IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,c. I. 8,

AND IN THE MATTER OF THE ARBITRATION ACT,
S.O. 1991, c. 17, as amended;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

AVIVA INSURANCE COMPANY

Applicant

- and -

LOMBARD INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Robert Rogers and Sharon Warden for the applicant

Harry Brown for the respondent

ISSUES:

1. Which insurer received the first completed accident benefit application form?

2. Is Aviva precluded from proceeding with the arbitration for failure to comply with Regulation 283/95?

3. Did Lombard deflect the application for accident benefits, and if so what are the consequences?

DECISION:

1. Aviva received the first completed application for accident benefits.

2. Aviva is precluded with proceeding with the arbitration for failure to comply with Regulation 283/95.

3. The arbitration was not initiated within the required time frame as set out in Regulation 283/95.

4. Lombard did not deflect the application for accident benefits.

5. Aviva is responsible to pay accident benefits to or on behalf of Jennifer Asmunt.

HEARING:

This hearing was held in Thunder Bay on April 22, 2004 and in Toronto on April 23, 2004 before me, M. Guy Jones.

FACTS:

The issues involved in this matter arise out of a motor vehicle accident which occurred on October 1, 1998 when Ms. Jennifer Asmunt was injured in a single car accident in Thunder Bay, Ontario. Ms. Asmunt suffered very serious injuries in the accident, however, fortunately she has made a very good recovery. At the time of the accident she was driving a 1997 Ford pick-up truck owned by White Pine Electric and insured by Lombard. At all material times she was living with Marty Ball, who worked at White Pine Electric. He owned a 1997 General Motors pick-up truck insured by Aviva. A dispute has arisen at to whether or not Ms. Asmunt was a dependent upon Mr. Ball at the time of the accident, and if so, it would then be the responsibility of Mr. Ball's insurer, Aviva, to pay accident benefits.

On or about January 14, 1999, Aviva received an application for accident benefits from Ms. Asmunt's lawyer, Alexander Zaitzeff, and subsequently began making accident benefit payments. They did not serve a Notice of Intent to Dispute until June or July, 1999, well outside the 90-day notice requirement as set out in Regulation 283/95. Aviva argues, however, that in fact Lombard received the first completed application for accident benefits and ignored it and as such cannot rely upon the 90-day notice provision as a defence to the late serving of a Notice of Dispute by Lombard citing the decision of Liberty Mutual Insurance Company vs. Commerce Insurance Company (unreported decision of Arbitrator Jones dated July 6, 2001) upheld on appeal [2001] O.J. No. 5479]. Aviva also argued that Lombard's actions amounted to deflection and that they ought not to be allowed to avoid payment of accident benefits by such actions.

Who Received the First Application and Did Lombard's Actions Amount to Deflection?

These two issues are interrelated and many of the material facts are intertwined and accordingly I will deal with them at the same time. As mentioned above, Ms. Asmunt was very seriously injured in the motor vehicle accident of October 1, 1998. She suffered a fractured neck, which resulted in temporary paralysis. She remained in hospital for almost four weeks and was virtually incapacitated for a considerable period of time thereafter.

On or about October 14, 1999, one of the owners of White Pine Electric, the owner of the motor vehicle which Ms. Asmunt was driving at the time, notified AON Read Stenhouse (AON) of the accident and injuries. AON was the broker for to both Lombard and Aviva. On that same day, Ms. Veronica Maunu, a claims manager at AON, forwarded a "Notice of Loss" form to Lombard, advising them of the accident and of Ms. Asmunt's injuries. On October 15, 1998, Mr. Martin Koretesky, an accident benefit adjuster with Lombard working out of Lombard's Toronto office was assigned to the file.

On the same day, Mr. Koretsky made contact with the owners of White Pine Electric and obtained information regarding the accident and Ms. Asmunt's injuries. What transpired after that date, until January 14, 1999 when Aviva received the completed application for accident benefits, was a series of meetings, phone calls and letters that left all involved feeling frustrated. I will summarize these briefly at this time.

On November 4, 1998 Mr. Koretsky wrote to Ms. Asmunt indicating that he had been attempting to contact her, without success, and advised her that she may have a claim for accident benefits against Lombard. Mr. Koretsky testified that he believes he enclosed an application for accident

benefits with the letter. Ms. Asmunt indicated that she did not receive the application, although she acknowledged receiving the letter. Although a considerable period of time was spent at the hearing with whether the application was received by Ms. Asmunt at that time, very little rests upon this, in my view. I conclude, however, that the application was not received by Ms. Asmunt at that time.

On November 11, 1998, because Mr. Koretsky was located in Toronto, and Ms. Asmunt in Thunder Bay, Mr. Koretsky decided to have an adjuster from Lombard's Thunder Bay office, Mr. Lou Pedron, obtain a statement with regard to the dependency issue from Ms. Asmunt, as well as from Mr. Ball. It would appear, and I so find, that Mr. Koretsky would maintain the responsibility for the accident benefit file while Mr. Pedron would do some of the on the scene investigation for him. As a result, the subsequent communications between the parties took place with Mr. Pedron rather than with Mr. Koretsky. While this was desirable from the point of view of obtaining information on the scene, it did result in Mr. Pedron, a person with limited experience in accident benefit claims, doing a lot of accident benefit work. A considerable amount of the confusion that subsequently developed, in my view, was as a result of this.

In any event, Mr. Pedron, on November 12, called Ms. Asmunt to attempt to set up a meeting for the next day. He was also to deliver an application for accident benefits to Ms. Asmunt as Mr. Pedron had learned that Ms. Asmunt had not received the application that Mr. Koretsky thought that he had mailed on November 4. Ms. Asmunt advised that she was meeting with her lawyer, Mr. Zaitzeff, on that date and she preferred to meet on November 16, 1998. What then transpired was a series of delays, none of which were caused by Mr. Pedron or Lombard.

Indeed, I find, on the facts, that Mr. Pedron did everything he could reasonably have been expected to arrange the meeting as soon as possible. In any event, Mr. Pedron finally met with Ms. Asmunt on December 3, 1999 at her residence along with her solicitor, Mr. Zaitzeff and his assistant, Ms. Liz Bienvenue. While there were some questions in Ms. Bienvenue's mind as to whether Mr. Pedron provided the application for accident benefits at that time, I find that Mr. Pedron did provide the application at that meeting. This makes sense in light of the fact that the application that was ultimately submitted by Ms. Asmunt to Aviva was stamped as a Lombard form and would have most likely have been obtained at the December meeting. At the meeting, Mr. Pedron took a statement from Ms. Asmunt relating to the dependency issue. Mr. Pedron testified that at the meeting he mentioned to Mr. Zaitzeff that he and his client had to select who to send the application for accident benefits to, and that no benefits would be paid until the application was filed. Ms. Bienvenue testified that she had no recollection of Mr. Pedron saying this and it was not in her seven pages of notes taken during the meeting. A review of those notes shows that the meeting discussed the issue of dependency at great length and there was a discussion of the priority sequence. While I am not sure that a great deal rests on it, I find that the issue of who was in priority was discussed and in all probability, Mr. Pedron did mention that Ms. Asmunt would have to select who to send the application to. While I accept that Ms. Bienvenue took notes of the meeting, and that there was no mention in the notes of who was to decide who to send the application to, I also note that no mention was made in the notes of the fact that the application for accident benefits was provided at that time. I found Ms. Bienvenue to be somewhat defensive in her testimony and was trying to avoid responsibility for any role in the delay in forwarding the application. As such, to the extent of her testimony and Mr. Pedron's testimony differ, I prefer that of Mr. Pedron's.

I am also troubled by Ms. Bienvenue's testimony to the effect that she was of the opinion that it was not up to Ms. Asmunt or her solicitor to choose who the application should be sent to, but rather up to Mr. Pedron or the broker. Ms. Bienvenue was an experienced law clerk with approximately eighteen years experience and had been with Mr. Zaitzeff's law firm since 1986. Mr. Zaiteff himself is a very experienced personal injury lawyer in Thunder Bay with roughly twenty-five years experience. As such, I was surprised to hear Ms. Bienvenue's testimony that she believed it was up to Mr. Pedron or the broker to choose which insurance company to send the application to. This appears to be inconsistent with Mr. Pedron's note of his conversation subsequently with the broker, Ms. Victoria Maunu on December 17, 1998, at which time Ms. Maunu advised Mr. Pedron that Ms. Bienvenue had told her that she was to send the application to Aviva. While I accept that this is simply a note made by Mr. Pedron at the time, he had no particular reason to make the entry in that way if it was not correct. It is also consistent with his earlier conversation with Ms. Maunu wherein he emphasized that it was up to the applicant and her lawyer, rather than the broker to decide who the application should go to.

It is clear that the choice of to whom the application for accident benefits should be sent to rests with the applicant and her solicitor. If Ms. Bienvenue and Mr. Zaitzeff, who did not testify, were of the view that it was up to the broker or Mr. Pedron to decide this issue, it would go a long way to explaining the delay that occurred, and the frustrations expressed by all concerned as to the delay in getting benefits to Ms. Asmunt.

In any event, unfortunately, the December 3, 1999 meeting was cut short due to Mr. Zaitzeff's having to attend another meeting. While much was made of the face that Mr. Pedron chose to deal first with the issue of dependency rather than getting the benefits to Ms. Asmunt as soon as possible, it was worth noting that it was not until approximately one hour into the meeting that Mr. Zaitzeff announced that he would have to leave in half an hour. In any event, it would appear that Ms. Bienvenue took the application with her from the meeting. Ms. Bienvenue filled out part of the application herself and on December 15, or, approximately twelve days later, forwarded it to Ms. Asmunt with a covering letter indicating that Ms. Asmunt should complete the rest of the application and sign it. This delay was caused, at least in part, due to the fact that Ms. Bienvenue had expected Ms. Asmunt to come into the office to sign the forms. Unfortunately, because of ill health, Ms. Asmunt was unable to come in and Ms. Bienvenue therefore mailed the application to Ms. Asmunt on December 15.

At about the same time, Ms. Asmunt's boyfriend, Mr. Ball, was understandably becoming increasingly impatient regarding the failure of accident benefits to be paid to or on behalf of Ms. Asmunt. On December 12, Mr. Ball phoned Mr. Pedron and advised him that Ms. Asmunt's homecare had been cut-off as no one was paying for it. Mr. Pedron was unaware that someone had authorised the treatment and was told by Mr. Ball that the treating doctor had approved it. Mr. Pedron told Mr. Ball that he didn't think anyone would pay for the care until the application for accident benefits was submitted and while Mr. Pedron had given it to Ms. Asmunt and her lawyer on December 3, Mr. Pedron didn't know what they had done with the application.

Mr. Pedron then called Mr. Zaitzeff's office and spoke with Ms. Bienvenue and discussed the fact that the treatment had been withheld as there had been no authorization. As Mr. Pedron's notes indicate, and I accept, he told Ms. Bienvenue that they couldn't proceed until the application had been submitted.

Finally, on December 17, 1998, Ms. Maunu called Mr. Pedron to advise that she had spoken to Ms. Bienvenue who in turn indicated that Ms. Bienvenue would be forwarding the application to Aviva.

Ms. Bienvenue testified that she was quite frustrated by the failure of Lombard to provide the benefits. Between December 15 and the actual submitting of the application, Ms. Bienvenue testified that she spoke to the broker, Ms. Maunu, who said that she would forward the application to Aviva. I find this somewhat surprising, given the note of Mr. Pedron of December 17, 1998, which indicates that he advised Ms. Maunu that it was up to the applicant rather than the broker to choose who to send the application to. I find as a fact that it was Ms. Bienvenue rather than Ms. Maunu that finally made the decision to send the application to Aviva.

Ms. Bienvenue subsequently crossed Lombard's name off the application and put in Aviva's name instead. On or about January 15, 1999, the application was received by Aviva.

Counsel for Aviva submitted that while it may have received the first formally completed application for accident benefits, that Lombard, through Mr. Pedron had received sufficient information in his dealings with the various parties so that Lombard, in essence, received the first

completed application for accident benefits. In support of this position he relies on the various F.S.C.O decisions, including: H'ng vs. Allstate Insurance Company of Canada (OIC A-96-000988, dated March 7, 1997) and Lopez vs. Canadian General Insurance Group (OIC A-96-001035, dated January 20, 1997).

I accept that one can submit an application for accident benefits to an insurer by means other than filling out and sending the formal application form. What constitutes submitting an application will depend upon the facts of each particular case. In this case, while Lombard, in the person of Mr. Pedron, did have a considerable amount of information that would be required to complete an application he did not have any actual bills submitted to him, which in other cases has been held to amount to the submission of an application. It is important to remember, in my view, that it is up to the applicant or her representative, to decide who they wish to submit the application to. Here Lombard had some verbally provided information but little more. In addition, there was clearly a major issue as to whom the application was going to be submitted to. I have already found, as a fact, that Mr. Pedron had mentioned to Ms. Asmunt and her representatives at the December 3, 1998 meeting that they had to decide who to submit the application to. Unfortunately, it was not until much later, January 1999, that this was done.

Deflection

Counsel for Aviva submitted that Lombard, through its actions, "deflected" the application for accident benefits to Aviva and thereby avoided having to pay the benefits itself. The concept of deflection of applications has been accepted by arbitrators and the courts in many cases. What constituted deflection is very much dependent upon the facts of each case. Not every situation

where an insurer suggests to an injured claimant that the application should be sent to another insurer constitutes deflection. On the other hand, any insurer who does suggest that another insurer should be sent the application does so at its peril.

In this particular case I am not convinced that the actions of the Lombard representatives, when viewed in their entirety, constitute deflection.

When Lombard first become aware of the claim, they wrote to the claimant and advised her that she might have a claim against Lombard for accident benefits. While it would appear that no application was included in the first letter, I do not attribute any sinister motive to this failure. It is clear that subsequent to sending the letter, Lombard primarily through Mr. Pedron, made numerous efforts to meet with Ms. Asmunt. During the delays, I note that there were discussions between Mr. Pedron and Ms. Bienvenue as to which insurer the claim should be made to (see Mr. Pedron's note of November 27, 1998). Due to delays, not of Lombard's making, the meeting did not occur until December 3, 1998 at which time the application was provided to Ms. Asmunt's legal representative. It is unfortunate that no decision was made at that meeting as to who was to pay the benefits. Clearly, the form could have been completed at that time and given to Mr. Pedron. Instead, Mr. Pedron, Ms. Asmunt, and her legal representatives, spent the time investigating the issue of dependency and other issues. With the benefit of hindsight, this is regrettable, however, I have already found that the meeting was cut short when Ms. Asmunt's solicitor advised that he had to leave in half an hour. I have also found that Mr. Pedron did provide the application at that time and did advise Ms. Asmunt and her representatives that it was their decision as to which insurer to request the accident benefits from.

What then transpired were further delays, although again not of Lombard's making. There were difficulties encountered by Ms. Bienvenue in getting the application completed by Ms. Asmunt due to Ms. Asmunt's inability to attend at the law offices as had been scheduled. There were further discussions between Mr. Pedron and Ms. Bienvenue in an attempt to clarify the dependency issue. For example, Mr. Pedron's log note of December 8, 1998 indicates that he spoke to Liz and "need to do this A.S.A.P. so that she, (Liz) can decide where A/B. appl. should be submitted". This indicates to me that no decision as to where the application should be sent had yet been made and that it was awaiting a decision by the claimant's representative.

I am somewhat troubled by Mr. Pedron's conversations with Ms. Asmunt's boyfriend, Marty Ball, on December 11, 1998. On that date, Mr. Pedron spoke to Mr. Ball with regard to the dependency issue. Mr. Pedron's notes indicate that near the end of the conversation Mr. Pedron "told him from what he says, she is dependent on him and the application should be sent to own pers. insurer as that is the first avenue of claim".

Mr. Pedron testified that he was simply expressing his view on the dependency issue and he was not deciding the issue or trying to force the application to be sent to Aviva. I accept this.

Later that same day Mr. Ball called Mr. Pedron again and advised that Ms. Asmunt's homecare and physio had been cut off as no one was paying for it. Up to that point, Mr. Pedron had not been aware that homecare was being provided and he advised Mr. Ball that no one would commit to payment of the treatment until the application was submitted. Mr. Ball indicated that

he had thought it already been, but Mr. Pedron advised him that he had given to Ms. Asmunt's solicitor on December 3 and he was not sure what they had done with it.

Mr. Pedron followed up with Ms. Bienvenue on December 15, 1998. Mr. Pedron's notes state:

> "told her I was called Friday and told that treatment… may be withheld from her as no one auth. this. We can't as appl. hasn't been submitted nor can c.u. not sure where they are submitting appl. and still need to address the issue of dependency."

On December 17, 1998, Mr. Pedron had a conversation with the broker for both Lombard and Aviva. Mr. Pedron's log notes indicate that the broker advised him that she had been speaking to Ms. Bienvenue and:

> "seems they don't know what to do re: submitting the appl. sugg. she give them the c.u. policy part and advise them they must decide where they wish to make the claim and if they wish to submit to c.u., should advise her so can report to them. Recomm. that she don't allow them to submit appl. to her as that wuld then put onus on her to report and it's a decision the insured/claimant has to make".

Later that day Mr. Pedron's log notes indicate that they broker had called:

> "she spoke to Liz (sol. asst.) has been asked to report the claim to c.u."

As noted above, Ms. Bienvenue testified that it was the broker who in fact made the choice to submit the application to Aviva. In light of Mr. Pedron's advice to the broker, noted in his log notes that the broker should be careful to let the applicant or her representative decide who to send the application to, as well as his log notes to the effect that the broker told him that Ms. Bienvenue directed that the application be sent to Aviva, I am satisfied that it was in fact sent to Aviva on instructions from Ms. Bienvenue.

What then transpired is that Ms. Bienvenue crossed out Lombard's name on the application for accident benefits and put Aviva's in its place. Ms. Bienvenue then spoke to a representative of Aviva and on or about January 12, 1999 Mr. Zaitzeff sent the completed application for benefits to Aviva.

When viewing all of the evidence in its entirety, it seems clear that a great deal of time was spent by Mr. Pedron and Ms. Asmunt' legal representatives on the question of whether or not Ms. Asmunt was a dependent of Mr. Ball or not, rather than getting the necessary accident benefits to the badly injured claimant. This is regrettable. It is perhaps explainable in part by the fact that this all occurred almost six years, when the concept of the first insurer to receive the application paying benefits and disputing later was relatively new. This does not mean that what Lombard did was desirable, for clearly it was not. I am not convinced, however, that Lombard's actions amounted to actual deflection in all the circumstances. Mr. Pedron was clearly trying to determine the dependency issue where as it would have been more desirable for him to simply have the claimant's legal representative choose one company or the other and proceed. What

Mr. Pedron did, however, was not done to avoid Lombard having to pay. When all is said and done, it was up to Ms. Asmunt or her legal representatives to choose one insurer or the other. While it took a long time for this decision to be made, for various reasons, it did not, in my view, amount to deflection.

I do not wish my comments to be taken as suggesting that the actions taken by Lombard are desirable. Their actions fall short of what should be done, however, viewed in all circumstances, they fall short of deflection.

As indicated above, Ms. Asmunt's representative submitted the application for benefits on or about January 12, 1999. What then transpired is that on January 26, 1999 Mr. Zaitzeff sent a letter to both Lombard and Aviva. In it he included a completed application for accident benefits for Lombard, but noted that he had sent an earlier completed application to Aviva on January 12, 1999. In that letter, Mr. Zaitzeff expressed frustration at the failure of the two insurers for not paying benefits but rather debating "which company is responsible".

Mr. Zaitzeff asked for a prompt response and assurance that Ms. Asmunt's needs would be met.

Aviva responded to this by way of a letter dated January 28, 1999, advising Mr. Zaitzeff that it believed Lombard was the priority insurer. It also advised that if it had to pay the accident benefits it would seek to recover all costs for any proceeding in the necessary legal actions for recovery of payments. It did not specify from whom, and Lombard was not sent a copy of this letter.

On January 26, 1999 Mr. Koretsky of Lombard of called Ms. DiClementi of Aviva and discussed the dependency issue and the fact that Lombard had not received a completed application.

On February 2, 1999 Ms. DiClementi spoke again to Mr. Koretsky, who advised her that Lombard intended to maintain its position regarding dependency and that Aviva had received the first application.

On June 17, 1999, Ms. DiClementi spoke to Ms. Bienvenue who had advised that they had received no response from Lombard nor a denial from them.

Aviva subsequently commenced payment of the accident benefits to Ms. Asmunt and on July 21, 1999 Aviva served Lombard a formal Notice of Intention to Dispute. I note, however, that on June 17, 1999 the adjuster for Aviva sent Lombard a faxed memo advising Lombard that it was Aviva's "intent, to recover all handling legal fees incurred as it is still our opinion that it is your policy which should be primary".

I am prepared, for the purpose of this decision, to accept that this would constitute sufficient notice for the purposes of section 3(1) of Regulation 283/95. That section states that no insurer may dispute its' obligation to pay benefits unless it gives written notice within ninety days of receipt of a completed application for benefits to every insurer who it claims is required to pay. Clearly, Aviva did not comply with the notice provision. The question then becomes whether

the "saving provisions" as set out in section 3 (2) of Regulation 283/95 apply. That section states:

> An insurer may give notice after the ninety-day period if,
>
> (a) Ninety days was not 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 reasonable investigations necessary to determine if another insurer was liable within the ninety-day period.

The courts have made it clear that very little leeway is to be given when determining whether the saving provisions of section 3 are to apply. The Ontario Court of Appeal in Kingsway General Insurance Company vs. West Wawanosh Insurance Company 58 O.R. (3rd) 251 stated:

> "The Regulation sets out in precise and specific terms a scheme for resolving disputes between insurers. Insurers are entitled to assume and rely upon the requirement for compliance with those provisions. Insurers subject to this Regulation are sophisticated litigants who deal with these disputes on a daily basis. The scheme applies to a specific type of dispute involving a limited number of parties who find themselves regularly involved in disputes with each other. In this context, it seems to me that clarity and certainty of application are of primary concern. Insurers need to make appropriate decisions with respect to

> conducting investigations, establishing reserves and maintaining records. Given this regulatory setting, there is little room for creative interpretations or for carving out judicial exceptions to deal with the equities of particular cases".

In our case it would appear that the reason for delay on the part of Aviva was the uncertainty on their part as to who was going to pay the benefits and that Aviva only decided to pay them in July 1999 and it served its notice within ninety days thereof. They argue that since they were unsure if Lombard was going to pay, there was no reason to serve a notice until it became clear that Lombard was not going to pay the benefits. While I have some sympathy for this position, I do not think that it is a total answer for Aviva. Even if this were sufficient reason to satisfy the two criteria set out in section 3(2), which I am not sure it is, it is clear that by early February 1999 Lombard had made its position clear that it was not paying. Even if one were to extend the starting period until then, there would still not be compliance with the ninety-day notice provision.

Counsel for Aviva also submitted that because of its actions, Lombard ought not to be able to rely upon the failure by Aviva to put Lombard on notice of its intent to dispute within ninety days of receiving the completed application form. In support of this position it cites the case of Liberty vs. Commerce (unreported decision of Arbitrator Jones, dated July 6, 2001) upheld on appeal by Lissiman, J., (2001 O.J. No. 5479) as well as Lombard Canada Insurance Company vs. Saskatchewan Government Insurance [2002 O.J. No. 4257 (S.C.J.)] With the greatest respect I do not think that these cases apply to this situation. In those cases the situation was such that the insurer that raised the issue of failure to comply with the ninety-day notice provision had

themselves had not complied. If they had complied with the legislation the other insurer would never have had to file a notice of intent to defend. That is not the case here. In our case, I have found that Lombard's actions did not amount to deflection. As such, they did not receive the first application for accident benefits and did not violate the Regulation.

Initiation of Arbitration:

The final issue raised by the parties is whether the application for arbitration was initiated within one year of when the insurer gave notice of its intent to dispute pursuant to section 7 (2) of Regulation 283/95. In light of my findings with regard to the above issues this point is somewhat academic, however, since it was raised by counsel, I will deal with it.

Since the Notice of Intent to Dispute was given on or about June 17, 1999, Aviva would have until June 17, 2000 to initiate the arbitration. It was not until September 6, 2001 that the arbitration was actually commenced. While no special form is required to initiate an arbitration, there are certain basic steps that have to be taken in order to initiate an arbitration. These have been discussed in Gore Mutual vs. Markel [1999] O.J. No. 2688 and also in CGU vs. Canada Life Casualty Life Insurance Company and Liberty Mutual Group (unreported decision of Arbitrator Jones dated February 27, 2000). In addition, while dealing with a loss transfer arbitration rather than a priority dispute, the decision in State Farm Mutual Insurance Company vs. Dominion of Canada General Insurance Company (unreported decision of Arbitrator Jones dated March 2004) also deals with this issue.

In essence, what is required is that there be an agreement to arbitrate and a demand to do so. I have previously stated that the mere serving a Notice of Intent to Dispute is not enough to initiate an arbitration (see: CGU vs. Canada Life Casualty Life Insurance and Liberty Mutual Group, cited above). If that were sufficient then there would be no need for section 7(2) of Regulation 283/95.

In our case, other than the fax of June 17, 1999 and the Notice of Intent to Defend, there was no further notice or reference to an arbitration until September 6, 2001.

This is clearly outside the one-year limit set out in section 7(1) of Regulation 283/95. It could be relieved against if Lombard had received the first completed application. I have found that this was not the case and therefore the arbitration was not commenced within the required time frame.

In light of the above, I find as follows:

1. Aviva received the first completed application for accident benefits.
2. Aviva did not comply with the notice requirements of section 3 of Regulation 283/95 or the one-year limitation for commencing an arbitration as required by section 7 of Regulation 283/95. As such the arbitration cannot proceed and Aviva is responsible for paying accident benefits to or on behalf of Ms. Asmunt.

In the event that the parties cannot agree on the issue of costs I may be spoken to.

Dated this _____ day of September, 2004.

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M. Guy Jones
Arbitrator