation 283/95 states as follows:

“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 s. 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.”

As set out above, the issue at this stage of this Arbitration is whether Coachman may give notice to ING after the 90-day period.

In order to determine that issue, I must consider whether Coachman made the reasonable investigations necessary to determine if another insurer was liable within the 90-day period and whether 90 days was not a sufficient period of time to make a determination that another insurer is liable under s. 268 of the *Act*.

EVIDENCE CALLED BY COACHMAN

(a) Evidence of Rita Rand

At the time of the subject accident, Ms. Rand was a senior claims representative at Coachman and had been employed as such at Coachman for approximately 4.5 years. She had been involved as a claims representative in the insurance industry since 1980.

Ms. Rand advised that once the subject accident had been reported, she retained Marc Newburgh of the adjusting firm of Sobel-Adamsons-Clements to investigate and handle the adjusting of the accident benefits claim of Jeffrey Walters.

Ms. Rand stated that Coachman insured the taxi in which Jeffrey Walters was a passenger at the time of the subject accident of October 5, 2002.

Ms. Rand advised that Newburgh was to contact the claimant Walters to obtain details of his injury and that Newburgh was also to look into any priority issues.

Ms. Rand advised that Newburgh reported that Jeffrey Walters was represented by Patricia Norris of the firm Swaminathan & Associates.

Newburgh obtained a completed Application for Accident Benefits, received by Newburgh on October 15, 2002.

The Application for Accident Benefits set out that Walters was a passenger in a vehicle which had been rear ended.

In the Application for Accident Benefits, the representative of Walters set out that Walters was not covered by an automobile insurance policy of his own, or of a spouse, or of any person on whom he was dependent or by any company vehicle policy on which he was listed as a driver. The Applicant for Accident Benefits was making a claim under the Coachman policy, as insurer of the vehicle in which Walters was riding at the time of the accident.

The Application for Accident Benefits did set out, however, that Walters was employed and working. His employer was identified as Solda Pools. The form showed that he was employed as a labourer.

Newburgh reported to Rita Rand by letter dated November 12, 2002. He set out his contact with the paralegal representing Jeffrey Walters.

Newburgh provided preliminary information about Jeffrey Walters but set out that he had not yet had the opportunity to meet with Walters.

Newburgh set out that he had met with the parents of Walters.

Newburgh also set out that Jeffrey Walters would be residing with his mother in St. John's, Newfoundland after his discharge from Sunnybrook on or about October 18, 2002.

Newburgh reported that he had requested a Statutory Declaration from Walters but had not yet received the same.

In his initial report, Newburgh covered the issue of "Priority of Coverage". He set out that he had been advised that Walters did not have a driver's

licence and did not own a motor vehicle. He repeated what was on the Application for Accident Benefits, i.e. that Walters was not a listed driver on a policy of insurance. He set out that he had requested further confirmation as to that.

Newburgh also set out that he had been in contact with Solda Pools and that he had telephone confirmation that Walters was employed as a service landscaper involved in the installation of swimming pool accessories and dealing with the opening and closing of pools and the installation of fences.

Newburgh reported that Walters had suffered a closed head injury, including a right frontal contusion and a right frontal sinus fracture.

The contents of the initial report of Newburgh were such that it was clear that the injuries sustained by Walters were serious and included a head injury. Newburgh covered topics in his report such as Catastrophic Impairment, entitlement to Case Management and Attendant Care.

Near the end of his initial report, Newburgh had a heading of "Further Handling". That included obtaining a detailed and signed Statement of Fact or a Statutory Declaration and confirmation of Priority Coverage.

By letter dated October 17, 2002 and marked as **Exhibit 1**, Newburgh wrote to the representative of Walters. He set out that in order to deal with claims for various forms of benefits, he required:

"Confirmation as to whether or not the Applicant has his own motor vehicle insurance, is listed as a driver on any Policy of Insurance, has regular use of any motor vehicle and/or is the spouse of or dependant of a driver listed on any Policy of Insurance."

Newburgh pointed out that unless the information was provided, the SABS set out that no benefits would be payable. He requested a response within 14 days.

In a report dated December 10, 2002, Newburgh again reported to Coachman. He advised that Walters was staying with his father in Deer Lake, Newfoundland and would be staying with him for about one month. He set out that Walters had recently suffered from meningitis. He reported that Walters had been discharged from hospital in St. John's on November 30, 2002.

The report of December 10, 2002 does not really deal with issues of Priority of Coverage. However, in that report, under "Further Handling", Newburgh set out that he had to "confirm Priority of Coverage".

Newburgh next reported to Coachman by letter dated January 14, 2003. Newburgh reported as to the various benefits payable. He recommended that an independent adjuster be retained in St. John's, Newfoundland to assist in obtaining a detailed and signed Statement of Fact from Walters. Under "Further Handling", there was no reference to Priority of Coverage, as in prior reports.

Ms. Rand advised that she contacted Newburgh by telephone and authorized him to retain the adjuster in Newfoundland to get a statement from Walters. She advised that by February 17, 2003, Provincial Adjusting Services in Cornerbrook, Newfoundland had been retained.

It was not until June 24, 2003, that a detailed statement was taken from Jeffrey Walters.

In the detailed statement taken from Jeffrey Walters, he stated as follows:

“I drove a company vehicle for my employer, Solda Pools...I had been insured under that policy to drive their automobiles. I did not have an automobile myself while up there.”

When Mr. Newburgh received that statement from Provincial Adjusting Services, he wrote to the representative of Walters by letter dated July 2, 2003.

Newburgh pointed out to that representative of Walters that the information in the statement contradicted what had been set out in the Application for Accident Benefits. Newburgh set out that based on the information in the statement, Walters would be eligible to receive benefits under the SABS from the insurer of Solda Pools.

Newburgh requested from the representative of Walters, the identity of the insurer of Solda Pools.

By letter dated August 19, 2003, Newburgh wrote to Solda Pools. Newburgh confirmed discussions held at the offices of Solda Pools on July 15, 2003. Newburgh confirmed that Walters was an employee of Solda Pools at the time of the accident. He also confirmed advice received from Solda Pools that Walters drove a vehicle for Solda Pools on a regular basis and was listed as a driver on their policy of insurance. He confirmed as well that at the time of the meeting, the representative of Solda Pools would not disclose the identity of the automobile insurer.

Newburgh requested the identity of the insurer and requested that Solda Pools report the matter to their insurer so that the insurer would take over the accident benefits claim of Jeffrey Walters.

Newburgh reported that on August 25, 2003 he noted a plate number on a vehicle in the parking lot of Solda Pools and ultimately did a search through the

Insurance Search Bureau of Canada to determine the identity of the insurer of Solda Pools.

By Notice to Applicant of Dispute Between Insurers, dated October 2, 2003, Coachman put ING on notice. The notice set out that Walters had regular use of his employer's vehicle. ING was provided with the Policy No. The notice set out that Walters was a listed driver on a policy covering a vehicle owned by Solda Pools.

Accompanying the Notice was a letter to ING. In the letter, Newburgh set out that it was not until June 24, 2003 that Coachman had obtained a detailed Statement of Fact from Walters. He set out that that was the first time that Coachman knew that Walters drove a company vehicle for Solda Pools. He set out that that was the first notification of a potential issue of "Priority of Coverage".

Newburgh set out in the letter how he attended at the office of Solda Pools on July 15, 2003 but that Solda Pools would not identify ING at that point.

Newburgh advised ING that it was the position of Coachman that ING was the insurer responsible to pay benefits under the SABS to Walters.

By report dated October 2, 2003, Newburgh reported to Coachman about the result of his search as to the insurer of Solda. He reported that he had given Notice to ING.

Newburgh advised that he was advised by ING that they were not accepting coverage as at November 6, 2003.

Under cross examination, Rita Rand acknowledged that in the initial fax from Coachman to Newburgh, he was told that Coachman was "unaware...of any other insurer who would be priority."

Ms. Rand was questioned as to whether she was aware of the 90-day period allowed for giving written notice to another insurer if there was a priority issue. It was pointed out to her that that was not referred to in letters sent by Coachman to Newburgh.

Ms. Rand stated that Newburgh got the Application for Benefits on October 16, 2002. It was pointed out to her that allowing 90 days would take her to January 16, 2003. She admitted that there was no tickler system to alert her about the expiry of the 90-day period.

She was questioned about the fact that the Application for Accident Benefits listed Solda Pools as the employer of Walters. She was also questioned as to whether she noticed that the Application for Accident Benefits was signed by Ms. Norris, the representative of Walters and not by Walters himself.

Ms. Rand acknowledged that she knew that Walters had been at Sunnybrook Hospital. She acknowledged, as well, that Newburgh had met the parents of Walters on October 18, 2002. She admitted that Newburgh had no further conversation with the parents as to whether Walters had a licence or his own automobile.

Newburgh reported to Ms. Rand, in his first report of November 12, 2002, that he was going to request further confirmation as to Priority of Coverage issues.

Ms. Rand admitted that the first report from Newburgh was received within about 30 days of the assignment.

Mr. Rand admitted that Newburgh in his report of November 12, 2002 confirmed that he had contacted Solda Pools by telephone to confirm employment of

Walters at that company. There is no reference in the report as to any discussions with the employer as to whether Walters drove a vehicle owned by Solda Pools.

Ms. Rand was questioned as to why a statement was not taken from Walters at an earlier date.

Ms. Rand was cross-examined about the fact that there had been numerous contacts with the representative of Walters re the payment of expenses and that there was no difficulty in obtaining information as to some of the items being claimed.

Ms. Rand was questioned as to why payments were not suspended until receipt of information requested was provided by that representative of Walters.

Ms. Rand stated that the initial Application for Accident Benefits did not show a Priority Issue and that they were giving Walters time to recover from his injuries.

Ms. Rand advised that she assumed in the months of October, November and December 2002 and January 2003, that there was no other insurer involved.

Ms. Rand was confronted with the fact that when Newburgh wrote to the representative of Walters by letter dated July 2, 2003 and requested Form OCF-16, i.e. Permission to Disclose Employment Information, that the document was received back by July 11, 2003, within nine days.

Ms. Rand was confronted with the fact that when Newburgh met a representative of Solda Pools on July 15, 2003 that he did a plate search, but, he could have got the information earlier with an AutoPlus Search.

Ms. Rand was confronted with the fact that the search identifying Halifax Insurance Company was received back by Newburgh by September 24, 2003.

Ms. Rand was confronted by the fact that in Newburgh's reports between November 12, 2002 and June 2003, there was nothing in the reports about Priority.

Ms. Rand admitted that she had no notes as to contact with Newburgh as to priority between November 12, 2002 and January 16, 2003 when the 90-day period for ordinarily giving Notice would expire.

Ms. Rand set out that during the early handling of the matter, because of the serious injuries, they were concentrating on medical issues.

Ms. Rand set out that she knew that the Application for Accident Benefits had been prepared by a paralegal and that it was reasonable to get confirmation as to some of the facts. She would not admit, however, that it was not reasonable to rely on the accuracy of the information provided by the paralegal in the original Application.

Ms. Rand admitted that they were going forward accepting what was in the original Application for Accident Benefits until the adjuster in Newfoundland obtained the statement from Walters in June 2003. She admitted that there had been no contact with Solda Pools to determine if Walters drove a company vehicle until after that statement had been obtained.

Ms. Rand confirmed that Provincial Adjusting Services was retained in early March 2003, but that the statement was not obtained from Walters until June 24, 2003.

Ms. Rand was confronted with the Newburgh report of June 11, 2003 in which there was no reference to Priority of Coverage.

She was confronted with the fact that the Newburgh report of December 10, 2002 made specific reference to Priority of Coverage, but the Newburgh report of January 14, 2003 made no reference to Priority of Coverage.

Ms. Rand stated that throughout the entire period, Newburgh was attempting to obtain a detailed and signed Statement of Fact from Jeffrey Walters.

Ms. Rand also stated that the difficulties with the file were in dealing with the representative of Jeffrey Walters.

(b) Evidence of Marc Newburgh

Marc Newburgh was called as a witness at the Arbitration Hearing. By the time that he gave his evidence, Ms. Rand had already been examined and cross-examined as to the contents of the various reports of Marc Newburgh.

Marc Newburgh advised that he was experienced as an insurance adjuster since 1979.

Newburgh stated that he set the file up on October 15, 2002. He contacted Patricia Norris, the paralegal representing Jeffrey Walters and obtained preliminary information from her. He learned that Walters had suffered a significant head injury. He was advised that Walters was single and was employed as a labourer. He was told that Walters had no vehicle of his own and had no driver's licence.

Newburgh stated that he received the completed Application for Accident Benefits on October 15, 2002. He reviewed Part 4 which set out that Walters was not covered by any other insurance policy. He sent a copy of the completed Application to Coachman.

Newburgh stated that he attended at Sunnybrook Hospital on October 16, 2002 and met with the parents of Walters. He learned that Walters suffered a head injury, had suffered a fracture of his occipital bone and that Walters' eyes were swollen shut. He learned that Walters would be discharged from hospital on October 18, 2002 and that he would be traveling to Newfoundland to reside at his mother's home or possibly in a nursing home in Newfoundland. He was told that Walters required neuropsychiatric testing. He was advised that Walters would ultimately return to Toronto perhaps four to six weeks later.

Newburgh stated that he wrote to the paralegal for Walters on October 17, 2002 as he did on every accident benefits claim. He requested confirmation as to whether Walters had his own vehicle, was listed as a driver on a policy of automobile insurance, was the spouse of or a dependent of an insured driver or had the regular use of any vehicle. He confirmed that he asked for a Statutory Declaration or statement as he wanted to confirm available insurance coverage.

He stated that he spoke with Ms. Norris, the paralegal on October 18, 2002 as to the information being requested. He did not further discuss priority issues then. He stated that Norris repeated that Walters had a head injury and was out of the Province as at that date. He confirmed with the hospital that Walters had been discharged on October 18, 2002.

There was some concern about case management and the need for Walters to have an Occupational Therapist. He conducted enquiries and ultimately located an Occupational Therapist and arranged for that therapist to be retained. He learned that there was not a lot of services available for brain injured victims in Newfoundland.

On November 5, 2002, he contacted a representative of Solda Pools Limited by telephone. Although he discussed the job which Walters had with Solda Pools, he had no discussions as to whether Walters operated a company vehicle.

Newburgh spoke with the paralegal again on November 11, 2002 and learned that Walters now had meningitis and was in critical condition. It was thought that he might need surgery.

Newburgh reported in detail to Coachman in Report #1 dated November 12, 2002.

Newburgh spoke with the paralegal again on November 19 and learned that Walters was still in an Intensive Care Unit.

Newburgh reported in detail to Coachman again by report dated November 25, 2002. He advised that he was still awaiting information to confirm the priority issues. He was awaiting a response from the paralegal as to previous requests for information.

Newburgh contacted the Occupational Therapist in Newfoundland on December 2, 2002 and learned that Walters was in hospital for surgery.

On December 4, 2002, Newburgh learned that Walters was living in Deer Lake with his father. Deer Lake, Newfoundland was a six to seven hour drive from St. John's.

Newburgh reported to Coachman in Report #3 on December 10, 2002 and reported that he was still awaiting information as to Priority of Coverage. Actually, the only reference to Priority of Coverage in that report was in the Further Handling listing, at the end of the report.

In Report #4 to Coachman, Newburgh recommended that an independent adjuster be retained in St. John's to obtain a signed statement from Jeffrey Walters. Newburgh stated that he conducted enquiries to locate an adjuster in Newfoundland and finally contacted Provincial Adjusting Services Limited on February 27, 2003.

On April 1, 2003, Newburgh faxed a list of questions to be covered in the statement to be taken from Walters to Provincial Adjusting Services. He exchanged calls with a representative of that company on five or six occasions between April 22 and June 12, 2003. He had discussions with the paralegal as to the need for confirming information in June 2003.

He learned on June 25, 2003 that the adjuster in Newfoundland had finally obtained a statement from Walters on June 24, 2003.

By reason of the information contained in the statement taken from Walters, Newburgh set out to obtain confirmation that Walters indeed operated a vehicle of his employer. Newburgh took steps to identify the insurer of Solda Pools. He wrote to the paralegal by letter dated July 2, 2003. He attended at Solda Pools on July 15, 2003 and told a representative of that company what Walters had set out in a statement about using a vehicle owned by Solda Pools during the course of his employment. He requested information as to the insurer covering the vehicles owned by Solda Pools, but the representative of Solda Pools would not provide that information. Newburgh noted a permit number on two Solda Pools' vehicles in the parking lot that day. He then proceeded to do a search through the Insurance Search Bureau of Canada to confirm the identity of the insurer of the Solda Pools vehicles.

Newburgh wrote to Solda Pools requesting information as to insurance coverage by letter dated August 19, 2003.

Newburgh finally received the result of his search on September 26, 2003 and proceeded to put ING on Notice on October 2, 2003.

Newburgh was cross-examined by counsel for ING.

Newburgh advised that he was aware of the 90-day period for giving Notice in Regulation 283/95.

Newburgh stated that he had not received specific instructions from Coachman as to the 90-day time period for giving notice.

Newburgh stated that in his initial discussions with the paralegal, he obtained confirmation that Walters had no licence and no vehicle. He admitted that he did not know where the paralegal got that information.

Newburgh advised that he was dealing with Priority of Coverage in discussions with Ms. Norris.

He stated that he had no internal system to keep track of the passage of the 90-day period of giving Notice.

Newburgh admitted that the Application for Accident Benefits identified Solda as an employer.

Newburgh stated that when he had his initial discussions with Mike Alkis of Solda Pools, he did not ask Alkis how Walters got from place to place while on the job. He admitted that he had the opportunity to ask Alkis if Walters used the company vehicle but didn't ask that question.

Newburgh stated that when he next made contact with Solda on July 15, 2003, he had no difficulty in then asking whether Walters drove a company vehicle. He obtained confirmation that Walters did indeed have regular use of a company vehicle.

Newburgh advised that in early December, he learned that Walters had no cognitive deficits and that he was living in Newfoundland with his father in Deer Lake. He admitted that he moved quickly to get an Occupational Therapist on the case.

Newburgh was questioned as to why he waited until February 2003 to hire an adjuster in Newfoundland to obtain a statement. He stated that he knew that Walters had a significant head injury. He concentrated on getting payments into effect for medical coverage. He stated that Walters would have had to have been cognitively able to give a statement. He stated that the paralegal was difficult to deal with in the first couple of months.

He said he learned in November 2002 that Walters was going to have additional surgery and he wanted things to settle down. He stated that in January 2003, he decided to move forward with the obtaining of a statement.

Newburgh admitted that in December 2002, he had little medical evidence on file.

Newburgh stated that he suggested to the paralegal that there be telephone contact with Walters with the paralegal on the line. He stated that the paralegal was a "road block".

Newburgh was confronted with the fact that in Report #3, under "Further Handling", he set out "Confirm Priority of Coverage". Yet, in Report #4 dated January 14, 2003, there was no such reference to Priority of Coverage under "Further Handling".

He stated that nothing had happened re the Priority of Coverage issue and that it had simply been left out of the "Further Handling" notation.

Newburgh was examined as to the fact that there was reference in his report of January 14, 2003 to the retaining of an adjuster in Newfoundland to obtain a statement from Walters. Yet, it appears that the adjuster was not actually retained until March 3, 2003.

Newburgh was questioned as to his allegation that the paralegal constituted a "road block". Yet, when an OCF-16 was sent to her, it was quickly returned.

Newburgh was questioned as to the fact that there was nothing reported as to Priority of Coverage in his Reports #4 – 8, except reference to the retaining of an adjuster to obtain a statement from Walters.

Newburgh was questioned as to the fact that there was nothing in his reports about the expiry of the 90-day period for giving Notice.

Newburgh claimed that he did discuss the urgency of obtaining a statement with the adjuster in Newfoundland. He claims that that was discussed in telephone calls with the adjuster but admitted that there was no written record of such calls.

(c) Evidence of Eric Humber

Eric Humber of Provincial Adjusting Services Limited was called as a witness by Coachman. He gave his evidence over the telephone.

Humber stated that he first had direct contact with Newburgh on March 3, 2003. He was retained to obtain a statement from Walters. He was told to obtain photo

identification from Walters, and information as to whether Walters owned a motor vehicle.

Humber stated that he telephoned the paralegal on March 18, 2003 and actually spoke with the paralegal on March 31, 2003. He contacted Newburgh to obtain a list of the questions which Newburgh wished him to ask of Walters. The paralegal, requested that he provide to her a fax listing such questions. He faxed a list of questions to the paralegal on April 1, 2003 and spoke with the paralegal again on April 9, 2003.

On June 11, 2003, he spoke with Newburgh and advised him that he was not receiving cooperation from the paralegal as to his attending with Walters to obtain a statement.

That resulted in Newburgh writing to the paralegal by letter dated June 11, 2003. In his letter to the paralegal, he noted that failure to respond "may jeopardize any further benefits your client might otherwise be entitled to receive".

Ultimately, a deadline was set for the obtaining of the statement. If one could not be obtained by June 26, the benefits payable would cease.

Humber succeeded in obtaining the statement on June 24, 2003.

Humber stated that he actually spoke with the paralegal on two or three occasions. He said he found the paralegal to be abrasive and that she did not wish to cooperate and that she then requested a listing of the questions to be put to Walters.

Humber was cross-examined by counsel for ING. Humber could not recall whether Newburgh said anything about any urgency in obtaining the statement.

Humber stated that there was nothing in his notes as to following up with the paralegal between April 9 and June 11, 2003. He admitted that once the paralegal

agreed to allow him to take the statement, that there was no problem in setting up the taking of the statement from Walters. It actually took him less than two weeks to set up the appointment, and he had no problem in doing so.

SUBMISSIONS ON BEHALF OF COACHMAN INSURANCE COMPANY

Counsel for Coachman submitted that Coachman ought to be allowed to give notice to ING after the 90-day period.

It was argued that in the Application for Accident Benefits, Jeffrey Walters completed the forms by setting out that he was not covered by an automobile insurance policy of his own, or of a spouse, or of any person on whom he was dependant and that he was not covered by any company vehicle insurance policy on which he was listed as a driver.

Counsel for Coachman argued that this information provided to Coachman was not accurate. He made reference to the case of *Primum Insurance Co. v. Aviva Insurance Co. of Canada*, (2005) O.J. No. 1477. In that Decision, in paragraph 23, the Court discusses the relevance of a material misrepresentation by an insured person. The Court also makes reference to the fact that s. 3(2)(b) of Regulation 283/95, requires a reasonable investigation by an insurer, which the Court states is in recognition of the fact that an insurer “may well need to investigate any information provided to it by the insured”. The Court sets out that “where an insurer can demonstrate that they were intentionally misled in a material way by an insured, the 90-day limit in s. 3(2)(a) might be insufficient in the circumstances”.

In the result, in the *Primmum* case, the Court concluded that “where an insurer can demonstrate that they were innocently misled in a material way...the 90-day limit...may be shown to be insufficient in the circumstances”.

However, at the end of the day, in *Primmum v. Aviva*, the Court still held that Primmum had failed to show that the 90-day period was insufficient. The Court specifically held that the 90-day period was more than enough time to investigate the matter.

Counsel for Coachman nonetheless argued that because the information provided by Walters on the initial Application was not accurate, that **maybe** the 90-day period was insufficient.

It was also argued on behalf of Coachman that several Arbitration Awards have concluded that what was required was a “reasonable” investigation, not perfection.

It was argued on behalf of Coachman that there was uncontradicted evidence that dealing with the paralegal for Walters was extremely difficult. Furthermore, Walters had sustained significant injuries, including a head or brain injury, eyes which were swollen shut, significant fractures and that there were issues as to his cognitive ability from time to time. It was argued that Walters was hospitalized at Sunnybrook Hospital in Toronto as well as at St. John’s Health Sciences Centre and St. Clair Mercy Hospital in Newfoundland.

It was argued on behalf of Coachman that dealing with Walters was made more difficult by reason of the fact that he moved to Newfoundland upon being released from hospital in Toronto. Taking a statement from him was not a simple matter.

Counsel for Coachman argued that Coachman need only show that 90 days was not a sufficient period of time to make a determination that another insurer was liable under s. 268 of the *Act*. Once that was demonstrated, Coachman need only satisfy the Arbitrator that Coachman made reasonable investigations necessary to determine if another insurer was liable within the 90-day period.

It was argued that Coachman retained Marc Newburgh as an adjuster to deal with the entire matter and then retained an adjuster in Newfoundland to take a statement from Walters.

Counsel for Coachman argued that all of the initial information supported the conclusion that there was no other insurer which might be responsible to pay benefits under the SABS to Walters.

It was argued that the duty of the insurer first and foremost was to deal with the needs of the insured. Walters had significant injuries and that was the first priority.

In the submissions of counsel for Coachman, reference was made to the following evidence:

- (b) Newburgh, on behalf of Coachman, began his investigation on or about October 16, 2002, the date after receipt of the completed Application for Accident Benefits;
- (c) Newburgh contacted the paralegal representing Walters almost immediately and obtained preliminary information from her. The paralegal repeated that Walters had no vehicle of his own and had no driver's licence;

- (d) Newburgh learned from the paralegal about the significant head injury suffered by Walters;
- (e) Newburgh met with the parents for Walters at Sunnybrook Hospital on October 16, 2002. He again learned about the severity of the injuries suffered by Walters and that the plan was that Walters would travel to Newfoundland once he was released from hospital on or about October 18, 2002;
- (f) Newburgh wrote to the paralegal on October 17, 2002 and requested confirmation as to whether Walters had his own vehicle, was listed as a driver in a policy of automobile insurance, was the spouse of or a dependant of an insured driver or had the regular use of any vehicle. Furthermore, he asked for a Statutory Declaration or statement to confirm available insurance coverage;
- (g) On or about January 14, 2003, Newburgh recommended that an adjuster be retained in Newfoundland to assist in obtaining a statement from Walters.
- (h) Eric Humber of Provincial Adjusting Services Limited in Newfoundland was retained on or about March 10, 2003.
- (i) On or about April 1, 2003, Newburgh forwarded a list of questions to Humber, questions which were to be put to Walters;
- (j) When difficulty arose as to setting up the time to take the statement from Walters, Newburgh again wrote to the paralegal threatening the cut off of benefits;
- (k) The adjuster in Newfoundland finally secured the statement from Walters on June 24, 2003;

- (l) That statement was the first notice that Walters had driven a company vehicle for Solda Pools;
- (m) Contact was made with Solda and ultimately a vehicle search was done such that Halifax Insurance Company was identified as the insurer of Solda Pools on or about October 2, 2003, the date when Notice was finally given to ING.

It was argued on behalf of Coachman that Coachman made reasonable investigations within the 90-day period.

It was argued that by reason of the facts of the case, 90 days was not a sufficient period of time in which Coachman was able to make a determination that another insurer was liable to pay benefits under the SABS.

Counsel for Coachman referred to the matter of Ontario Municipal Insurance Exchange v. Liberty Mutual (Jones) (October 10, 2000). Arbitrator Jones concluded in that case that “it is important to note that s. 3(2) requires a reasonable investigation, not perfection”. In awards in Federated Insurance Company of Canada v. CGU Insurance Company of Canada (Malach) (September 2, 2003) and in Guardian Insurance Company of Canada v. Wawanesa Mutual Insurance Company (Malach) (August 5, 1999), I too concluded that “one does not put an insurer to the test of perfection in each case”. An Arbitrator must simply determine whether or not investigations made by an insurer were “reasonable”.

I considered the same issue in the case of Pilot Insurance Company v. Royal & SunAlliance (Malach) (August 8, 2005).

Counsel for Coachman finally submitted that Coachman has satisfied both requirements found in s. 3(2) of Regulation 283/95 and that the circumstances in this

matter are just and appropriate for extending the 90-day period for giving Notice under s. 3(1) of the Regulation.

SUBMISSIONS ON BEHALF OF ING

In cases such as this, counsel for the Respondent always argue that whatever the insurer, seeking the extension to give notice has done, is insufficient. Counsel for Responding insurers, attempt to pick holes in whatever was done by the insurer seeking the extension of time.

Counsel for ING argued that the Application for Accident Benefits, in this case, was completed by the paralegal and not the insured Applicant. It was argued that that should always raise suspicions for the insurer receiving the Application.

It was pointed out that Mark Newburgh met with the parents of Walters at an early time in his handling of the matter. Although he obtained information as to the injuries sustained by Walters, and again was told that Walters had no other insurance, Newburgh did not enquire enough as to the source of that information.

It was argued that the investigation done was not “reasonable”. It was pointed out that in the initial report from Newburgh, under Further Handling, confirmation of Priority Coverage was item 4 on the list of things to be done.

It was argued that Newburgh had made contact with Solda Pools early on and that although he obtained confirmation that Walters was employed, he never asked the person at Solda Pools whether or not Walters had the regular use of a company vehicle.

It was argued that although Newburgh asked the paralegal for confirmation as to available insurance early on, he did not threaten to terminate benefits until June of 2003.

It was argued on behalf of ING that the Priority Issue was not a priority for ING and its adjuster.

It was argued that during the first 90 days, one letter was written to the paralegal asking for a Statutory Declaration or statement and that there was then no follow up for a period of seven or eight months.

Counsel for ING questioned why there was no priority to contact Walters before the expiry of 90 days following receipt of the Application for Accident Benefits.

Counsel for ING argued that although it was alleged that the paralegal was a roadblock, in June 2003, it did not take very long to arrange for the statement to be taken from Walters.

It was argued that a letter was written in June 2003 and that within about two weeks, the statement was obtained. Counsel questioned why that could not have been done in the first 90 days following receipt of the Application for Accident Benefits.

It was argued on behalf of ING that there was no medical evidence that Walters was unable to give a statement early on.

Counsel for ING argued how simple it was for Newburgh to take down the permit number of a vehicle in the Solda Pools lot and to search the same.

Counsel for ING also criticized the fact that even after the statement was taken from Walters in June 2003, that it still took more than three months to put ING on Notice.

It was argued that it is not the most complicated thing to take a statement from an insured person and get information from an employer of that person.

It was argued that it was not enough to say that an insurer is unable to take a statement from its insured and that the insurer did not address the issue of vehicle use with an employer.

It was argued that it was obvious that there was more work to be done in November 2002 but that really, that wasn't done until June 2003.

It thus was argued on behalf of ING that the investigation made by Coachman was not "reasonable" and that 90 days was a sufficient period of time for Coachman to have been able to determine that another insurer was liable to pay benefits under the SABS.

CONCLUSIONS

I have heard Arbitrations and have made Awards in which I have extended the time to give Notice under s. 3(1) of Ontario Regulation 283/95. I have heard other Arbitrations and have made other Awards where I have determined that the time for giving Notice ought not to be extended.

In each case, an Arbitrator must review the facts and consider whether the investigations made were reasonable and whether 90 days was not a sufficient period of time to make a determination that another insurer is liable under s. 268 of the *Act*.

In this case, I conclude that Coachman may give Notice after the 90-day period.

I specifically find as a fact that the investigations made by Coachman were reasonable in this case.

I also find as a fact that 90 days was not a sufficient period of time to make a determination that another insurer is liable to pay benefits in this case.

As set out in the various Awards referred to above, one does not put an insurer to the test of perfection in each case.

In this case, Mr. Newburgh was hired quickly. The Application for Accident Benefits was received early on, on October 15, 2002.

Mr. Newburgh had early contact with the paralegal representing Walters and requested confirmation of insurance particulars.

The matter was made more difficult by reason of the serious injuries sustained by Walters and the fact that Walters was transferred early on, i.e. October 18, 2002 to Newfoundland.

The Application for Accident Benefits completed by the paralegal, showed that there was no other insurer responsible to pay benefits under the SABS to Walters. Obviously, an insurer should not simply accept whatever an insured or an insured's representative has filled out on a form. However, when an insured person or his representative notes no other insurance being available, when such coverage was available, that does mislead an insurer.

Newburgh arranged for an adjuster in Newfoundland to be retained. Early on, Newburgh was more concerned about providing for the needs of Walters who was hospitalized in Newfoundland on two occasions.

The severity of the injuries suffered by Walters and the fact that he moved to Newfoundland, did make it more difficult to obtain a statement from him within the initial 90-day period after receipt of the Application for Accident Benefits.

I have considered the Submissions of counsel for ING. In any case, it is easy to second guess what one insurer has done in respect of investigating whether another insurer may be responsible to pay benefits under the SABS. In the final analysis, an Arbitrator must examine all of the facts and finally determine, as a finding of fact, whether what an insurer did was “reasonable investigations” under s. 3(2)(b) of Regulation 283/95. My finding that what was done in this case was “reasonable” does not mean that Coachman ought not to have done some of the things which counsel for ING pointed out.

The evidence disclosed that notwithstanding the early action taken by Coachman to appoint an adjuster to deal with the matter, notwithstanding contact with the paralegal for Walters, Solda Pools and the parents of Walters, there was no early determination that another insurer was liable to pay benefits under the SABS to Walters. It is clear from the evidence, in my view, that 90 days was not a sufficient period of time in which Coachman ought to have made a determination that another insurer was liable to pay benefits under the SABS.

As set out above, I conclude that Coachman may give Notice after the 90-day period.

I will shortly contact counsel in order to set a date to hear Submissions as to Costs relating to this part of this Arbitration.

There are other issues to be determined between the parties, and when I contact counsel for the parties, we will set a further Pre-Hearing date, in order to discuss the additional issues.

I order that ING Insurance Company of Canada pay the fees and disbursements of the Arbitrator.

DATED this 1st day of March, 2007.

Stephen M. Malach, Q.C., Arbitrator