

Case Name:

Liberty Mutual Insurance Co. v. Commerce Insurance Co.

Between

Liberty Mutual Insurance Company, applicant (respondent in appeal), and

The Commerce Insurance Company, respondent (appellant)

[2001] O.J. No. 5479

[2001] O.T.C. 978

36 C.C.L.I. (3d) 269

[2002] I.L.R. I-4049

111 A.C.W.S. (3d) 812

Court File No. 99-CV-163258

Ontario Superior Court of Justice

Lissaman J.

Heard: December 10, 2001.

Judgment: December 19, 2001.

(59 paras.)

Insurance -- Insurers -- Liability, where two or more policies cover risk -- Automobile insurance -- Accident benefits.

Appeal by the Commerce Insurance Company from an arbitrator's award requiring it to pay statutory accident benefits to Ponnudurai and to reimburse Liberty Mutual Insurance Company for benefits already paid by it to Ponnudurai. Ponnudurai was struck by a motor vehicle in a parking lot while visiting Ontario. She was a resident of the United States. Her husband had an insurance contract with Commerce which covered Ponnudurai. Liberty was the insurer of the vehicle which struck Ponnudurai. Ponnudurai sustained serious injuries in the accident. Her lawyers wrote to Commerce advising it of the accident and that it might be liable for benefits to her. They subsequently wrote to Liberty and claimed damages from Liberty. Ponnudurai later issued a statement of

claim against Liberty. The arbitrator found that Ponnudurai had not abandoned her claim against Commerce and that Commerce was responsible for benefits, as it was the first insurer to receive a completed application for benefits.

HELD: Appeal dismissed. Commerce received sufficient notice that Ponnudurai was making a claim for benefits against Commerce to constitute a completed application for benefits. Ponnudurai was not required to complete a formal application. In addition, Commerce did not serve Liberty with a Notice of Dispute.

Statutes, Regulations and Rules Cited:

Arbitration Act, S.O. 1991, c. 17, s. 45.

Insurance Act, R.S.O. 1990, c. I.8, s. 268, 268(2), 268(4), 268(5), Reg. 283/95, ss. 1, 2, 3, Reg. 776/93, s. 59, 59(1), 59(2), 59(3), 59(4).

Ontario Rules of Civil Procedure, Rule 62.01.

Counsel:

Linda Matthews, for the respondent.
J. Douglas Wright, for the appellant.

1 LISSAMAN J.:-- This is an Appeal from an Arbitral award made by Mr. Guy Jones ("Arbitrator Jones" or "the Arbitrator") dated July 6, 2001. The Arbitration hearing was held in the City of Toronto on May 15, 2001, pursuant to the provisions of Regulation 283/95 - Disputes Between Insurers, made under the Insurance Act, R.S.O. 1990, c. I.8, as amended ("the Regulation") and the Arbitration Act, S.O. 1991, c. 17.

2 This Appeal is brought pursuant to section 45 of the Arbitration Act, S.O. 1991, c. 17 and Rule 62.01 of the Rules of Civil Procedure. The oral arbitration agreement between the parties provided that either party be entitled to appeal as a matter of right on matters of law or matters of mixed fact and law.

3 The Appellant, the Commerce Insurance Company ("Commerce Insurance") appeals the arbitration decision requiring it to pay statutory accident benefits to Rizwana Ponnudurai ("Mrs. Ponnudurai") and to reimburse the Respondent, Liberty Mutual Insurance Company ("Liberty Mutual") for statutory accident benefits already paid to or on behalf of Mrs. Ponnudurai. The Appellant asks that the Arbitrator's decision be overturned and this Court find that the Respondent was the first insurer to receive a completed application for benefits.

FACTUAL BACKGROUND

4 On August 3, 1996, Mrs. Ponnudurai was with her husband Ronald Ponnudurai visiting in the Province of Ontario. She was a pedestrian in a parking lot in the City of Toronto when she was struck by a motor vehicle. At the time of the accident and at all material times, Mrs. Ponnudurai was a resident of the State of Massachusetts and was the spouse of Ronald Ponnudurai.

5 At the time of the accident, Ronald Ponnudurai had a valid contract of motor vehicle liability insurance with Commerce Insurance. The Appellant is a general property and casualty insurer which carries on business in the State of Massachusetts. Commerce Insurance issued a motor vehicle liability policy bearing policy Number 96MMT48100 to Mr. Ponnudurai, pursuant to the terms of a standard automobile policy issued in the State of Massachusetts. Mrs. Ponnudurai was also a named insured, or alternatively, the spouse of the named insured under the Commerce Insurance policy. Commerce Insurance is not a licensed motor vehicle insurer in the Province of Ontario, however on May 30, 1974 Commerce Insurance executed a Power of Attorney and Undertaking ("PAU") and agreed to the following terms:

Not to set up any defence to any claim, action or proceeding, under a motor vehicle liability insurance contract entered into by it, which might not be set up if the contract had been entered into in, and in accordance with the law relating to motor vehicle liability insurance contracts of the Province or Territory of Canada in which such action or proceeding may be instituted, and to satisfy any final judgment rendered against it or its insured by a Court in such Province or Territory, in the claim, action or proceeding, up to

(1) the limit or limits of liability provided in the contract;

but

(2) in any event an amount not less than the limit or limits fixed as the minimum for which a contract of motor vehicle liability insurance may be entered into in such Province or Territory of Canada exclusive of interest and cost and subject to any priorities as to the bodily injury or property damage with respect to such minimum limit or limits as may be fixed by the Province or Territory.

6 The vehicle that struck Mrs. Ponnudurai was owned by Antonio Marchione and was insured by Liberty Mutual Insurance Company ("Liberty Mutual"), pursuant to the terms of a standard automobile policy issued in the State of Massachusetts. Allstate Insurance Company ("Allstate Insurance") was at all material times the insurer of another motor vehicle involved in the collision.

7 As a result of the accident, Mrs. Ponnudurai sustained serious personal injuries. The ultimate issue is which of the two insurers is required to pay statutory accident benefits to Mrs. Ponnudurai as a result of the motor vehicle accident that occurred on August 3, 1996.

8 Following the accident, Mrs. Ponnudurai retained Keches & Mallen, P.C., a law firm based in Taunton, Massachusetts to represent her with regard to any claims arising out of the personal injuries she sustained as a result of the motor vehicle accident in Ontario. A series of correspondence between counsel for Mrs. Ponnudurai, Commerce Insurance and Liberty Insurance ensued.

9 On September 10, 1996, Patrick J. Dolan ("Mr. Dolan") of Keches & Mallen wrote to Commerce Insurance, advising them of Mrs. Ponnudurai's accident and the injuries she sustained as a result. Mr. Dolan also advised Commerce Insurance that in Ontario there is a system of no-fault benefits which is substantially different than the Massachusetts system. The letter was also to serve as notice of Mrs. Ponnudurai's claim as against Commerce Insurance and read as follows:

Apparently, in Ontario there is a system of no-fault benefits which is substantially different than ours. Under that system, it may well be that Commerce's insurance policy must provide benefits for Ms. Ponnudurai.

Therefore, please accept this letter as notice of a claim. Kindly contact me at your earliest convenience so that we may discuss in full.

10 Commerce Insurance responded to Mrs. Ponnudurai's solicitors by letter dated September 16, 1996. The letter confirmed that Massachusetts law provides for Personal Injury Protection Coverage up to \$8,000 for auto accidents occurring on or after January 1, 1989. The coverage is afforded for medical expenses, lost wages and replacement services which have been certified as accident-related. Commerce provided an "Application for Benefits - Personal Injury Protection" which was the standard form for the Massachusetts Personal Injury Protection Plan ("PIPP") to be completed and returned so that Mrs. Ponnudurai's claim could be processed for benefits afforded under the Massachusetts Injury Protection Law.

11 Commerce Insurance filed a note at the arbitration hearing that was made by its claims representative, Ms. Charlene Marlborough. The note refers to a phone call with Mr. Dolan on September 16, 1996 and reads: "called [Attorney] Dolan 822-2000 - he now states that there is coverage under the Liberty Mutual Policy - we can void our loss - he was just trying to cover all bases."

12 Mrs. Ponnudurai completed the Massachusetts Application for Benefits and returned an executed copy to Commerce Insurance dated September 19, 1996. During the Examination for Discovery of Ronald Ponnudurai conducted on April 30, 1999, Ms. Matthews, counsel for the Respondent asked Mr. Ponnudurai about the Application for Benefits. He confirmed that the application had been completed, signed and returned to his wife's counsel in September 1996.

13 On September 30, 1996, Mr. Dolan wrote to Liberty Mutual advising of Mrs. Ponnudurai's intention to claim for damages. The letter read as follows:

Please be advised that I represent Rizwana Ponnudurai for personal injuries she sustained on August 3, 1996. On that date, Ms. Ponnudurai was with her husband in Toronto, Canada, decorating a car for a wedding in a parking lot. A motor vehicle operated by your insured, Antonio Marchione, came in to the parking lot at a high rate of speed and struck Ms. Ponnudurai.

As a result, she suffered serious personal injuries, including a fractured leg.

Please accept this letter as a notice of claim for personal injury damages.

14 On November 8, 1996, Liberty Mutual wrote to Mrs. Ponnudurai's counsel in response to the September 30th letter advising that they were in the process of investigating the accident and that a response would be provided upon completion of the investigation.

15 On November 25, 1996, Claudine Cloutier ("Ms. Cloutier"), an attorney with Keches & Mallen, wrote to Commerce Insurance informing them that Mr. Dolan had left the office and that she would be handling Mrs. Ponnudurai's claim. The letter also explained that at the time of the accident Mrs. Ponnudurai was the primary caregiver to her two-year old son. As a result of the acci-

dent, Mrs. Ponnudurai was immobilized in a full leg cast and was consequently unable to care for her son. Mrs. Ponnudurai was thus seeking replacement services benefits from Commerce Insurance to help her care for her son as her husband worked outside the home.

16 In the same letter, Ms. Cloutier advised Commerce Insurance of the no-fault insurance scheme in Ontario and confirmed that she had forwarded Mrs. Ponnudurai's application for benefits to Commerce Insurance:

Pursuant to Canadian law, Ms. Ponnudurai can not collect under the no-fault insurance package available for the driver of the automobile. She must collect under her own no-fault insurance protection. Accordingly, I have forwarded her application for P.I.P. benefits.

17 Ms. Marlborough, the claim representative from Commerce Insurance assigned to Mrs. Ponnudurai's file, noted a conversation she had with Ms. Cloutier on December 24, 1996. The note reads "spoke with Claudine Cloutier, the new [Attorney] on this loss - there is still some confusion re: the primary PIP."

18 On December 26, 1996, Ms. Cloutier wrote to Ms. Kitty Chow at Liberty Mutual in Unionville, Ontario, referring to their recent communications regarding Ontario law in situations where a pedestrian has been struck by an automobile. Ms. Cloutier referred to the fact that Ms. Chow had informed her that under Ontario's no-fault scheme, insurance benefits are to be provided by the pedestrian's company and not that of the driver. Ms. Cloutier asked that Ms. Chow confirm this in writing so that she could provide Commerce Insurance with Liberty Mutual's denial of coverage, allowing Mrs. Ponnudurai to collect her benefits through Commerce Insurance.

19 By letter dated December 26, 1996, Ms. Cloutier informed Commerce Insurance of her communications with Ms. Chow at Liberty Mutual regarding Ontario law. Ms. Cloutier also added that she had asked Liberty Mutual for confirmation of this in writing but had yet to receive it. She enclosed a copy of the Statutory Accident Benefits Schedule ("SABS") for Ontario which was provided to counsel by Liberty Mutual as well as a copy of the accident report prepared by Gerald Dwyer, Police constable with the Metropolitan Toronto Police.

20 On January 20, 1997, Sheila Young, a Senior Claims Specialist in the Claims Department at Liberty Mutual, responded to Ms. Cloutier and advised that the investigation of the accident had been completed. Ms. Young added that the investigation revealed that the vehicle driven by Sau King Chung was responsible for Mrs. Ponnudurai's loss and that Mrs. Ponnudurai should seek recovery from Allstate Insurance, Mrs. Chung's insurer. On February 14, 1997, Ms. Young wrote to Richard Bardi, Mrs. Ponnudurai's new counsel in Massachusetts, reiterating Liberty Mutual's position.

21 On June 3, 1997, Mr. Bardi communicated with all three insurers implicated in this matter. He wrote to Ms. Ruth Weert at Liberty Mutual, confirming that Commerce Insurance was Mrs. Ponnudurai's insurer at the time of the accident and that under Ontario law, if Commerce Insurance does business in Ontario, it would be required to pay Mrs. Ponnudurai's medical bills. Ms. Marlborough at Commerce Insurance was copied on this letter. Mr. Bardi wrote to Ms. Marlborough at Commerce Insurance, repeating the substance of his letter to Ms. Weert from the same day. Mr. Bardi also wrote to Allstate Insurance indicating that he would appreciate hearing from them on the matter.

22 On July 27, 1998, Mrs. Ponnudurai submitted a completed Application for Accident Benefits to Allstate Insurance by fax and courier. On July 28, 1998, Mrs. Ponnudurai's Canadian counsel William McCorrison of Hughes, Amys, forwarded a completed Application for Accident Benefits to Liberty Mutual.

23 Ruth Weert of Liberty Mutual responded the following day, suggesting that the claim should have been made to Allstate, the insurer for Mrs. Chung. Allstate Insurance responded to the application on August 10, 1998 by way of an Explanation of Assessment Form, denying Mrs. Ponnudurai's application, suggesting that she should be claiming from her automobile insurer, and that the striking vehicle insured by Liberty Mutual would have priority over Allstate Insurance.

24 On September 14, 1998, Mrs. Ponnudurai applied for mediation with the Financial Services Commission of Ontario ("FSCO"), as against Liberty Mutual. The mediation was conducted on November 23, 1998, but efforts to resolve the dispute failed.

25 On February 3, 1999, the Statement of Claim against Liberty Mutual was issued for the payment of statutory accident benefits. Mrs. Ponnudurai commenced an action in the Superior Court of Justice against Liberty Mutual arising out of a claim for accident benefits on the basis that Liberty Mutual insured the vehicle that struck her.

26 In a letter dated March 11, 1999, Ms. Marlborough at Commerce Insurance responded to Mr. Bardi:

I reviewed the file and no formal denial was issued. The prior attorney had advised that all medical bills were paid by HCHP and that any additional charges were to be picked up by Liberty Mutual. Commerce does not insure any vehicles outside the USA and in fact was doing business solely in Mass. at the time of the incident which took place in a private parking lot in Canada. The prior attorney withdrew the claim so there was no need to issue a written PIP denial.

No supporting documentation was provided by counsel for Commerce Insurance to substantiate its position that Mrs. Ponnudurai's claim had ever been withdrawn by her counsel. On the Examination for Discovery of Mrs. Ponnudurai conducted on April 30, 1999, her Canadian counsel Mr. McCorrison confirmed that no claim was pursued nor was a lawsuit ever commenced against Commerce Insurance for denial of accident benefits. This assertion by Commerce Insurance appears to have been based on a telephone conversation between Ms. Marlborough and Mrs. Ponnudurai's former solicitor on September 16, 1996.

27 Arbitrator Jones commented that while he accepted that the conversation occurred between the parties and that the adjuster may well have concluded that Commerce could "void our loss", a review of the entire correspondence both before and after the September 16, 1996 note made it clear that Mrs. Ponnudurai had not in fact abandoned her claim against Commerce.

28 On July 27, 1999, Mrs. Ponnudurai's Canadian counsel, William McCorrison of Hughes, Amys, wrote to Commerce Insurance and requested payment of what had accrued to \$78,078.61 in benefits for income replacement benefits, benefits for loss of earning capacity and supplementary medical and rehabilitation benefits. Mr. McCorrison outlined the SABS, enclosed a completed Application for Accident Benefits and a copy of the PAU dated May 30, 1974. Mr. McCorrison noted that he had confirmed with the Insurance Council of Canada and the Superintendent of Insurance for British Columbia that the PAU was still in force.

29 On August 9, 1999, Ms. Marlborough of Commerce Insurance responded to Mr. McCorrison's July 27th correspondence. She advised that as the loss had taken place approximately three years prior, a full investigation would be required prior to any commitment on the part of Commerce Insurance under the personal injury portion of Mrs. Ponnudurai's policy. At no time has Commerce Insurance paid any monies to Mrs. Ponnudurai with respect to her claim.

30 On December 24, 1999, Liberty Mutual forwarded a Notice of Dispute Between Insurers to Commerce Insurance pursuant to the Insurance Act.

31 On November 23, 2000 Liberty made a "without prejudice" payment to Mrs. Ponnudurai in the amount of \$22,504.90 on account of Caregiver Benefits payable at a rate of \$256.00 per week for fifty-eight weeks plus interest from August 14, 1998 to October 31, 2000.

32 The parties agreed to submit the dispute as to which of them was required to pay accident benefits in respect of Mrs. Ponnudurai as a result of the motor vehicle accident that occurred on August 3, 1996 to Arbitrator Jones.

33 Arbitrator Jones held that Commerce Insurance was the insurer responsible to pay benefits for reasons released on July 6, 2001.

34 Mrs. Ponnudurai has an ongoing claim for accident benefits.

The Issues

There are four issues to be resolved on appeal:

1. Did the Arbitrator err as a matter of law in finding that Commerce Insurance was the first insurer to receive a completed application for benefits?
2. Did the Arbitrator err as a matter of law in failing to find that Liberty Mutual was the first insurer to receive a completed application for benefits?
3. Did the Arbitrator err in making findings of fact that were not supported by the evidence?
4. Did the Arbitrator err as a matter of law in failing to find that Liberty Mutual failed to give notice to Commerce Insurance within 90 days of receipt by it of a completed application of its intention to dispute its obligation to pay benefits?

ANALYSIS

Standard of Review

35 The standard of review on an appeal from a private arbitration (absent any specific provision to the contrary in the arbitration agreement) is one of correctness: see *887574 Ontario Inc. v. Pizza Pizza Limited*, [1995] O.J. No 936 (Gen. Div.), *National Ballet of Canada v. Glasco*, (2000), 49 O.R. (3d) 230.

The First Insurer to Receive a Completed Application for Benefits

36 Under Ontario's motor vehicle accident insurance legislation, where a person has been injured in a motor vehicle accident and there is a disagreement as to who should pay the injured party's statutory accident benefits, section 268 of the Insurance Act sets out a "priorities system".

Section 268(2) of the Insurance Act sets out the rules for determining who is liable to pay statutory accident benefits:

2. 2. In respect of non-occupants,
 - i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,
 - ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant
 - iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of the automobile involved in the incident from which the entitlement to non-fault benefits arose,
 - iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund.

37 Section 268(4) allows the insured to choose the insurer from whom he or she will claim benefits where it is possible to have recourse against more than one insurer. Subsection 5 overrides this provision where the person is a named insured or the spouse of a named insured:

- (4) Choice of insurer - If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of no-fault benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits.
- (5) Same - Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or same-sex partner or a dependant, as defined in the Statutory Accident Benefits Schedule, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy."

38 Section 1 of Ontario Regulation 283/95 - Disputes Between Insurers requires all disputes as to who should pay the injured party's benefits under section 268 of the Insurance Act to be settled in accordance with the Regulation. Section 2 sets out who should pay pending the resolution of any disputes as to payment:

2. 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.
[emphasis added]

39 I refer to Ont. Reg. 776/93 - Statutory Accident Benefits Schedule - Accidents after December 31, 1993 and before November 1, 1996, s. 59 ("SABS" or "the Schedule"). Section 59(1) of the Schedule sets out the obligations of the various parties with regard to reporting, forwarding and completing accident benefit applications. Section 59(1) states:

- (1) A person who wants to apply for benefits under this Regulation shall notify the insurer within thirty days after the circumstances arose that gave rise to the entitlement to benefits, or as soon as practicable thereafter.
- (2) The insurer shall promptly provide the person with:
 - (a) the appropriate application form;
 - (b) a written explanation of the benefits available under this Regulation; and
 - (c) written information to assist the person in applying for benefits, including information to assist the person in making any possible elections.
- (3) The person shall submit an application for benefits to the insurer within ninety days of receiving the application forms.
- (4) A failure to comply with a time limit set out in subsection (1) or (3) does not disentitle a person to benefits if the person has a reasonable excuse.

40 Counsel for Commerce Insurance conceded at the outset of the hearing before Arbitrator Jones that his client was responsible to pay the accident benefits pursuant to section 268(5). Arbitrator Jones then had to determine which of the insurers was the first to receive a completed application for benefits, as per section 2 of the Regulation.

41 Arbitrator Jones found as a fact that Commerce Insurance was the first insurer to have received a completed application for benefits. Although Liberty Mutual received the first formal completed Application for Ontario Accident Benefits on July 25, 1998, Arbitrator Jones found that this was not determinative of which insurer should pay and that an application for accident benefits need not be on a certain form in order to be valid.

42 In order to meet the requirements of the legislation, an application for accident benefits must provide sufficient particulars to reasonably assist the insurer with the processing of the application and the assessment of the claim. See *Lopez v. Canadian General Insurance Group*, [1997] O.I.C.D. No. 83 at paragraph 24. It has been held that the receipt of an invoice from a treatment provider including the name of the injured party, the date of the accident and the insurance policy number should provide sufficient information to an insurer to know that a claim for accident benefits is being made. See *Pooler v. Guardian Insurance Company of Canada* [1999] O.I.C.D. No. 233.

H'Ng v. Allstate Insurance Co., [1997] O.I.C.D. No. 34 upheld on judicial review by the Divisional Court on September 28, 2000, [2000] O.J. No. 3589 (Div. Ct.) set out that an "application for benefits" under subsection 59(3):

... must identify the particular benefit sought, or, at minimum, provide sufficient particulars to enable the Insurer to reasonably identify the benefit in question.

...

An application is not limited to a particular form. It may include additional information contained in a covering letter, and documentation enclosed or appended.

...

The Forms do not require the applicant to choose a benefit category. However, the forms should provide the essential information required by the insurer to allow it to determine whether an applicant may be entitled to a benefit under the Schedule.
[emphasis added]

43 Arbitrator Jones reviewed the evidence and concluded that Mrs. Ponnudurai, through her solicitor on September 10, 1996 let Commerce Insurance know that she would be making a claim for statutory accident benefits. Specifically, Arbitrator Jones referred to the fact that Mrs. Ponnudurai completed and returned the Massachusetts benefits claim form provided to her by Commerce Insurance and dated September 19, 1996. He also made note of correspondence from Mrs. Ponnudurai's solicitors to Commerce Insurance in November and December of 1996 and in June of 1997, advising them of their obligations under the no-fault insurance scheme in place in Ontario, and seeking replacement services benefits and reimbursement of medical expenses.

44 The Appellant claims that in the event that Commerce Insurance did receive a completed application on September 1996, Commerce Insurance received advice from Mrs. Ponnudurai's counsel during a telephone call that Mrs. Ponnudurai was withdrawing her claim for benefits. The evidence does not support the Appellant's claim, and I agree with the Arbitrator's conclusion that a review of the entire correspondence both before and after the September 16, 1996 note of the phone call made it clear that Mrs. Ponnudurai had not in fact abandoned her claim against Commerce Insurance.

45 The Appellant argues that in coming to the conclusion that the letter Commerce Insurance received from Mrs. Ponnudurai's counsel dated September 10, 1996 was sufficient to constitute a "completed application for benefits" for the purposes of section 2 of Regulation 283/95, the Arbitrator relied on a number of decisions decided under Section 59 of the SABS. The Appellant claims that the Arbitrator should not have relied on these decisions as they were decided under the SABS and not under Regulation 283/95.

46 The Appellant further suggests that these cases do not stand for the proposition that an insurer receives a "completed application" within the meaning of the regulation as soon as the insurer receives notice that an insured might make a claim for benefits. Rather, the Appellant contends that the cases deal with circumstances where an insurer was trying to defeat an insured's claim by taking the position that they had not made application in a timely fashion.

47 The Appellant suggests that it is a basic principle of statutory interpretation to give words their ordinary meaning. The Appellant further argues that the only logical interpretation is that the drafters of the regulation intended a "completed application" to be equivalent to the "formal application" that Arbitrator Jones concedes Liberty Mutual received first.

48 I have reviewed Arbitrator Jones' analysis and the cases cited in support of his finding regarding a "completed application for benefits." I do not accept the Appellant's suggestion that the Arbitrator's reliance on these decisions was misplaced. While the cases refer to the SABS, the SABS is directly applicable to the case at bar, and clearly sets out the obligations of the various parties with regard to statutory claims for accident benefits. The cases set out what is required for an insurer to know that a claim is being made and to proceed with the processing of that claim.

49 Further, I reject the Appellant's claim that an "ordinary meaning" interpretation necessarily leads to the conclusion that a "completed application" is the equivalent of a formal application. A

"completed application" is not limited to a specific form, and as long as the insured provides the essential information with sufficient particulars required by the insurer to allow it to process and assess the claim, an application for accident benefits can meet the requirements of the legislation.

50 The Appellant submits that Mrs. Ponnudurai's former counsel were American attorneys who were confused as to the nature of the Ontario legislation. While it is clear that the American attorneys and insurers implicated in this case were obviously unfamiliar with the Ontario legislation, this does not relieve Commerce Insurance of its obligations under the law, nor does it excuse its delay in processing Mrs. Ponnudurai's claim for benefits. Commerce Insurance signed the PAU in 1974 which was still valid at the time of the accident, and consequently had the same responsibilities for dealing with a claim as does an Ontario insurer. See *Healy v. Interboro Mutual Indemnity Insurance Company et al.*, (1999), 44 O.R. (3d) 404 (Ont. C.A.).

51 I do not find any error in law in the Arbitrator's finding that Commerce Insurance was the first insurer to receive a completed application for statutory benefits. I agree with Arbitrator Jones' assessment of the facts and of the documentation filed. I find that a review of the correspondence and documentation between Mrs. Ponnudurai's solicitors and Commerce Insurance from September 10, 1996 until December 1996 reveals that Mrs. Ponnudurai intended to make an application for accident benefits to Commerce Insurance. As stated by Arbitrator Sampliner in *Prosser v. Progressive Casualty Insurance Co.*, [1997] O.I.C.D. No.69 at paragraph 15, an "analysis of a claim should look beyond the forms, and review the correspondence and dealings of the parties". By the end of December 1996 Mrs. Ponnudurai, through her solicitors, had provided the requisite information and sufficient particulars to constitute a completed application. Accordingly, Commerce Insurance was the first insurer to receive a completed application for benefits, and was obligated under the Regulation to pay Mrs. Ponnudurai for her claim pending the resolution of any insurer's dispute.

Notice of Dispute

52 Section 3 of Regulation 283/95 sets out the notice requirements in cases where an insurer disputes its obligations to pay benefits under section 268 of the Insurance Act:

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

(2) An insurer may give notice after the 90-day period if,

- (a) 90 days was not a sufficient period of time to make a determination that another insurer or insurers is liable under section 268 of the Act; and
- (b) the insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90-day period.

53 While Liberty Mutual served Commerce with a "Notice of Dispute" on December 24, 1999 pursuant to Regulation 283/95 in response to the Application for Accident Benefits that it had received in July of 1998, Commerce Insurance never served this Notice to Dispute in response to the Application for Accident Benefits that it had received in July of 1999.

54 As set out in section 3 of Regulation 283/95, no insurer may dispute its obligation to pay benefits under section 268 of the Insurance Act unless it gives written notice within ninety days of its receipt of a completed application for benefits to every insurer who it claims is required to pay under that section.

55 Although Commerce Insurance did not itself serve a Notice to Dispute, it argued that since Liberty later received a completed Application for Accident Benefits in July 1998, didn't serve a Notice of Dispute until December 1999, and paid Mrs. Ponnudurai "without prejudice" in November 2000, it ought not be able to recover from Commerce Insurance.

56 Arbitrator Jones held that Commerce Insurance was undoubtedly responsible to pay the accident benefits and had ninety days pursuant to section 3 of Regulation 283/95 from the time it received the first application for benefits to serve Liberty Mutual or any other insurer with a Notice of Dispute advising Liberty Mutual that it was holding it responsible to pay the benefits. I agree with the Arbitrator's finding that Commerce Insurance ignored the claim and did not serve Liberty with a Notice of Dispute. As cited by the Appellant in its factum at paragraph 39, the Court will insist on strict compliance with the notice provisions of the Regulation. See *State Farm v. Ontario (Minister of Finance)*, (2001), 53 O.R. (3d) 436 (Sup. Ct.).

57 Arbitrator Jones further commented that Commerce Insurance is in essence disputing its own obligation to pay benefits under section 268 without having itself complied with the notice provisions of section 3. Commerce Insurance had received the necessary particulars and information constituting the first completed application for accident benefits by December 1996, and as such was required to pay out the benefits and then serve a Notice to Dispute under the Regulation. Instead of complying with the legislation, the Appellant refused to pay, and in the words of Arbitrator Jones, "now turn around and argue that they still ought not to pay, due at very best to a technical argument that they themselves have ignored."

58 In my view Commerce Insurance's failure to comply with the requirements of Ontario law has resulted in a considerable delay of payment of accident benefits to the injured party in this case. Mrs. Ponnudurai's claim has been ongoing since 1996 and her efforts to claim benefits as a result of the motor vehicle accident have been frustrated by the Appellant's actions. In certain kinds of cases in my view the position adopted by Commerce Insurance would have left it exposed to a possible bad faith claim and a claim for punitive damages. Fortunately this is not one of those cases. *Ready v. Progressive* [1994] O.I.C.D. No. 32, cited by Arbitrator Jones, highlighted the policy intention of the statutory benefits scheme and the risk of allowing insurers to frustrate the statute's spirit by simply denying benefits:

The statutory accident benefits scheme was intended to provide for speedy and informal adjustment of claims. It would contravene the remedial character of the legislation to allow *Progressive* to frustrate Mr. Ready's election under subsection 268(5) simply by denying benefits before Mr. Ready filed a written application form.

59 Given the foregoing, in my view the Appellant has failed to demonstrate that Arbitrator Jones was incorrect in his application of the law or in his findings of fact in concluding that Commerce Insurance was the first insurer to receive a completed application for benefits, thereby requiring it to pay statutory accident benefits to Mrs. Ponnudurai. I likewise agree that having received the first completed application for benefits, Commerce Insurance failed to pay the benefits, and did not

serve a Notice of Dispute within the ninety day period pursuant to section 3 of Regulation 283/95. The appeal of Commerce Insurance is therefore dismissed and the Arbitrator's order confirmed. Costs are to be awarded to the Respondent, Liberty Mutual, and fixed at \$2500 plus assessable disbursements plus applicable G.S.T.

LISSAMAN J.

cp/d/qlala/qlkjg

---- End of Request ----

Print Request: Current Document: 11

Time Of Request: Wednesday, May 20, 2009 15:27:17