

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990, c. I. 8, and REGULATION 283/95

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

AND IN THE MATTER of an Arbitration between:

ALLIANZ INSURANCE COMPANY OF CANADA

Applicant

- and -

DOMINION OF CANADA GENERAL INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Mark K. Donaldson for the applicant

D'Arcy McGoey for the respondent

ISSUE:

1. Did Allianz give notice of intention to dispute within the time frame required by section 3 of Regulation 283/95, and if not, do the saving provisions apply?

ORDER:

1. Allianz did not give notice within the required time frame, and the saving provisions do not apply.

HEARING:

The arbitration was held in the city of Toronto, in the province of Ontario on January 19, 2006, before me, M. Guy Jones, arbitrator. No voce evidence was called and the hearing proceeded on the basis of documents filed.

FACTS AND ANALYSIS:

TThis priority dispute arises out of an accident which occurred on September 15, 2001. On that date Mr. Albert Moore was a passenger in a motor vehicle owned by Mr. Jeffrey Taylor, driven by Mimi Lenox,

and insured by the respondent, Dominion of Canada General Insurance Company ("Dominion"). Mr. Moore was injured in the accident and he subsequently submitted an application for accident benefits to Allianz Insurance Company of Canada ("Allianz"). Allianz is involved as: (i) it insured the grandfather of the claimant, upon whom the claimant may have been primarily dependent at the time of the accident, and (ii) insured the other motor vehicle involved in the accident.

Under the cover of a letter dated January 3, 2002, the claimant submitted an application for accident benefits to Allianz. On May 9, 2002 Allianz forwarded a notice of intention to dispute to Dominion. Dominion takes the position that Allianz cannot pursue the arbitration as it did not provide the notice of intent to dispute within 90 days of receiving the completed application for accident benefits as required by section 3 (1) of Regulation 283/95. In response, Allianz raised two defences:

- (1) they did serve the notice within 90 days of receiving the first completed application;
- (2) if not, the saving the provisions of section 3(2) of Regulation 283/95 should apply.

I will deal with each submission separately.

WHEN WAS THE FIRST COMPLETED APPLICATION RECEIVED BY ALLIANZ?

While acknowledging that it received an application for accident benefits from the claimant, on or about January 7, 2002, Allianz takes the position that the application was incomplete and that it was not until on or about February 14, 2002 or later that it received requiring information such that the application could be considered a completed application as referred to in section 3 (1) of Regulation 283/95.

A brief review of the facts is necessary in order to determine if the application received on January 7, 2002 should be considered complete at that time.

After receiving the application for accident benefits on January 7, 2002, Allianz on January 9, 2002 sent Mr. Moore's representative an OCF-9/59, Form 1, in which they stated:

We are unable to process your application for the following reasons;
Part 4 of the OCF-1 (Application for Accident Benefits) is incomplete, part II of OCF-1 is not dated and we need additional information to assist in determining your entitlement to benefits as per section 33 of the Statutory Accident Benefits Schedule.
A field adjuster will be in touch with you to obtain further information.

On January 9, 2002, an Allianz independent adjuster spoke with Mr. Moore's solicitor and sent an 8-page statutory declaration form to him, requesting that it be completed and returned to Allianz.

On January 23, 2002, a signed statement was obtained from James Sutherland, the grandfather of the claimant and on the following day it was forwarded to Allianz. On February 14, 2002, the claimant's solicitor forwarded to Allianz a medical brief and an application for accident benefits.

On March 6, 2002, the claimant's solicitor forwarded the employer's confirmation of income and activities of normal life form and on March 7, 2002 forwarded a 2-page statutory declaration signed by Mr. Moore.

While there was some confusion as to which application for accident benefits was received when, with what information, I am of the view that the application received on January 7, 2002 was complete with the exception of a date on the bottom of the form. Arbitrators and judges have consistently held that the application for accident benefits is not restricted to a particular form, nor must each box in a form necessarily be filled in. Each case must be determined on its particular set of facts. The application should provide sufficient particulars to reasonably assist the insurer to process the application and claim fairly and expeditiously. It may include information in a covering letter or document. The application, in order to be completed, need not necessarily include supporting medical or employment data (see *London Lopez vs. Canadian General Insurance*) [1977] O.I.C. D No. 3; and *H'ng vs. Allstate Insurance Company*, [1977] O.I.C. D No. 34.

The application received on January 7, 2002 was missing the date on which it was completed, on page 7 of the form. I find that this was not fatal to the application. It was, at best, an administrative detail, and not required information for the insurer to respond to the application for accident benefits. One must remember that the objective in these situations is to get the benefits to the injured party as quickly as possible, without being delayed by minor technicalities. Any further information that Allianz needed in this particular case went more to the administration of the claim rather than being necessary to constitute a completed form. Accordingly I find that the completed application was received on January 7, 2002. As such, the 90-day period expired on April 9, 2002. As the notice of intention to dispute was not forwarded to Dominion until May 9, 2002 we must now turn to the issue of whether the "saving provisions" of section 3 (2) of Regulation 283/95 should be invoked in this case.

SHOULD THE 90-DAY NOTICE PERIOD BE EXTENDED PURSUANT TO SECTION 3(2) OF REGULATION 283/95?

In order to extend the time for notice, Allianz must show that it falls within the required criteria set out in section 3 (2) of Regulation 283/95, which states:

- 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 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.

In order to make a determination with regard to the 2-part test, it is necessary to look at what happened in this matter. As noted above, the application for accident benefits was received on January 7, 2002 along with a letter from the claimant's legal representatives, Lerner & Associates, dated January 3, 2002. Part 4 of the application indicates the applicant had no policy of his own, there is no policy that lists him as a driver but there is a policy of insurance for a person upon whom he is a dependent. The form then lists James Sutherland as the policy holder upon whom the claimant was dependent. Mr. Sutherland is the grandfather of the claimant. The application was properly filled out.

Allianz then hired UAB, an independent adjusting firm, to obtain a signed statement from the named insured, James Sutherland. UAB was instructed to cover the priority issues as the claimant was not in the Sutherland vehicle at the time of the accident. The UAB adjuster, on January 9, 2002 wrote the claimant's legal representative enclosing an eight page form to be filled in as a statutory declaration by the claimant, pursuant to section 33 of the statutory accident benefits schedule. It is worth noting that the

form does not ask questions regarding the driver of the car in which the claimant was situated in, other than asking the names and addresses of all passengers and where they were seated at the time of the accident. On the other hand, it asks for further information regarding the other driver, including the year, make and model of the other car. Notably it does not ask for the insurance particulars of the vehicle in which the claimant was an occupant.

On January 23, 2002 the UAB adjuster obtained a signed statement from the claimant's grandfather, James Sutherland. His statement indicates that the claimant, Albert Moore, was not a dependent of Mr. Sutherland. His statement was forwarded to Allianz on January 24, 2002. The UAB adjuster, in the covering letter to Allianz states:

In light of the foregoing based upon the information provided by Mr. and Mrs. Sutherland it is clear that the claimant, Albert Moore, would not fall within the definition of "insured person" as defined in section 2 of the Statutory Accident Benefit Schedule.

The UAB adjuster then closed his file, having completed the assignment.

On March 7, 2002, the claimant's legal representative sent to Allianz a 2 page statutory declaration. It was not in the form sent by Allianz, but it did state clearly that the claimant was in the Taylor motor vehicle, and not in the other motor vehicle. It is to be remembered that the Taylor motor vehicle was subsequently found to be insured by Primmum, and the Lennox vehicle by Allianz. Thus, if the claimant was not a dependent of his grandfather, as Allianz was being advised by its agent, UAB, on January 24, 2002, then it would obviously be important to know who insured the Taylor vehicle as it would be the next in line in priority.

While there were some other documents exchanged during the applicable time frame, they do not seem to add a great deal to the picture, other than noting that the claimant's legal representative wrote letters to Trafalgar Insurance Company, as the insurer of the grandfather, Mr. Sutherland, as well as Allianz, as the insurer of the other motor vehicle involved in the collision. As Trafalgar is owned by Allianz, and the file was handled by one adjuster, this may have complicated matters slightly but did not materially alter the situation.

After examining the relevant documents, it is worth reviewing the Allianz adjuster's file notes to determine what else was known and done during the time in question.

On January 23, 2002, there was note in the adjuster's file that there was injury to "operator # 2 — son — attend Moore". The note goes on to indicate the "son was a passenger in a vehicle... owned by Jeffrey Taylor on police report - - vehicle # 1."

On January 18, 2002, the adjuster's notes state:

With reference to UAB, they have been assigned to complete tasks with the rep. and James Sutherland. I have contacted the adjuster handling the case to make sure that we obtain info. regarding criminal charges priority re: dep/financially for care, copy of police report if available and info. regarding vehicle in which c2 (the claimant)

was a passenger in, insurer, and Pol. #.

Thus, it is clear that by January 18, 2002, if not before, Allianz was alert to the issue of priority as it related to the vehicle in which the claimant was an occupant and wanted to find out the insurance particulars regarding that motor vehicle.

The next note to file of any significance to our issue is dated May 18, 2002 and states:

Reviewed the UAB report dated January 24, 2002 re: the dependency issue...Albert Moore was not primarily dependent on his mother, who is listed on this policy... and therefore would proceed to the vehicle he was not in at the time of the accident which I believe to be Dominion of Canada...and the dispute between insurers will be filed . . .

There is no indication in the documents before me as to how Allianz became aware that Dominion insured the Taylor vehicle.

Allianz takes the position that it conducted an adequate investigation, which included a signed statement from the grandfather and requested a statutory declaration in certain form, which was not filled out by the claimant's solicitor. I have already noted that the statutory declaration form sent by Allianz did not request insurance particulars of the car in which the claimant was an occupant. I also note that in the statutory declaration provided by the claimant through his solicitor it made it very clear that the claimant was an occupant of the Taylor vehicle.

While no insurance particulars are provided, there is no evidence before me that the claimant's solicitor was being uncooperative and there is no indication that Allianz made any efforts to contact the lawyer after that date to obtain any insurance particulars.

There is some suggestion that Allianz may have been misled as to the existence of any insurance on the Taylor vehicle by the police report, a partial copy of which was filed as an exhibit. The report, which shows only the top two thirds of the front page, indicates that Jeffrey Taylor was the owner of vehicle # 1 and that it was uninsured. In addition, the investigating officer's notes indicate that the claimant was the driver of vehicle # 2 which is clearly incorrect. In addition, the officer's notes indicate that Jeffrey Taylor claimed that his vehicle had been stolen, which also turned out to be incorrect.

If Allianz relied on this apparent misinformation, it might be entitled to an extension of the 90-day notice period. However, it would appear that it did not receive the investigating officer's notes until October 9, 2002, well after the 90-day period. With regard to the police report, it is unclear when this was received. The claimant's solicitor's letter of December 28, 2001 states "We attach a copy of the police report" but it is not clear if it was in fact attached. The adjuster's notes of January 2, 2002 state: "Son was a passenger in a vehicle . . . owned by Jeffrey Taylor on police report". On the other hand, the adjuster's note of October 18, 2002 state "obtain info. regarding criminal charges, priority re: depen/financially for care, copy of police report, if available". This obviously suggests that the police report was not in the file.

I note that nowhere in the documents filed is there any reference to the Taylor vehicle being uninsured and therefore there being no point on following up on the potential source of insurance. There is no

evidence that Allianz relied on the police report to its detriment.

I am very cognizant of the fact that adjusters are extremely busy individuals handling many complex and difficult files. This must be taken into account when considering whether the notice period should be extended. In this case, there was adequate time within the notice period to make a determination that another insurer was liable. While some investigation of the dependency issue was conducted, very little was done with regard to the other potential source of insurance - the insurers of the motor vehicle in which the claimant was an occupant. In my view, the applicant is unable to satisfy the requirements of section 3 (2) (a) or (b) and accordingly the time for service of the Notice of Intent to Dispute is not extended and the arbitration cannot proceed.

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

Dated this ___ day of March, 2006 in the City of Toronto, Province of Ontario.

M. Guy Jones
Arbitrator