

**IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.1.8, as amended
AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c.17, as amended
AND IN THE MATTER OF an Arbitration**

B E T W E E N:

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
AS REPRESENTED BY THE MINISTER OF FINANCE**

Applicant

- and -

KINGSWAY GENERAL INSURANCE COMPANY

Respondent

AWARD

Scott W. Densem – Arbitrator

Heard: September 24 and 30, 2010

Counsel: John Friendly and Stephen Raphael for HMQ (MVACF) – Applicant

Mark Wilson for Jevco (Kingsway)

Heard: September 24, 2010, and September 30, 2010

Introduction

The parties appointed me pursuant to the *Arbitration Act, 1991*, and Regulation 283/95 of the *Insurance Act*, to arbitrate a dispute as to which of the applicant and the respondent have the higher priority obligation to pay Statutory Accident Benefits to Katarzyna Jendrzczak.

The arbitration was conducted pursuant to the terms of a written arbitration agreement signed by the applicant and the respondent on September 24, 2010. The arbitration was also conducted pursuant to a November 19, 2009 letter from Densem ADR Solutions Inc. to counsel for the parties.

Factual Background to the Issues

Katarzyna Jendrzejczak was involved in an accident as a pedestrian on November 5, 2008. She was struck by an uninsured automobile operated by Osra Mojadiddi. She applied to MVACF for Statutory Accident Benefits (SABS). MVACF has paid SABS to Ms. Jendrzejczak of approximately \$91,542.67 (this amount includes adjusting expenses). MVACF served Jevco with a Notice of Dispute Between Insurers seeking to recover the SABS payments, *et cetera*, from Jevco. It is acknowledged by Jevco that at all material times Ms. Jendrzejczak was the estranged spouse of a Jevco insured, therefore still an "insured person" under the Jevco policy.

The Issues

The issues as stated in the arbitration agreement can be paraphrased as, which of MVACF or Jevco has ultimate responsibility to pay SABS to Ms. Jendrzejczak? If it is Jevco, what amount is Jevco required to reimburse MVACF? The arbitration hearing conducted September 24, and 30, 2010, dealt with only the first issue. Should it be necessary, the parties will have the opportunity to introduce evidence and make submissions regarding the second issue.

The determination of the first issue depends on my findings with respect to the evidence relevant to Regulation 283/95, sections 3(1) and (2). Section 3 (1) requires an insurer who wishes to dispute its obligation to pay SABS to give

written notice within 90 days of its receipt of a completed application for accident benefits to every insurer it claims is required to pay. Section 3 (2) allows the written notice to be given after 90 days if the disputing insurer can establish that 90 days was not a sufficient time to determine that another insurer(s) is liable to pay SABS, and, the disputing insurer proves that it made the reasonable investigations necessary to make this determination within the 90 day period.

To determine when the 90 day limitation commences, the question that must be answered is, when did MVACF receive a “completed” SABS application?

It should be noted that the *Insurance Act* was amended in respect of accidents occurring on or after September 1, 2010 to expressly stipulate both that MVACF is not an insurer for the purposes of Regulation 283/95, and that it is not required to comply with the 90 day requirements of sections 3 (1) and (2). Since we are dealing with a November 5, 2008 accident, the law to be applied to the issue to be decided in this case pre-dates the amendments to the *Insurance Act* in respect of accidents occurring on or after September 1, 2010. Prior to September 1, 2010, according to the case law MVACF was considered to be an insurer for the purposes of Regulation 283/95, and therefore had to comply with the requirements of sections 3 (1) and (2).¹

The Positions of the Parties

The position of MVACF is that it complied with the 90 day notice requirement in the service of its Notice of Dispute Between Insurers and hence is entitled to reimbursement from Jevco for SABS paid.

¹ Allstate Insurance Company of Canada v. MVACF (2007), 84 O.R. (3d) 401 (CA)

MVACF submits that Jendzejczak's SABS application was incomplete for the purposes of starting the 90 day limitation period in Regulation 283/95, section 3 (1) when that application was received by MVACF December 8, 2008. Therefore, it argues, the limitation period could not commence until the application was "complete", which, it submits, did not occur until January 20, 2009 at the earliest. MVACF further submits in the alternative that the application was not complete until February 6, 2009, when it received Jendzejczak's Statutory Declaration (Priority Questionnaire) containing the information it needed to determine whether Ms. Jendzejczak's estranged spouse, Janus Jendzejczak, had insurance.

MVACF submits that since it served its Notice of Dispute Between Insurers on Jevco on April 14, 2009, it was within time if either the January 20, 2009 or February 6, 2009 dates started the 90 limitation period. Jevco does not dispute MVACF's position on the service of the Notice of Dispute so the critical issue is when did the 90 day limitation period commence?

The first application deficiency cited by MVACF is found in part 10, page 7. It requires the claimant to provide details of any disability plan income, Employment Insurance Benefits, or Social Insurance Benefits (welfare).

The second deficiency cited by MVACF is that page 8 was missing from the application. This page requires the claimant's signature. It is intended to authorize the collection and use of personal information about the claimant. The described uses range from the adjustment of the SABS claim to the compilation

of statistics for the purposes of facilitating more efficient operation of the automobile insurance system.

The third deficiency cited by MVACF is that the Police Motor Vehicle Accident Report was missing when the application was received on December 8, 2008.

MVACF submits that these deficiencies were not corrected until its adjusters received the properly completed and missing pages, and the police report, on January 20, 2009.

MVACF is placing the greatest reliance on the missing police report for its "incomplete" argument. It stresses that the OCF-1 Application for Accident Benefits Form, mandated by Regulation, stipulates in Part 11 that the application must include a police report before the applicant can apply to MVACF for SABS.

Jevco's position is that the police report was received by MVACF as part of the enclosures of the December 2, 2008 letter sent by Jendrzyszczak's representative and received by MVACF on December 8, 2008. It submits that if a police report was required, the application was complete by December 8, 2008, and the 90 limitation period would have expired March 8, 2008, long before MVACF's Notice of Dispute Between Insurers was served.

Jevco submits that even if the police report was not received by MVACF until January 20, 2009, MVACF had a "functionally adequate" application on December 8, 2008, sufficient to allow it to make reasonable investigation of any relevant facts concerning whether there might be an insurer with higher priority to pay SABS.

MVACF submits that if it did not serve its Notice of Dispute Between Insurers within the required 90 day limitation period, it is protected by Regulation 283/95, section 3 (2), in that 90 days was not a sufficient period of time to make a determination that Jevco was liable, and that it made the reasonable investigations necessary within 90 days to make that determination.

Jevco disputes MVACF's submissions on section 3 (2) and argues that MVACF has not proven that it is entitled to relief under section 3 (2) in the event that it is found MVACF did not comply with the 90 day limitation period.

Evidence and Analysis:

The following exhibits were introduced into evidence at the arbitration hearing :

- Exhibit 1: Productions of the Applicant (19 tabs)
- Exhibit 2: Supplementary Productions of the Applicant (5 tabs)
- Exhibit 3: February 3, 2009 Letter from Ipacs Law Office (Mary Meropoulous) and enclosed Statutory Declaration of Katarzyna Jendrzyczak, dated January 15, 2009.
- Exhibit 4: MVACF computer log notes authored by Lori Gillespie (4 pages, various dates).
- Exhibit 5: February 13, 2009 e-mail from Marva Herriot-Stewart to Lori Gillespie and attached update status report dated February 13, 2009.

Exhibit 6: May 13, 2010 Letter from Ipacs Law Office (Mary Meropoulos) to Mark Wilson, and attached Police Motor Vehicle Accident Report (1 page).

Exhibit 7: November 25, 2008 Peel Regional Police Letter and attached Police Motor Vehicle Accident Report (1 page).

In addition to the documentary evidence listed above, *viva voce* evidence was received from three witnesses, Lori Gillespie, Mary Meropoulos, and Lorie Cesario (nee Abballe).

I find that the documentary and *viva voce* evidence establishes that the following events occurred on the dates indicated:

November 5, 2008: Pedestrian-motor vehicle accident (Exhibit 7).

December 2, 2008: Katarzyna Jendzejczak's representative Mary Meropoulos of Ipacs Law Office, sends an OCF-1 SABS application to MVACF *via* December 2, 2008 letter (Exhibit 1, tab 1).

December 8, 2008: December 2, 2008 letter received by MVACF. Claim assigned by Tina Werner to Lori Gillespie. There is a dispute between the parties as to whether MVACF received with this letter the Motor Vehicle Accident Report (Police Report), identified in the letter as enclosure 5 (Exhibit 2, tab 1, Exhibit 2, tab 2).

- December 10, 2008: MVACF (Lori Gillespie) letter to Ipacs Law Office acknowledging receipt of Jendrzejjczak's application for SABS and advising that handling of the claim would be assigned to ClaimsPro Inc (Exhibit 1, tab 3).
- December 10, 2008: MVACF (Lori Gillespie) letter to Lilya Kogut (CGI Adjusters²) assigning Jendrzejjczak's SABS claim for adjusting (Exhibit 1, tab 4).
- December 12, 2008: Kogut assigns the Jendrzejjczak claim to Marva Herriot-Stewart, an SCM/ClaimsPro examiner in the MVACF unit (Exhibit 1, tab 4).
- December 12, 2008: Jendrzejjczak claim assigned by Marva Herriot-Stewart to Lorie Cesario (nee Abballe), a non-MVACF unit SCM/ClaimsPro adjuster. Cesario had stopped working in December before seeing the assignment because of her pending marriage that took place on December 12, 2008 (Evidence in Chief of Lorie Cesario).
- December 17, 2008: Herriot-Stewart fax to Lori Gillespie acknowledging receipt of the Jendrzejjczak claim and confirming that it would be handled accordingly (Exhibit 1, tab 5).

² MVACF confirmed at the hearing that CGI was purchased by SCM/ClaimsPro. SCM/ClaimsPro had a dedicated MVACF unit headed by Lilya Kogut. Marva Herriot-Stewart, to whom the Jendrzejjczak claim was assigned by Kogut, was part of the SCM/ClaimsPro MVACF unit. Herriot-Stewart assigned the claim to Lorie Cesario (nee Abballe), an SCM/ClaimsPro adjuster, not part of the dedicated MVACF unit. Nothing turns on this for the purposes of the issue being decided here as MVACF concedes all persons noted who handled the claim were agents for MVACF. This may be relevant to quantum in so far as recovery of adjusting expenses is concerned.

January 4, 2009: Lorie Cesario returns to work (Evidence in Chief of Lorie Cesario).

January 12, 2009: Letter from Lorie Cesario to Jendrzejczak, copied to Ipacs Law Office (Mary Meropolous), following a Cesario/Meropoulos phone conversation of the same date. The letter notes deficiencies in Jendrzejczak's SABS application, including an incomplete page 7, her missing signature on page 8, and the lack of a Police Report. The letter also encloses a "Priority Questionnaire" for completion and signature by Jendrzejczak (Exhibit 1, tab 6, Exhibit 1, tab 12, Evidence in Chief and Cross Examination of Lorie Cesario).

January 15, 2009: Jendrzejczak's representative, Mary Meropoulos, advises Lorie Cesario in a telephone conversation that she will fax page 8 of the SABS application, she will indicate on page 7 that the claimant is receiving social assistance, and that the Statutory Declaration will follow (this is what Ms. Cesario refers to as the Priority Questionnaire) (Exhibit 1, tab 12).

January 15, 2009: Letter from Ipacs Law Office (indicating fax transmission as well as regular mail) to Cesario enclosing a completed page 7, and a signed page 8

of Jendzejczak's SABS application. The letter also states that the Police Motor Vehicle Accident Report is enclosed (Exhibit 1, tab 7).

January 20, 2009: Date stamp confirms that regular mail copy of the above-noted January 15, 2009 letter is received by SCM Adjusters (Exhibit 1, tab 7).

February 2, 2009 Jendzejczak's representative, Mary Meropoulos, advises Lorie Cesario in a telephone conversation that she will return the completed priority questionnaire to Cesario by fax (Exhibit 1, tab 12).

February 3, 2009: Letter from Ipacs Law Office (indicating fax transmission as well as regular mail) to Cesario enclosing, *inter alia*, completed Statutory Declaration (Priority Questionnaire). This document contains the full name, date of birth, and address for Jendzejczak's estranged spouse, Janush Jendzejczak (Exhibit 3).

February 6, 2009: Date stamp confirms that regular mail copy of the above-noted February 3, 2009 letter is received by SCM Adjusters (Exhibit 3).

April 14, 2009: Lorie Cesario makes the following notes to the file: (12:01 p.m.) The Statutory Declaration (priority questionnaire) had been received from Ipacs Law

office on February 6, 2009. (12:02 p.m.) She asks Herriot-Stewart to inquire of MVACF whether MVACF could obtain Janush Jendrzeczak's driver's licence information to see if he had automobile insurance at the time of Katarzyna Jendrzeczak's accident. (12:26 p.m.) His driver's licence information is obtained and communicated to Cesario by Herriot-Stewart. (12:31 p.m.) Cesario completes an Autoplus search on Janush Jendrzeczak and confirms that at the time of the accident he had automobile insurance with Jevco.

April 14, 2009: Cesario makes a note to the file at 7:57 p.m. that a Notice of Dispute Between Insurers was sent to Jevco *via* fax and by Insurance Courier Service.

I will deal first with the dispute as to whether MVACF received the police report from Ipacs Law Office with the Ipacs Law office December 2, 2008 letter. The resolution of this issue is entirely dependent upon making findings of fact and inferences from the documentary and *viva voce* evidence.

Lori Gillespie testified on behalf of MVACF. In examination in chief she said that mail received by MVACF is first handled in the mail room. It is sent to clerical operations where it is opened, date stamped, and logged into the system. No note is made by the mail room of exactly what documents are received with a particular mailing. The mail is then sent to data support who conduct a cursory review and then send it to the "team leads" for assignment (in this case Tina

Werner assigned the file to Lori Gillespie). No note is made by data support or by the team leads of exactly what documents are received. After the assignment is made, the mail goes back to data support, then to clerical operations again where it is put in a file folder and given a number for tracking. The mail is then given to the assigned handler, who in this case was Ms. Gillespie.

Ms. Gillespie testified that she reviewed what had been received from Ipacs Law Office under cover of their December 2, 2008 letter. She said that she did not find a police report amongst the enclosures although the December 2, 2008 letter indicated that it had been enclosed and the SABS application showed a check mark in Part 11 indicating that it was enclosed as part of the application.

In this case, as was her usual practice, she kept the original documents and made photocopies to send to Liliya Kogut at SCM/ClaimsPro. She would have to remove any staples in the documents to photocopy them. She did not recall whether she had to do so with respect to the December 2, 2008 mailing from Ipacs Law Office.

She was asked by counsel for MVACF whether the police report could have been misplaced by her or someone else at MVACF. She answered that this was "possible", but she did not think it had happened.

Counsel for MVACF asked Ms. Gillespie why if the police report was missing and not enclosed with the December 2, 2008 letter from Ipacs Law Office that she would not have mentioned this in her December 10, 2008 letter to Liliya Kogut assigning the claim to SCM/ClaimsPro? She responded that a missing

police report *"is really quite standard"* and she expected that SCM/ClaimsPro would follow up on it.

Under cross examination by counsel for Jevco, Ms. Gillespie acknowledged that the original documents from her file show the marks of four staple holes, or in other words, having had two staples in them at some point in time. She agreed that the letter could have been stapled, and the enclosures stapled separately to the letter. She also agreed that the staples had been removed and that she probably would have done it, although she did not recall. At that time she was receiving an average of two applications per week.

The envelope containing what was received from Ipacs Law Office would have been discarded in the mail room. If there was anything still in the envelope at that time it would be gone. The mail room would either clip together or use elastics to group documents removed from envelopes.

She confirmed to counsel for Jevco that there were "five sets of hands" on the documents before she received them. On cross examination she described this sequence as the mailroom, data support, Tina Werner, data support, and the mailroom again.

Ms. Gillespie admitted that she did not check to see if all six enclosures itemized in the December 8, 2008 letter from Ipacs Law Office were present when she reviewed the mailing. She repeated her evidence in chief that it was *"so standard not to have a police report that I did not concern myself with it"*. She repeated as well that she did not have a particular reason for not pointing out to Ipacs Law Office in her December 8, 2008 letter that the police report was not

enclosed with their December 2, 2008 letter other than relying on her assigned adjuster to deal with it. *"I must have known in my mind that the police report was missing when I sent the file to SCM."* Ms. Gillespie acknowledged that it would standard procedure to look for a police report because having one is important to MVACF, *"but I don't recall if I looked for it on this file"*.

She admitted that to her knowledge the first mention anyone on MVACF's behalf made of the missing police report to Ipacs Law Office was the January 12, 2009 letter (Exhibit 1, tab 6) from Lorie Cesario to Ipacs Law Office.

Mary Meropoulos, Ms. Jendrzejczak's representative, testified on behalf of Jevco. On examination in chief, she identified her signature on the December 2, 2008 letter to MVACF (Exhibit 1, tab 1). She confirmed that she had completed the OCF-1 SABS application on behalf of her client, with the exception of the signature portion.

Ms. Meropoulos stated that the application was made to MVACF because her client had been struck by a vehicle that, according the police report, was uninsured, and she knew that Ms. Jendrzejczak did not own a vehicle. Ms. Meropoulos did not know the insurance status of Ms. Jendrzejczak's estranged husband at the time the application was made. She thought that could be sorted out later, if necessary. In the meantime, her client needed SABS.

She described the process whereby correspondence authored by her would be prepared and mailed. This procedure applied to the December 8, 2008 letter. She dictated the letter. Her assistant, Madga Rutkowska, typed the letter. Ms. Rutkowska had been employed by Ipacs Law office for some time and was

familiar with the system. Generally Ms. Meropoulos would have correspondence and enclosures sent both by facsimile and regular mail. In the case of the December 2, 2008 letter, it was sent by regular mail only because, "*I just wanted to get it out*". Ms. Rutkowska presented the completed letter and enclosures to Ms. Meropolous for review and approval. Ms. Meropoulos stated that she would "generally" review the enclosures to a letter. In this case when asked whether the six enclosures (this would include the police accident report) identified on the letter were presented to her by Ms. Rutkowska with the completed letter for review, and then sent with the letter, she answered, "*to the best of my knowledge, yes*".

A little later in her evidence in chief she stated, "*traditionally I try to look and see that all enclosures are there, but it happens sometimes that enclosures are not enclosed. In this case, I thought they were there.*"

Under cross examination by counsel for MVACF, Ms. Meropoulos indicated that the time around December, 2008, "*was always busy.*" She acknowledged that this case was not the only time there had been a question about enclosures missing from letters.

She was asked about the omitted information on p. 7 of the application and the missing signature on p. 8. She recalls later completing p. 7 with the appropriate check marks. With respect to p. 8, the signed version sent by Ipacs Law Office to MVACF with the January 15, 2008 letter is dated December 2, 2008. Ms. Meropoulos said that Ms. Jendrzejczak signed it while in hospital. Ms. Meropoulos may have met with Ms. Jendrzejczak to do this or it could have been

one of her clerks. Ms. Meropoulos said that the signed version of p. 8 *“could have been in their file but not originally sent out”*.

She was referred to Exhibit 7, the November 25, 2008 letter to Ipacs Law Office from Peel Regional Police enclosing the 1 page police report. The letter bears an Ipacs Law Office date stamp of December 1, 2008. This supported her belief that the police report was enclosed to MVACF with her December 2, 2008 letter because Exhibit 7 confirms that she had the police report the day before.

Ms. Meropoulos was asked about her contacts with MVACF or its adjusters. She had no contact with anyone at MVACF directly. She recalled speaking only with Lorie Cesario by telephone, but her recollection was not very good as to when or how many conversations she had with Ms. Cesario. She recalled one “contact” with Ms. Cesario dealing with missing parts to the SABS application. She did not question Ms. Cesario about this, or try to determine who was mistaken about the sending or receiving of the enclosures. Her only concern was to make sure that Ms. Cesario got them so that her client’s SABS application would be dealt with. She said, *“I’ll get that out to you”*, and sent the police report *“again”*.

Ms. Meropoulos could not recall whether this contact took place before or after she received Ms. Cesario’s January 12, 2009 letter (Exhibit 1, tab 6).

Lorie Cesario (nee Abballe) testified on behalf of MVACF. With respect to the police report issue she stated that sometimes she would receive a “short form” police report which would provide information only with respect to the date of the accident and the drivers involved. A “full” police report was required by

MVACF. This usually provided additional information such as a diagram of the accident scene, details of charges, details of passengers in vehicles, and (sometimes) details of witnesses.

She testified that as far as she was concerned she did not receive the "full" police report until she received the Ipacs Law Office January 15, 2009 letter. That letter was received January 20, 2009, according to the date stamp (Exhibit 1, tab 7). She was referred to Exhibit 2, tab 3. This is a fax cover sheet, a copy of the Ipacs Law Office January 15, 2009 letter, and a copy of page 7 of the SABS application that had been completed (with check marks inserted that were missing on the copy in the application sent with the Ipacs Law Office December 2, 2008 letter). It is notable that missing from Exhibit 2, tab 3 is page 8 of the SABS application, and the police report, both of which are referred to as having been enclosed. Ms. Cesario acknowledged however, that these documents were received on January 20, 2009 with the mailed copy of the January 15, 2009 letter.

On cross examination Ms. Cesario stated that she first reviewed the Jendzejczak file assignment on January 12, 2009. Although she returned to work around January 4, 2009, it took her about a week to get to the Jendzejczak claim. She explained, "*I had a lot of work when I came back. I had a big file load, 90 to 100 files which are 40% MVACF, and I'm on the road too.*" She was clear that she did not find any type of police report attached to or inside the "*folder with an elastic around it*" that constituted the file. She said that before she received

the file, at least one copy of it would have been made from the file received from Lori Gillespie at MVACF by either Lilya Kogut, or Marva Herriot-Stewart.

She testified that she first reviewed the file on January 12, 2009. She telephoned Mary Meropoulous, Jendrzeczak's representative, the same day. This is confirmed by her computer log notes (Exhibit 1, tab 12). In examination in chief she stated that she could not recall whether she had any discussion with Mary Meropoulos about missing information or forgotten enclosures when they spoke on January 12, 2009. Ms. Cesario's computer notes regarding her conversation with Ms. Meropoulos on January 12, 2009 do not indicate any reference to either of them mentioning incomplete aspects of the SABS application. There is no mention of a discussion concerning a missing police report (Exhibit 1, tab 12, January 12, 2009, 7:32 p.m. note).

Ms. Cesario's notes indicate that after conversation with Ms. Meropoulos she conducted a detailed file review. In the "disposition" part of her 7:56 p.m. note she writes, "*Obtain p/r, notes, and statements*".

At 8:37 p.m. Ms. Cesario made further notes concerning her file review summarizing the contents of a letter she had drafted addressed Ms. Jendrzeczak, and copied to Ms. Meropoulos (Exhibit 1, tab 6). Her notes and the letter say the same thing about the police report, "*We require a 'complete' police report. Should you have a copy of this report, please provide us with a copy. Please note that MVACF will not accept the Short version of the police report*".

The issue of whether MVACF received the police report with the Ipacs Law Office December 2, 2008 letter is difficult to resolve. The evidence before

me does not facilitate a certain determination. The essence of Ms. Meropoulos' evidence was that she thought she had followed her usual procedure in sending out the December 2, 2008 letter, and *"to the best of my knowledge"* she had enclosed the police report. Understandably however, she could not state with certainty that the police report was enclosed. Ms. Meropoulos testified, *"Traditionally I try to look and see that enclosures are there, but it happens sometimes that they are not enclosed."*

She was anxious to get the application to MVACF, and deviated from her usual procedure of sending letters by both facsimile and mail because *"I just wanted to get it out"*. There were other aspects to the application that were not complete, including the missing signature on page 8, and the incomplete page 7. It is noteworthy to me as well that in responding Ms. Cesario's January 12, 2009 letter, the fax copy of the Ipacs Law office January 15, 2009 letter (Exhibit 2, tab 3) was missing the police report and the signed copy of page 8, even though the letter refers to them being enclosed. The evidence indicates that these documents were enclosed with the mailed copy of the Ipacs Law Office January 15, 2009 letter.

The evidence of Lori Gillespie and Lorie Cesario on this issue does not, in my view, make things any more certain. Ms. Gillespie described what seemed to be an exceedingly complicated procedure from the time mail is received by MVACF to the time the file was in her hands for further assignment. She testified that *"I must have known the police report was missing..."* when she assigned the file to SCM/ClaimsPro. She also said that she could not remember checking for

the police report; but explained that she would not have been concerned about it because it was "*pretty standard*" not to have one, and that her adjusters would deal with it. Based on her evidence, I do not think Ms. Gillespie was sure one way or the other whether there was a police report in the file that she was assigned by Tina Werner, or whether it was in the package she sent to Lilya Kogut at SCM/ClaimsPro.

Lorie Cesario was more certain in her evidence. She (and me, as the arbitrator) has the benefit of the computer log notes she made at the time these events were happening. She testified that she did not see a copy of any type of police report on January 12, 2009 when she reviewed the copy of the file she had received from Marva Herriot-Stewart. Although she did not mention the missing report when she first spoke with Ms. Meropoulos on January 12, 2009, that is probably because, as her notes (Exhibit 1, tab 12) indicate, she did not conduct a complete file review until after that conversation. It is clear from her notes that after she had reviewed the file, she wrote the same day to Ms. Meropoulos addressing the issue of the missing police report.

I accept that Ms. Gillespie, Ms. Meropoulos, and Ms. Cesario were truthful witnesses. I believe they were all trying to do their best to recall events that happened close to two years prior to their arbitration testimony. At the time, all three of them were busy with a high volume of automobile accident claims related work. It does not surprise me that whether a police report did or did not accompany a particular letter for a SABS application would be something that would be difficult to recall with any certainty, or even at all.

I accept Ms. Cesario's evidence that there was no police report in the file that she reviewed on January 12, 2009. This is corroborated by her contemporaneous notes. In my view this leads to two possible conclusions. Either the police report was not enclosed with the Ipacs Law Office December 2, 2008 letter, or that it was enclosed, and somewhere between its receipt in MVACF's mail room and Lorie Cesario receiving the file it was lost or misplaced.

I am of the view that given the uncertainties of the evidence, the only way this issue can be resolved is to resort to an analysis of the legal standard of proof and upon whom the burden of proof rests.

In this case, Jevco has the onus of proving on a balance of probabilities that the Ipacs Law Office December 2, 2008 letter enclosed the police report, and that it was received by MVACF on December 8, 2008. Counsel for Jevco did a very capable job demonstrating the convoluted mail/file handling process employed by MVACF. This raises the possibility for the inference to be drawn that the police report could have been lost between MVACF's receipt of it on December 8, 2009, and Ms. Cesario's receipt of the file. After careful consideration of the evidence, I am unable to draw that inference. I do not believe that such an inference would be sufficiently supported by evidence of complicated mail/file handling alone, when the evidence about whether the police report was enclosed is uncertain. Therefore, a conclusion that the police report was lost would be speculation, and that is insufficient to discharge the burden of proof.

In my view the evidence is insufficient to establish that it was more likely than not the police report was enclosed with the letter and received by MVACF as indicated. Although I find Ms. Meropoulos' evidence to be quite truthful, it is equivocal, and when considered in the context of the rest of the evidence it is not enough to discharge the burden.

The next issue that I must deal with is whether, even if MVACF did not have the police report until January 20, 2009, it nevertheless had a functionally adequate SABS application by December 8, 2008 for the purposes of addressing the insurance priority issue. If so, then the 90 day period for service of the Notice of Dispute Between Insurers would still commence December 8, 2008.

The evidence establishes that MVACF received the Jendrzejczak OCF-1 SABS application by December 8, 2008. On the first page of the application the claimant's name, address, and birth date are provided. The claimant's marital status was noted as "*separated*". It is also noted that the claimant was a pedestrian and was struck by "the third party". On page 4 of the application at the bottom it is noted on behalf of the claimant that, "*the vehicle that struck me did not have insurance*". Form 3, the Motor Vehicle Accident Claims Fund Application for Statutory Accident Benefits was included in the OCF-1. It contained the name of the alleged uninsured driver, make, model, and year of his vehicle, and the plate number of his vehicle.

Page 4 of the OCF-1 stated that Ms. Jendrzejczak was not covered under her estranged spouse's insurance. Obviously this turned out to be incorrect information. Ms. Meropoulos testified that at the time she completed the

application she knew that Ms. Jendrzejczak was separated or even divorced from her spouse, but she did not know his insurance status. She believed the driver who struck Ms. Jendrzejczak was uninsured and she knew her client did not have insurance. She thought there was enough information in the application for further inquiries to be made. She wanted to get the application to MVACF as soon as possible to get her client SABS, and any priority issues could be sorted out later.

It is questionable whether this approach strictly complies with the claimant's investigation requirements of part 11 of the OCF 1, or part 6 of MVACF Form 3, but I find that there was no intention on the part of Ms. Jendrzejczak or her representative, Ms. Meropoulos, to mislead MVACF on this point.

In any case, the evidence shows that MVACF did not accept the spousal insurance information in the OCF 1 at face value and knew proper confirmation of this had to be obtained. MVACF's Lori Gillespie confirmed in her *viva voce* testimony that she was alerted right from the beginning to the need to properly investigate the question of whether Ms. Jendrzejczak might be insured through any policy her estranged spouse might have. Exhibit 1, tab 4 confirms this. In assigning the file to Lilya Kogut of SCM/ClaimsPro, Ms. Gillespie states, "*Do note that the claimant is separated. Maybe we can find insurance with the husband.*"

By December 10, 2008, using the information in the application, MVACF had completed searches on both parties involved in the accident, the claimant, Katarzyna Jendrzejczak, and the driver, Osra Mojadiddi, and satisfied itself that

neither of them had automobile insurance at the time of the accident (Exhibit 1, tab 9). MVACF's Lori Gillespie testified on cross examination that by December 10, 2008, MVACF knew that the only relevant insurance inquiry to be pursued was whether Ms. Jendrzejczak had insurance through her separated spouse. In their testimony both Ms. Gillespie and Ms. Cesario agreed on cross examination that they knew the police report would provide no useful information on Ms. Jendrzejczak's separated spouse or his insurance status. To the extent that it may be relevant to the "complete" application issue, both Ms. Gillespie and Ms. Cesario testified that they also knew the missing information on page 7, part 10, and page 8, would provide no information about the only relevant insurance inquiry – the insurance status of Janus Jendrzejczak, and whether any policy he had covered Katarzyna Jendrzejczak.

MVACF, through Lorie Cesario of SCM/ClaimsPro, began adjusting Ms. Jendrzejczak's claim on January 12, 2009. The only reason this did not happen earlier is that Ms. Cesario got married in December, 2008, and did not get to the assignment until a week after she returned to the office, in January, 2009. The notes of what she discussed in her first conversation with Ms. Meropoulos indicate that there would be no delay in MVACF's handling of the claim in so far as the payment of SABS to Ms. Jendrzejczak was concerned. They also indicate that part of the conversation was directed to getting information about the priority issue as it involved Janus Jendrzejczak.

Ms. Cesario followed up with her January 12, 2009 letter to Ipacs Law Office. In addition to requesting the missing/incomplete information, she sent a

Statutory Declaration (Priority Questionnaire). This was returned, completed, and received by MVACF February 6, 2009. Paragraph 9 on page 2 of the document contained the full name, date of birth, and address of Ms. Jendrzejczak's estranged spouse. Ms. Cesario did not act immediately on this information, but on April 14, 2009, within about a half an hour, the necessary searches were conducted by MVACF using the information and it was determined that at the material time Ms. Jendrzejczak's spouse was insured with Jevco.

I will now address the case law and counsel's submissions on how it should apply to this issue.

MVACF's position is that part 11 of the OCF-1 requires that a claimant must include a completed police report before the applicant can apply to MVACF for SABS. MVACF submits that the rationale of the decisions on the completed application issue is an insurer/MVACF who responds to an application for SABS paying SABS in a timely way ought not to be penalized in the interpretation of when a completed application is received for the purpose of that insurer/MVACF protecting its rights to seek priority against another insurer. Further, MVACF argues that the arbitration and court decisions support the position that a SABS application to MVACF is not "complete" unless it includes a police report.

Jevco argues that the case law establishes that the test for whether an application is "complete" for the purposes of section 3 (1) is whether an insurer has a "functionally adequate" application; one which provides sufficient particulars to reasonably assist the insurer with the processing of the application, and with pursuing its rights to seek priority against another insurer.

In my opinion, the state of the law on this issue is summarized by Justice Perell in *Ontario (Minister of Finance) v. Lombard Insurance Company of Canada*³ (*Ontario v. Lombard*). Though there are differences, in my view this case is the same as the case at bar in respect of the facts upon which the decision is based. It involved a SABS application to MVACF and a “missing” police report. Like this case, the issue for determination was when an OCF 1 application should be considered complete to start the 90 limitation period under 3 (1). As noted by Justice Perell, other cases did not deal with that issue. They were concerned with when something other than an OCF 1 application could trigger the commencement of the 90 limitation period in 3 (1).

After an extensive review of the case law, Justice Perell concludes: “...a *completed application is needed...for the first insurer to exercise its right to dispute its obligation to pay benefits. In this context, a first insurer would be able to exercise its rights if it receives: (1) a genuinely completed application; or (2) an application, which although inaccurate or incomplete in some particulars, is nevertheless functionally adequate (emphasis added).”*

Both parties accept this as an accurate statement of the law to be applied, but disagree as to how it should apply to the facts of this case. In other words, there is a disagreement as to when the OCF 1 application in this case should be deemed “functionally adequate” for the purposes of starting the 90 day limitation period in section 3 (1).

I will say at the outset that if I were not bound to follow Justice Perell’s decision in *Ontario v. Lombard*, I would have accepted Jevco’s submission that

³ 2010, 100 O.R. (3d) 51, Ont. Sup. Ct.

on December 8, 2008, or by December 10, 2008 at the latest, MVACF had a functionally adequate SABS application for the purposes of protecting its priority rights. I say that because in my view, the presence or absence of a the police report is of no relevance in this case to whether the SABS application should be considered “complete” for the purposes of section 3 (1).

The rationale behind the need for a police report is explained in Arbitrator’s Novick’s decision at first instance in *Ontario v. Lombard*. She accepted the submissions of MVACF’s counsel that the date on which MVACF should be deemed to have received a completed application may well be different than the date by which a private insurer should be so deemed. She stated, “...*an insurance company that receives an application will generally have some connection to a person involved in the accident...(and) can call upon its connection with the party involved to confirm that the accident took place, and to provide information that would be useful for a priority investigation. The Fund does not have that benefit or access to that information. It can only rely upon the details of the accident as provided by the claimant. The only evidence available to corroborate basic information such as whether another vehicle was involved, and if so, who insures that vehicle, is the police report.*”⁴

That rationale has no application to this case. Having a police report only matters in cases where the question is whether the persons or vehicle(s) involved in the accident are insured. There is no information in police reports about whether persons not involved in the accident are insured. Specifically, for a case like this where a SABS claimant is struck by an uninsured vehicle there is

⁴ *Ontario v. Lombard*, Arbitrator Novick, October, 2009, at p. 11.

no information in police reports to assist with the question of whether she may have insurance through an estranged spouse.

In this case, the information MVACF required to conduct a search that would provide the answer to the insurance question was the full name and date of birth of Ms. Jendrzeczak's estranged spouse. Although his address might have been helpful, it was not necessary to get the answer. MVACF knew from the beginning that this was the information required to do an insurance search.

It is clear from the evidence, and the MVACF witnesses admit, that none of the police report, the missing information on page 7, and the missing signature on page 8, was necessary for this inquiry. Therefore, but for *Ontario v. Lombard*, I would have concluded that by December 8, 2008, or by December 10, 2008 at the latest, MVACF had a functionally adequate SABS application with respect to being able to protect its priority rights.

I will discuss now why I feel I am bound by the result in *Ontario v. Lombard* to conclude that the Jendrzeczak SABS application was not functionally complete until February 6, 2009, when MVACF received the name, date of birth, and address of Ms. Jendrzeczak's estranged spouse.

In *Ontario v. Lombard*, false information was provided by the claimant in his OCF 1 that he had been struck by a vehicle while riding his bicycle on Dufferin Street on October 26, 2007. No identification information for the driver or his vehicle was provided. The police report was not attached but was indicated as having been ordered. There was no information provided about the investigating officer. Without a police report or information from the claimant

about the driver's identity or vehicle details, MVACF had no way of checking on the insurance status of the driver. This was the only relevant insurance inquiry to be made in that case for the purposes of priority.

On February 11, 2008, MVACF's adjusters received a copy of a police "incident" report. This was not a motor vehicle accident report. It provided information that the claimant had attended 14 Division on July 7, 2007, advising that he had been involved in an "incident" involving his bicycle and a "motor vehicle" at the Galleria Mall on June 30, 2007. The incident report contained no information about the driver or the vehicle alleged to have been involved. The police declined to prepare a motor vehicle accident report. The claimant obviously knew this when his SABS application was made to MVACF on October 26, 2007.

On February 12, 2008 MVACF's adjusters made a request of the Galleria Mall for a copy of their incident report. This was initially refused on March 31, 2008. After involvement of counsel on behalf of MVACF, the Galleria Mall report was provided to MVACF on June 3, 2008. The report contained the licence plate number of the vehicle involved in the incident with the claimant. With this information MVACF was able to search and determine that the vehicle was insured with Lombard.

The key piece of information necessary to enable MVACF to investigate whether there was insurance available to the SABS claimant was the licence plate number of the vehicle involved in the accident. At first instance, the arbitrator concluded that the 90 day limitation period commenced February 11,

2008, when MVACF knew that there was no police report for the accident. She reasoned MVACF knew at that point a police report would not provide the necessary information for it to search for insurance priority, and that it had to make other inquiries to try to obtain this information.

Justice Perell disagreed with this approach. He concluded that the 90 day limitation period for service of a Notice of Dispute Between Insurers should not start to run until MVACF had obtained the specific details required to conduct the insurance search. In that case, this meant the vehicle licence plate number which MVACF did not have until June 3, 2008. He reasoned, "*In my opinion, this (learning there was no police report) triggered an obligation on the Fund to pursue this information elsewhere, which is what it did, but it did not create a situation where the Fund should be deemed to have received a completed application when it clearly had not received a completed application. There was no fair basis to deem the Fund to have received a completed application. It had not received a genuinely completed application. It had not received a functionally completed application. It had not received the external information that would supplement the standard form and make it complete.*"⁵

It seems to me this conclusion effectively means that in a case involving MVACF, the 90 limitation period cannot commence until MVACF has the specific details required to conduct the search that will disclose the presence or absence of insurance. It is immaterial whether that information comes from the police report, or another source.

⁵ *Ontario v. Lombard*, Applicant's Brief of Authorities, para. 61 to 63.

One could attempt to distinguish this case from *Ontario v. Lombard* on the facts. In *Ontario v. Lombard*, MVACF may reasonably have thought for quite some time after receiving the SABS application that a police report would provide the specific details necessary for an insurance search, whereas in this case MVACF knew from the beginning that a police report would not provide the specific details necessary for an insurance search.

I do not think that this is relevant to the result however, because in either case, there was a date by which it was known that the police report would not advance the insurance inquiry. One might argue that this would lead to the conclusion arrived at by Arbitrator Novick in *Ontario v. Lombard*. She held that once it was known there was no police report that would provide specific details for the relevant insurance search, it should no longer be considered as a factor in determining whether the application was complete. She thought the 90 day limitation period should run from that date.

Applying the same reasoning to this case, it was known by December 8, 2008, or December 10, 2008 at the latest, that a police report would not provide specific details for an insurance search. Therefore, from that date it should no longer be considered a factor in determining whether the application was complete.

The problem with this reasoning is that Justice Perell has decided in *Ontario v. Lombard* that such an approach is, "...not correct as a matter of policy, interpretation, or the case law."⁶ He rejects the arbitrator's approach to the completeness issue that was essentially founded on when it was discovered that

⁶ Perell J., in *Ontario v. Lombard*, at para. 45.

the presence or absence of a police report was irrelevant to the necessary insurance inquiries.

Instead, Justice Perell sets out in general terms a method for determining when the 90 day limitation period should commence. He seems to restrict this rationale to these “rare” types of cases where it is “impossible” to obtain a police report. Without specifically saying so, it appears this is why he selected the date upon which MVACF learned the vehicle licence plate number as the date for commencing the 90 limitation period. It is not clear to me whether he intends this method to apply to insurers in general, as well as MVACF. For the purposes of my decision, it is sufficient for me to conclude that he intends that it be applied to MVACF cases.⁷

He states, “I understand that it is very rare that it would be impossible to obtain a MVA (Police) Report, and thus the circumstances of this case presented a rare problem. In my view, the correct solution for that rare problem was to treat the application form as a completed application for the purposes of having an insurer (the Fund) promptly pay benefits but not as a completed application for the different purposes of allowing the insurer to exercise its rights to dispute its obligation to pay those benefits, provided that the insurer continues to take steps to ascertain the missing information.”

It is unfortunate, I think, that police reports are mentioned in the foregoing statement of the law by Justice Perell, because the inability to obtain the police report is not the basis for his decision. A careful analysis of the case suggests

⁷ As I have pointed out in the beginning of these reasons, amendments to the SABS make the issues in this case moot for accidents on or after September 1, 2010.

that deeming a SABS application complete for priority purposes in an MVACF case does not turn on the availability of, the utility of, or even the existence of a police report. The *ratio* of the decision appears to be that to deem a SABS application functionally adequate for 90 day priority purposes, MVACF must have the specific details necessary to conduct an insurance search, no matter what the source of that information.

Therefore, I feel that I am bound by the precedent established in *Ontario v. Lombard* to find that Ms. Jendrzeczak's SABS application was not complete in the functional adequacy sense until February 6, 2009, when MVACF received Ms. Jendrzeczak's Statutory Declaration (Priority Questionnaire) containing the name, birth date, and address, of Ms. Jendrzeczak's estranged spouse, Janus Jendrzeczak .

Given my conclusion on the law, I must deal with Jevco's argument that MVACF, by its conduct, should be considered to have waived its right to require a police report, and that MVACF should be estopped on those grounds and because of its delay in pursuing the appropriate priority inquires from arguing that it did not receive a completed application for priority purposes.

Justice Perell, in his statement of the law in *Ontario v. Lombard* does list as one of the grounds upon which an insurer could be deemed to have received a completed application, waiver or estoppel caused by its conduct.⁸

It is noteworthy to me that Justice Perell did not discuss the waiver or estoppel issue at all with regard to the facts of *Ontario v. Lombard*. Those facts are not unlike this case in that a similar amount of time passed between MVACF

⁸ Perell J., in *Ontario v. Lombard*, at para. 51.

discovering that a police report would be of no use to the relevant insurance inquiry, and MVACF pursuing those inquiries to a successful conclusion. In fact in that case the time period was longer than this case (February 11, 2008 to June 3, 2008 v. January 20, 2009 to February 6, 2009). That may be because the argument was not advanced before him. I would have thought however, that if he felt it had some applicability to the case he would have addressed the concept.

In this case, in support of the estoppel argument, Jevco's counsel focuses on MVACF's conduct in failing to promptly point out to Ms. Jendrzczak's representative the deficiencies in the application when submitted on December 8, 2008. These admittedly were not drawn to Ms. Meropoulous' attention until January 12, 2009. MVACF pursued the statutory declaration and the information was received on February 6, 2009. MVACF did not act on that information until April, 14, 2009, but in my view that is relevant only to the timeliness of the service of the Notice of Dispute. If the service of the Notice complied with section 3 (1) (and it did if the 90 days is calculated from either January 20, 2009, or February 6, 2009) then the delay until April 14, 2009 in doing the insurance search could hardly be valid grounds for estoppel.

I do not find that MVACF should be deemed to have received a completed application on December 8, 2008 (or December 10, 2008) on the basis of waiver or estoppel. The fact that MVACF did not explicitly draw to Ms. Meropoulos' attention the missing information from the SABS application at its first opportunity does not mean that it waived its right to require the information. I think it would

require a clear statement of intention by MVACF to waive the requirement before that conclusion could be made, and that is not the situation here.

With respect to estoppel, this requires some detrimental reliance, or alteration of one's legal position on the part of the party asserting the estoppel. In this case, MVACF began adjusting Ms. Jendrzejczak's SABS claim reasonably promptly. There is no evidence that the time between December 8, 2008 and January 12, 2009, with Ms. Cesario's marriage, and the Christmas holidays in between, had any detrimental effect on payments MVACF had to make and for which they could seek recovery from Jevco. There is no evidence that Jevco's position is legally any different because the Notice of Dispute Between Insurers was not served until April 14, 2009, when even if it had been concluded that the 90 limitation period commenced December 8, 2008, MVACF could have served a timely Notice of Dispute Between Insurers by March 8, 2008. Therefore, putting the argument at its highest, I do think this approximate 5 week difference is a sufficient delay to constitute the basis for an estoppel argument, especially absent evidence of detrimental reliance on Jevco's part.

As a final comment on this argument, I note that in cases involving the 90 day limitation period and section 3 (1) and (2) issues the courts seem to have gone out of their way to give some latitude to insurers seeking to enforce their priority rights where the insurers have started paying SABS promptly to a claimant. I find that MVACF did so in this case. Those insurers who appear to

have sought to avoid paying SABS promptly have not fared as well when seeking to enforce their priority rights.⁹

In view of my conclusions on the section 3 (1) issues, it is unnecessary for me to consider whether MVACF should be entitled to relief under section 3 (2).


Conclusion

I find that Jevco is the priority insurer and that MVACF is entitled to reimbursement from Jevco in respect of payments made by it in connection with the SABS claim of Katarzyna Jendrzczak.

MVACF is also entitled to recover its costs of the arbitration from Jevco.

If counsel are unable to agree on the quantum of reimbursement and/or the quantum of costs, they are invited to contact my Coordinator to obtain a date for a telephone conference to discuss how these issues or either of them should be further addressed.

Dated at Toronto, January 25, 2012



Arbitrator Scott Densem

⁹ Cf. *ING Insurance Company of Canada v. State Farm Insurance Companies*, (2009) 97 O.R. (3d) 291 (Ont. Sup. Ct.); and *ING Insurance Company of Canada v. TD Insurance Meloche Monnex*, [2010], O.J. No. 3549, (Ont. C.A).