

**IN THE MATTER OF** the *Insurance Act*, R.S.O. 1190, c.l.8, as amended,  
And Ontario Regulation 283/95;

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

**AND IN THE MATTER OF** an accident benefits claim by Soraya Jahangiri;

**AND IN THE MATTER OF AN ARBITRATION**

B E T W E E N:

ECONOMICAL MUTAL INSURANCE COMPANY

Applicant

and

BELAIR INSURANCE COMPANY OF CANADA

Respondent

**AWARD**

This is a dispute between two insurance companies about the responsibility to pay statutory accident benefits to a person injured as a result of the use or operation of a motor vehicle. The parties have submitted their dispute to me to resolve pursuant to the *Insurance Act* and Regulation 283/95. Mr. Gord Robson appeared on behalf of Economical and Mr. Thomas Clemenhagen appeared on behalf of Belair.

The issue to be resolved at this juncture is a procedural one concerning the notice required to allow Economical to pursue Belair in this proceeding. Economical alleges that it gave a timely notice to allow engagement of Ontario Regulation 283/95. Belair disputes this position.

**FACTUAL BACKGROUND**

This matter comes before me pursuant to an Arbitration Agreement entered into by the two insurers. The Arbitration Agreement is Exhibit 1 to this proceeding. Pursuant to this Agreement, it is agreed that each of the parties are insurers carrying on automobile insurance in the Province of Ontario. The dispute between the insurers relates to the claims of one Soraya

Jahangiri for statutory accident benefits arising out of a motor vehicle accident that occurred October 10, 2004.

Economical received a completed Application for Accident Benefits for these claims. Importantly, that document was received by Economical on October 27, 2004. In accordance with Regulation 283/95 Economical has been processing and paying statutory accident benefits with respect to Soraya Jahangiri.

Economical takes the position that it gave formal notice of a dispute between insurers to Belair on January 24, 2005 but Belair disputes any obligation to Economical on the basis that Economical did not comply with the procedural requirements of Ontario Regulation 283/95.

Exhibit 2 to the proceedings is an Agreed Statement of Facts that elaborates on the underlying circumstances of this case. At one time it appears that Economical was the insurer of a Toyota automobile. Soraya Jahangiri was a listed driver under the Economical policy and was the spouse of the named insured under the Economical policy. However, the coverage under the Economical policy was subject to a suspension of the coverage effective July 5, 2004. Since this accident occurred on October 10, 2004, it is the position of the parties that accident benefits coverage under the Economical policy was not in force on the date of the accident.

Belair Insurance Company, on the other hand, issued a policy to Mirza Baig, which was in force on the date of the accident. It was the vehicle insured by Belair, driven by Mirza Baig, that struck the vehicle that Soraya Jahangiri occupied causing her injuries. No other vehicles were involved in the accident.

The Agreed Statement of Facts also recites that Economical, by its claims representative, Melissa Miles, sent a letter to Belair dated January 24, 2005. The letter was intended to be the notification of a dispute between insurers, contemplated by Ontario Regulation 283/95.

Belair received the letter on February 2, 2005.

The parties produced a Joint Document Brief for assistance at the hearing. It was marked as Exhibit 4. The Application for Accident Benefits submitted on behalf of Soraya Jahangiri is at Tab 1 of Exhibit 4 and clearly shows a date stamp of being received by Economical Insurance

on October 27, 2004. A copy of Economical's letter dated January 24, 2005 is at Tab 2 of Exhibit 4. The parties confirmed to me that the back of the original of this letter has the "date received" stamp of Belair of February 2, 2005.

Enclosed with the January 24, 2005 letter is a Notice to Applicant Of Dispute Between Insurers. This Document, intended to be a notification to Soraya Jahangiri and not to Belair necessarily, is handwritten and dated "2005-01-24". A version of this document is reproduced at Tab 4 of the Joint Document Brief and this copy does show the receipt stamp of Belair indicating receipt in the mail room on February 2, 2005.

### **THE LAW WITH RESPECT TO PRIORITY DISPUTES**

Since substantial changes were made to automobile insurance in June of 1990, the payment of "no fault" statutory accident benefits to victims of motor vehicle accidents has been a cornerstone of the compensation available to Ontario's motorists. The benefits available are extensive and the monetary implications are very significant in serious cases. As a matter of policy, the Government of Ontario makes provision that insurers should make these "statutory accident benefits" broadly available.

This policy is implemented by defining, very broadly, many individuals as insureds in relation to motor vehicle accident policies. Under a single policy, a potential insured person with respect to statutory accident benefits includes the named insured, the spouse of the named insured, the dependants of either, listed drivers on the policy, regular users of the vehicle, occupants of the vehicle, persons struck by the vehicle, and persons in other vehicles who are involved in an accident that involves the insured vehicle.

By casting things widely, one can be fairly confident that there is an automobile insurer available to handle an accident benefits claim when an injury occurs. Frequently an injured person will have the status of "insured person" under two or more different policies, with possible recourse to different insurers. However, the Government has also made provision for sorting out the priority of these obligations between various insurers. In Section 268 of the *Insurance Act*, ranking provisions are set out to delineate the obligations of the various insurers in relation to

the injury of an individual. At present, it is not necessary for me to consider those ranking provisions in connection with this case.

In support of the provisions in the *Insurance Act*, a regulation has been issued, Ontario Regulation 283/95, which sets out the procedure to be followed for resolving disputes between insurers about priority in relation to payment of accident benefits. That Regulation is mandatory and requires insurers to access the prescribed procedure for the purpose of determining such disputes. The Regulation requires an insurer that receives a completed accident benefits application from an insured to respond to the claim. The Regulation gives the obligation over to that insurer to pursue any other insurers which might be “higher ranking” in the hierarchy established under Section 268 of the *Insurance Act*.

However, subsection 3(1) of the Regulation provides as follows:

**No insurer may dispute its obligation to pay benefits under Section 268 of the Act unless it gives written notice within ninety (90) days of receipt of a completed application for benefit to every insurer who it claims is required to pay under that section.**

The question for my determination is whether or not Economical may dispute its obligations in view of the notice that it gave, or did not give, in compliance with subsection 3(1) of Ontario Regulation 283/95.

## **EVIDENCE OF MELISSA MILES**

Melissa Miles was tendered as the only *viva voce* witness in these proceedings. She is the adjuster who had carriage of this case at all relevant times. She works for Economical as a claims adjuster in its Accident Benefits Department. With the consent of the parties, her testimony was given without the presence of a reporter.

She indicated that she has been employed in her present capacity since June of 2002 as an Accident Benefits Claims Handler. She briefly described her duties, which included the obligation to respond to various claims and deal with representatives of claimants and so forth. She was the person who had principal responsibility at Economical for the handling of the claim

by Soraya Jahangiri. She acknowledged having received the Application for Accident Benefits which is at Tab 1 of Exhibit 4, on October 27, 2004.

She described the process undertaken at Economical to deal with this claim in view of the coverage difficulty. Initially, a referral was made to Economical's Underwriting Department for a decision as to whether or not coverage would be considered in force in view of the suspension status. It is understood that Economical concluded that coverage would not be considered as in force from an underwriting point of view. The problem was referred back to the Claims Department to be dealt with accordingly.

A meeting took place between four or five individuals at Economical on Tuesday, January 18, 2005. At that time, it was determined that Economical would not extend coverage to the claimant and therefore would be pursuing the appropriate insurers for reimbursement in "a priority dispute". I do not interpret the evidence of the witness about Economical's declination of coverage as indicating any intention to ignore the obligations created by Section 283 of the Regulation. To the contrary, it appears that Economical has conducted itself correctly in relation to the obligations it has to Soraya Jahangiri.

However, the evidence of Melissa Miles makes it clear that no decision was made within Economical until January 18, 2005 about whether or not to challenge coverage and therefore initiate a priority dispute. There is no evidence of any communication by Economical to Belair at any time prior to January 18, 2005.

Following the meeting of January 18, 2005, Ms. Miles testified that she was away on January 19 and January 20, 2005. On Friday, January 21, she was back at work and she began drafting the letter which ultimately became the letter found at Tab 2 of Exhibit 4, bearing date January 24, 2005, purporting to notify Belair of a priority dispute. Melissa Miles testified that on Monday, January 24, 2005, she proofread and completed the letter, completed the form that was enclosed with the letter, and "mailed" the letter.

She was questioned quite closely about the procedure concerning this. She indicated that she would have prepared the letter on a computer station at her desk. Key information in the letter including the date and file number information and so forth would have been entered into the letter on an automated basis by the system she was using at Economical. When she was

satisfied with the text of the letter she sent it to a local printer to be printed into a hard copy. The local was a printer used by perhaps twenty people. According to her testimony she obtained the printed letter from the printer, put it and the enclosure (the claim form found at Tab 3 of Exhibit 4) into an envelope and put it in a designated location for mail which is located about 15 feet from her desk.

The process at Economical with respect to dispatching of mail is that it is the job of the adjuster to put the mail in its "ready to go" state at the pick up location in the office. People from the mailroom pick up the mail three times a day, at 8:00 a.m., 11:00 a.m. and 2:00 p.m. Ms. Miles frankly acknowledged that she does not know when the letter would have been put in the pick up box. If she put it in the pick up box after 3:00 p.m., the mail room staff would not have picked it up until the following day, January 25, 2005.

The witness was asked about the possibility that the letter might have been completed at her desk some date later than January 24, but indicates that that would not have been possible. The letter was dated the day it was printed and there would not have been any other date that the letter would have been taken from the printer and put in the mailbox. Additionally, the enclosed form shows a corresponding date. According to the testimony of this witness, and the documentation, there is no reason to suspect that the letter and its enclosures were not ready to go on January 24, 2005, which necessarily means that the letter would have been in the hands of Economical's mail room, at the latest, on January 25, 2005.

I did not find any reason to doubt the evidence offered by Ms. Miles. I believe that she was trying to be helpful to the proceeding and was giving truthful evidence as to her handling of the matter.

#### **EVIDENCE (BY AFFIDAVIT) OF DEBBIE FORLER**

An Affidavit of Debbie Forler, sworn April 13, 2006, was tendered to the proceeding and accepted on consent. She is identified as an employee in the mailroom who described the workings of the mailroom in question. According to her Affidavit, the Claims Department employees deposit outgoing mail at three baskets located in the Claims Department and the mail is collected from there by mailroom employees. She deposed that the mail is picked up at a minimum of two times per business day, 10:30 a.m. and 1:30 p.m. In addition she deposed

that mailroom employees have unofficially instituted an earlier pick up, which takes place at 7:15 a.m. “in order to keep up with the workload”.

The process described by Forler is that the mail is picked up from the Claims Department and is taken to the mailroom for further handling. It is sorted by method of delivery into four categories. Mail destined for Canada Post is affixed with appropriate postage and then is put into a bin for pick up by a local courier at approximately 4:00 p.m. That courier takes all of the mail to Canada Post at 70 Trillium Drive, Kitchener, before the close of business. It is indicated that there is a 5:30 p.m. deadline for delivery of this mail to Canada Post.

## **ANALYSIS AND DECISION**

The issue is a narrow one. Can Economical proceed with this priority dispute in view of the notice requirements of Ontario Regulation 283/95?

To answer that question, I must determine whether or not Economical complied with the requirement that it “give(s) written notice within ninety (90) days of receipt of a completed application for benefits” to Belair. It acknowledges having received the completed Application for Accident Benefits on October 27, 2004. The 90<sup>th</sup> day after receipt of that Application was January 25, 2005. The evidence tendered by the parties indicates that Belair received the Notice of Dispute on February 2, 2005. It was sent by Economical, in the sense of being put into Economical’s mail system, on January 24, 2005. It went into the Canada Post mail system on January 24 or January 25, 2005.

I was invited by counsel for Belair to conclude that the Economical letter was not even sent prior to the 90 days, in view of the date stamp of its receipt at Belair. I admit to some concern about the lapse in time between the date on the letter (January 24) and the date stamp of its receipt on February 2, 2005. This seems to be an inordinate length of time for a routine piece of mail to be transmitted from one business to another. However, I accept the evidence tendered on behalf of Economical that the letter was generated on January 24, 2005, put in an envelope with its enclosure, and put into Economical’s mail system which resulted in it being delivered to the Post Office on either January 24, 2005 or January 25, 2005. The evidence tendered in support of this finding is credible, unambiguous, and consistent with the expected business practices of the organization.

However, Belair raises a more substantial issue. Belair takes the position that merely putting the notice letter into the mail is not adequate to discharge Economical's obligations under subsection 3(1) of Ontario Regulation 283/95. Belair does not challenge the manner of the communication. Belair accepts that notice by mail is adequate notice. The challenge is to the timing of the notification.

Based on the findings of fact I have made concerning Economical's practice, it is clear that it is virtually impossible that the January 24, 2005 letter could have been received by Belair within the 90-day time limit. This evidence, and the inferences I take from that evidence, when combined with the agreement of counsel and the evidence as to the receipt stamp of the documentation at Belair, force the conclusion that Belair did not receive the notice of the dispute within 90 days after Economical received the completed application.

On these findings of fact, this communication between Economical and Belair bridges the expiry of the time limit for giving of notice. The notice was dispatched by Economical within the time limit but not received by Belair until after the time limit.

Economical argues that the obligation imposed on it by the Regulation is to "give" the notice and that the operative step to be taken within the ninety days is the dispatching of the communication. They argue that the steps which they took, and which I have found were taken, were adequate to discharge their obligations under the Regulation.

In conjunction with this argument, Economical also argues that there is no prejudice to Belair as a result of any time delay with respect to the provision of notice. The window for commencement of an arbitration proceeding allowed a further twelve months for commencement of that proceeding. In my view the decision of the Court of Appeal in *West Wawanosh v. Kingsway*<sup>1</sup> makes it clear, in my view, that there is no latitude for an arbitrator to read in any elasticity to the notice provisions other than that which can be found in the Regulation itself. I do not accept that the notice should be considered as valid by reason of lack of prejudice to Belair. Economical's obligation is to comply with the Regulation.

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<sup>1</sup> *West Wawanosh Insurance Company v. Kingsway General Insurance Company*, 53 O.R. (3d) 436 (S.C.J.), decision of Sharpe J.A. dated February 15, 2002

This leads to the more substantial issue in this case of whether or not the acts of Economical do comply with the Regulation and the obligations of Economical to “give notice” within ninety (90) days. Belair, not surprisingly, takes the position that the operative word in the Regulation is “notice” and it is “notice” which must be given within the ninety (90) days. Belair distinguishes the use of the word “give” from other provisions that use the word “send”. While “send” might support and interpretation that the date of dispatch is the critical date, it is argued by Belair that to “give notice” means an effective communication to the recipient which requires receipt of the document.

In the submissions of counsel we reviewed a number of cases that approach the issue of “give” and “notice”. A case relied upon by Economical is *Leeson v. The Village of Havelock* [1940] O.R. 331, a decision of the Ontario Court of Appeal. This case involves the issue of notification under the *Municipal Act* for a person making a personal injury claim as a result of a slippery sidewalk. The *Municipal Act* at the time barred any action unless “notice in writing of the claim and of the injury complained of has been served upon or sent by registered post to the head or the clerk of the corporation”. The Court of Appeal agreed with the comments of the trial judge who concluded that “the giving of notice is mandatory”. The trial court found that the dispatching of notice by registered mail, whether received or not, was adequate to comply with the statutory provision. I note, importantly, that the statutory provision called for the sending of the notice within the time frame, not the “giving of notice”. There may be an important distinction and Belair certainly argues that there is.

Perhaps more relevant to the case at hand is the Decision of Arbitrator Guy Jones given in the *State Farm v. Lloyd's* Arbitration, January 2002. This was a case in which the arbitration directly addressed the sufficiency and timeliness of notice delivered pursuant to Ontario Regulation 283/95 in a priority dispute, similar to the dispute at hand. In that case, State Farm received the Application for Accident Benefits on August 16, 1999. It put the next insurer on notice on November 17, 1999, two days after the 90-day time limit expired. Lloyd's, another insurer, was not put on notice until December 17, 1999. State Farm purported to deliver a notice of a dispute which was dated September 16, 1999. However, it appears that the document may not have been sent by State Farm until November 9, 1999. TTC admitted to receiving it two days after the 90-day notice expired, on November 17, 1999. Arbitrator Jones addressed the issue unambiguously as a question of when the notice was received. He came to the following conclusion:

**In this case, the evidence suggests that the notice was received on November 17, 1999 and accordingly I find that it was served with the ninety days.**

Parenthetically, I point out that nothing in Ontario Regulation 283/95 calls for any document to “served” and I take Arbitrator Jones’ use of that term as a general term, not implying any particular formal requirement with respect to service.

Economical, in its submissions, suggests that the Decision of Arbitrator Jones is incorrect. It has argued that the Legislature could have used the word “received” instead of “notice given” in the Regulation if it had intended to require receipt of the notice as the triggering event within ninety days. I am most reluctant to adopt this approach towards interpretation of a statute. I do not find it particularly helpful to imagine what the Legislature might have done if it had faced the very fact situation now before us for consideration. Legislatures do not write regulations and legislation for the purpose of dealing with specific fact situations, but write the language intending to have general application to many circumstances. The hypothesis that the drafters could have used more precise language if they had contemplated specific facts at hand is, in my view, not generally a helpful approach to statutory interpretation.

In any event, it appears to me that there is ample authority to support the conclusion that giving notice requires some receipt of information or notification. In the 1994 labour case of *New Brunswick Broadcasting Ltd. v. N.A.B.E.T.*, 1994, 42 L.A.C. (4<sup>th</sup>) 109, the Canada Arbitration Board dealt with a case of addressed notice provisions which required a notice of termination to be given to the Regional Office of the Union within ten working days. The collective agreement required the employer to “give” written notice. Apparently the employer dispatched the written notice but it was not received within the time frame. The Arbitrator concluded, at paragraph 67 of the Decision,:

**The fact that the Regional Office may have had knowledge of the dismissal is not relevant in the interpretation of Article 8.3. The notice of dismissal must be given to the Regional Office of the Union. For the letter to have been given as required under the Article, the Regional Office must actually have it in its possession. Placing the letter in the company’s mail system is not enough, though placing the copy in the Regional Office’s post office box may be enough. Similarly, if the notice is given to a Regional Office representative this would have sufficed.**

Interestingly, the parties in the *New Brunswick Broadcasting* case pointed out that there are many other methods of delivering notice such as facsimile transmission which would alleviate

come concerns about these kinds of communications. Similar argument was made by Belair in this case. It pointed out that Economical, faced with obligation to give notice with an expiring 90-day deadline imminent, could have selected a number of alternate methods of making the communication but instead put the notification into mail, in the ordinary course.

The 1995 of *R. v. Reiss*, a Decision of the Alberta Provincial Court, Criminal Division, discusses Criminal Code provisions with respect to breathalyser certificates that precludes its receipt and evidence unless before the trial a copy of the certificate and notice of intention is “given to the other party”. The Court approved a decision from *R. v. W.T. Boychuk Motors Ltd.* [1970] 3 O.R. 162 as follows:

**The word “give” likewise causes no difficulty. It means taking something from one person and putting it in the possession of another person. Simply stated, it means handing over from one person to another.**

Counsel for Economical in argument has carefully referenced various provisions of the Statutory Accident Benefits Schedule and other provision that use different language to address the need of one party to communicate to another party. Frequently the Regulation calls for a communication to be received or something to be “given” or “sent”.

While I can conceive that in other circumstances one might conclude that a communication obligation has been satisfied by dispatching a notice that a party was obliged to give, I am required to address the notification requirements under Ontario Regulation 283/95 only. In this case, the Regulation is calling for a notification of a potential claim and calls for that to be done within a relatively short time frame, providing only limited elasticity, on specified criteria. I am very sympathetic to the argument that a technical defence put forward by Belair in this case might have the effect of requiring Economical to pay a claim that was not otherwise payable. There is certainly a sense that oversight of a notice provision by a few days is disproportionately sanctioned by imposition of potentially significant liability on an insurer who has collected no premium in respect of the risk, while exempting the insurer that may have had the statutory obligation to pay the benefits.

However, as discussed in other decisions and in particular in the various appeal decisions in *West Wawanosh v. Kingsway*, the parties are presumed to be sophisticated organizations, capable of availing themselves of expert assistance when required, and are engaged in

conducting business of this nature on a regular basis. The courts have indicated that we should apply the procedural requirements of Ontario Regulation 283/95 and I do so in this case.

I conclude that Economical did not "give notice" within the 90-day time period as required by subsection 3(1) of Ontario Regulation 283/95.

In accordance with the Arbitration Agreement submitted by the parties, I order that costs, inclusive of counsel fee, disbursement and all applicable taxes in the amount of \$2,500.00 is payable by Economical to Belair.

May 2, 2006

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LEE SAMIS