IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, Sections 268 and 275 and Regulations 283/95, 664 and 668 thereunder;

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

TD GENERAL INSURANCE COMPANY

Applicant

- and -

MARKEL INSURANCE COMPANY

Respondent

AWARD

Counsel Appearing

Maya S. Krishnaratne for the Applicant

Brian G. Sunohara for the Respondent

Introduction

This matter arises out of an accident which occurred November 26, 2008. The incident involved a heavy commercial vehicle, a truck, which at the time of the accident was being operated by Jasbir K.[1] In this incident Kuldip M. sustained injuries and as a result of those injuries made a claim for Statutory Accident Benefits.

The vehicle involved was a 2005 Volvo tractor. That vehicle is classified as a "heavy commercial vehicle" within the meaning of the Ontario accident benefits regime in operation. When a heavy commercial vehicle is involved in an accident there is a possibility of loss transfer and that is one aspect of this matter.

[1] In consideration of the privacy interests of witnesses who were required to testify about their personal affairs, I have deleted reference to surnames.

Markel Insurance Company was the insurer of the Volvo truck. Kuldip M. had a personal policy of insurance with TD General Insurance Company. The TD policy did not insure a heavy commercial vehicle. On or about January 28, 2009, Kuldip M. submitted a completed application for accident benefits to TD General Insurance Company. In accordance with the applicable regulations, TD General proceeded to adjust the claim for accident benefits. It is understood that TD General continued to pay benefits to Kuldip M.

The circumstances of this loss are such that TD General might be able to recover some or all of its outlay from Markel on two separate principles. It is possible that Markel is the higher ranking insurer pursuant to the priority rules applicable to these claims. Independent of the priority issue, it is asserted that TD General is entitled to recovery from Markel on principles of loss transfer.

Priority disputes and loss transfer disputes have been a part of the automobile insurance compensation system since 1990. However, there are a few cases where both aspects are involved in the same matter. This case is exceptional in that regard.

The procedure applicable to priority disputes and loss transfer disputes are not identical. A loss transfer dispute is based on a form of fault determination and arises out of the circumstances of the accident and the particular classification of the vehicles involved in the accident. Loss transfer does not apply in most cases. It primarily applies when one of the vehicles involved in an accident is a heavy commercial vehicle or where one of the vehicles involved in an accident is a motorcycle, snowmobile or similar vehicle.

Priority disputes arise when there is some confusion about which insurer has the highest priority to pay the accident benefits to a particular victim. In accordance with the regulations, the insurer paying the benefits has the possibility of effecting a recovery and transfer of the claim to another insurer by evoking a procedure now described in Ontario Regulation 283/95.

While both priority disputes and loss transfer disputes are required to be resolved by arbitration pursuant to the *Arbitration Act*, 1991, the procedure is somewhat different. A priority dispute requires a Notice of Dispute to be provided to an adverse insurer within a strict time limit. Thereafter, arbitration must be commenced within a time measured in relation to the notice.

Loss transfer generally involves the submission of a loss transfer indemnification request and a commencement of arbitration thereafter. There is not such a strict notice of dispute applicable to loss transfer.

Both kinds of disputes are to be resolved by arbitration, and this dispute has been put forward to me in that regard.

The Record in This Proceeding

The parties have entered in to an arbitration agreement dated September 6, 2011. The arbitration agreement refers to a dispute with respect to both priority between the insurers and with respect to loss transfer. Ontario Regulation 283/95 is quoted in part. Section 275(4) of the *Insurance Act* with respect to loss transfer indemnification is referred to.

The arbitration agreement calls for the arbitration to determine all matters in dispute with respect to both priority of payment for Statutory Accident Benefits and with respect to a loss transfer claim.

Exhibit 2 to the proceeding is an Agreed Statement of Facts dated August 16, 2011. This document sets out general statements about the undisputed facts in this case and in particular the accident circumstances, the involvement of the individuals, and the respective roles of the insurers.

Furthermore, it is recorded that Markel investigated the circumstances of this accident in the months following the event and came into the possession of a written statement from Jasbir K. dated February 16, 2008 and a written statement of Fayyaz M., a manager at Malik Services, at the time of the accident. The Jasbir K. statement is dated December 16, 2008 and the Fayyaz M. statement is dated December 10, 2008.

These statements were obtained by Markel shortly before Kuldip M. submitted an application for accident benefits to TD General on or around January 28, 2009.

TD General apparently was alive to the possibility of a priority dispute and on February 18, 2009 sent to Markel a notice of a priority dispute. This priority dispute notice included the prescribed form for giving notification of the insured person. That form is attached to the Agreed Statement of Facts at Tab 1. According to the Agreed Statement of Facts, Markel did not receive the notice until February 20, 2009.

According to the agreed record, Markel sent a follow-up letter April 30, 2009 requesting a response regarding the priority dispute. The letter to TD General to Markel is found at Tab 2 of the agreed record. In that letter, it is recorded that TD General had not received any response to the previously referred to Notice of Dispute. The characterization of the dispute in the letter is:

> **"It is our position that Mr. M. who has applied for benefits with TD Insurance through his policy, was in the course of his employment and insured with Markel Insurance Company at the time of his motor vehicle accident. Accordingly, we have submitted our priority dispute for your consideration".**

That letter was acknowledged and a response provided nearly two months later on June 22, 2009. The response is found at Tab 3 of Exhibit 2 in the form of a letter from Markel to TD General. In that correspondence, Markel recites the fact that it has received a Statement of Claim in a tort proceeding, which I take to be a claim for compensation for personal injuries arising out of the same motor vehicle accident.

In the letter dated June 22, 2009, Markel has referred to various assertions in the Statement of Claim. In particular, there are allegations in the Statement of Claim which touch on the circumstances of Kuldip M.'s involvement with Jasbir K. The assertion referred to in this Statement of Claim implies that Jasbir K. had requested that Kuldip M. provide a resume with a contrived work history. Again according to the allegation, Kuldip M. did not provide Jasbir K. with the false resume but asserts that Jasbir K. was short-handed and therefore agreed to take Kuldip M. along with him "only as a shadow, so that the plaintiff [Kuldip M.] could gain valuable truck driving, experience, without remuneration".

Markel's correspondence relies on the Statement of Claim assertions to conclude "It appears that Mr. M. does not meet the requirements as laid out by section 66 of the Regulation. Section 66[1][a] specifies that the "insured automobile is being made available for the individual's regular use…"." And then, thereafter, in the same letter, the position of Markel is set out as:

> **"Markel advises you that we are not in a position to accept any obligation to pay Statutory Accident Benefits at this time, in respect of the 'priority issue' that you have identified".**

The author of the letter invites further communications. The Notice of Dispute document sent to Markel in February 2009 has some particulars of TD General's theory about priority. In part three of that document TD General says as follows:

> **"Mr. M. was employed as a second driver by Jasbir K. (driver, driving at time of accident). Mr. Jasbir K. was hired by Malik Services (6840981 Canada Inc.) as an independent operator to drive the tractor trailer involved in the accident. The agreement between Mr. Jasbir K. and Malik was that Jasbir K. would be responsible for hiring the second driver. Jasbir K. subcontracted Kuldip M. as the second driver for the trip. Jasbir K. was to be paid for her services by Malik and Kuldip M. was to be paid by Jasbir K.**
>
> **Kuldip M. was not a passenger accompanying Jasbir K. as indicated by Kuldip M.'s solicitors in submitting the application for accident benefits to us. Kuldip M. was employed and in the course of his employment at the time of the accident.**
>
> **Jasbir K. confirmed to TD Insurance that he had subcontracted to Kuldip M. for this trip from Manitoba to Ontario.**
>
> **Malik confirmed TD Insurance that he was the owner of the truck insured with Markel Insurance. Malik also confirms that he had contracted Jasbir K. (who is a self-employed operator) for this trip and Jasbir K. was responsible for hiring the second driver."**

According to the Agreed Statement of Facts, TD General first initiated priority dispute arbitration proceedings by serving Markel with a Notice of Commencement of Arbitration on February 23, 2010. This document was received by Markel after 7:00 p.m. on February 23, 2010. The timing of this document is important. It is to be noted that this document was sent more than one year after the notice of dispute between insurers was sent to Markel and received by it.

At the same time that these communications about priority were going on, TD General was also addressing loss transfer. The Agreed Statement of Fact recites that TD General sent its first loss transfer request for indemnification dated February 26, 2009 to Markel under cover of a letter dated March 3, 2009. Loss transfer is a reimbursement scheme that is derivative of fault determination and the communication sent made reference to fault determination rules and set out the factual basis for a request for indemnity. The letter is found at Tab 4 of Exhibit 2. I note that the author of this letter is a different individual than was involved in the previous communications from TD General to Markel. In the correspondence of March 3, 2009, the writer clearly identifies herself as having coverage of "the loss transfer portion of this claim". Enclosed with the letter was a loss transfer request for indemnification form in the amount of $600.00 covering the period from January 28, 2009 to February 20, 2009. Evidently a notice of loss transfer as well as a police report was attached to the letter of March 3, 2009.

With respect to loss transfer, TD General asserted that it sent further requests that were not responded to with reimbursement.

The Agreed Statement of Facts indicates that TD General first initiated loss transfer arbitration proceedings by serving Markel with a Notice to Participate on February 23, 2010 and it is agreed that this document was received by Markel after 7:00 p.m. on February 23, 2010.

Apparently counsel for TD also sent a Notice of Commencement of Arbitration with respect to loss transfer proceedings on August 31, 2010.

The parties have agreed that there are no limitation issues with respect to the commencement of the arbitration proceedings in the loss transfer claim.

In addition to the duality of the proceedings between the two insurers, this matter has become complicated by transactions that occurred during the course of the arbitration. The Agreed Statement of Facts refers to a letter of June 6, 2011 which is at Tab 5 of Exhibit 2. That letter followed a prehearing telephone conference wherein TD General was requested to formalize its request to reinstate the priority dispute against Markel.

The letter recites that TD General withdrew the priority dispute at the January 7, 2011 pre-hearing.

The June 6, 2011 letter, however, advises that on May 27, 2011 counsel for Markel provided disclosure with respect to witness statements from Mr. M. and Jasbir K. On the basis of that information, TD General indicated that it wished to reinstate the priority dispute. Out of an abundance of caution, it enclosed yet another Notice of Commencement of Arbitration.

In addition to the Statement of Facts contained in Exhibit 2, I was provided with a "Supplementary Agreed Statement of Facts" which was marked as Exhibit 3 to this matter. This document establishes that Kuldip M. commenced a tort proceeding against Jasbir K. arising out of the subject accident. It confirms that Markel insured Jasbir K. in respect of that tort action. The remainder of the Supplementary Agreed Statement of Fact documents the transactions between counsel during the course of the arbitration proceeding. Of particular interest is the history of production with respect to statements that Markel had in its possession from Mohamed F. and Jasbir K. Evidently these were referred to in Schedule B delivered under cover of a letter dated September 29, 2010. TD General was not previously notified of the existence of these statements.

In January 2011, counsel for TD General requested copies of those statements. In February 2011, counsel for Markel advised that a claim for privilege was being asserted. In May 2011, counsel for Markel advised counsel for TD General of the contents of the statements and in particular "The fact that the statements suggested that there was a direct contract between Kuldip M. and Malik Services and there was an ongoing contract between Kuldip M. and Malik Services at the time of the November 26, 2008 motor vehicle accident". Letters exchanged between counsel on May 27, 2011 and June 14, 2011 summarized the contents of the statements and the contents of the conversation between counsel.

Exhibit 4 to the proceeding is an Agreed Document Brief with nine tabs. Tab 1 is the Statement of Claim which, as expected, shows an action instigated by Kuldip M. against Jasbir K. with respect to bodily injuries arising out of the subject accident.

Tab 2 is the communication from counsel for Markel to counsel for TD including the Schedule D which lists the statements of Jasbir K. and Malik. The documents at Tabs 3 and 4 of Exhibit 4 are communications between counsel addressing privilege issues associated with the

productions of Markel. The remaining documents of Exhibit 4 are documents that could also be found in Exhibit 2, the Agreed Statement of Facts.

A further document brief, the Applicant's Document Brief, was received and marked as Exhibit 5 to the proceedings. This document brief consists of three documents. It was agreed that the documents at Tab 2 and 3 were admitted to form part of the record in this proceeding without necessarily agreeing to the truth of the contents. Tab 1 of Exhibit 5 was subject to further proof from a witness and was indeed identified and received as an Exhibit by me during the course of the testimony of Betty Levinson.

A number of witnesses were called *viva voce* in this matter to give evidence on the different aspects that were put before me for determination.

Evidence of Betty Levinson

Betty Levinson, a representative of the Applicant, TD General, was called and gave testimony. Her involvement in this case is essentially as a person operating in a supervisory capacity in the claims operation of TD General. She was able to give evidence identifying certain business records which were marked as Exhibits in the proceeding. She identified the various log notes as being documents created in the course of carrying on business as an insurer. She was able to assist us in understanding the chronology of events through this matter.

I found her evidence to be forthright and highly reliable. I have no concerns about accepting her testimony in this proceeding.

In particular, I was impressed by her candor in discussing the issue of the timeliness of the commencement of the priority dispute arbitration. It is clear from her testimony that it was the intention of TD General to have the priority dispute put into the arbitration process prior to the expiry of the limitation. Indeed, she testified that the matter was put into the appropriate channels at TD General to be distributed for the formal commencement of an arbitration sometime prior to the expiration of the limitation period. For reasons which are not apparent on this record, and are unknown to this witness, it is acknowledged that the arbitration was not in fact commenced within the statutory time limit, i.e. it was not commenced within 1 year after the service of the Notice of Dispute between insurers. No explanation is given for this. Most importantly, it is absolutely clear from Ms. Levinson's testimony and the other documentation and Exhibits, that the failure to commence the arbitration within the time limited for doing so was not a conscious decision by TD General and it most certainly was not a decision of TD General induced by some acts or representation of Markel. This might be a very different case if those were the circumstances.

Ms. Levinson's testimony helped us understand the vacillation by TD General later on in the proceedings. As the record shows, TD General initially commenced proceedings against Markel both as a priority dispute and a loss transfer dispute. The priority dispute was not commenced in a timely manner. As matters progressed, TD General indicated that it would not proceed with the priority dispute aspect but would only proceed with the loss transfer aspect. Ms. Levinson testified regarding TD's General perception that the priority dispute was not a particularly strong case. Of course, she was operating at that time with only some of the information that has since been made available to her. And, the strength or weakness of the priority dispute surely must have been measured taking into account the limitation problems associated with commencement of the arbitration. So when Ms. Levinson says that the case

was not a particularly strong one, I find that a significant aspect of this was the weakness brought about by failure to commence arbitration in a timely manner.

Evidence of Kuldip M.

The claimant for statutory accident benefits in this matter is Kuldip M. He is the TD General insured who, at the time of the accident, was an occupant of a vehicle insured by Markel. The circumstances of his connection with that vehicle are highly relevant to the question of what the priority for payment of accident benefits will be.

According to Kuldip M., he was contacted by Jasbir K. with respect to the possibility of accompanying him on a long haul trip using the subject vehicle. According to Kuldip M., he had known Jasbir K. for many years, from India, when they were students together. Jasbir K. contacted Kuldip M. asking if he would be interested in accompanying Jasbir K. on a trip out west.

At the time of this inquiry, Kuldip M. was employed and earned $12.00 an hour in a labouring position. In order to accompany Jasbir K. on the trip he needed to be excused from his work place. There is no doubt that Kuldip M. obtained leave from his employer by misleading his employer and falsely indicated that he had to deal with family issues connected with his child's education. It didn't seem to have troubled this individual to have misled his employer with this deceit.

He indicated that he was of the view that he was going along with Jasbir K. for the benefit of getting experience and getting some insight into what it is like to work as a truck driver. This is an odd point in Kuldip M.'s career to be looking for this insight as he had already gone through the necessary training and testing to get his AZ license for the purpose of driving trucks. One would have thought that he would have some reasonable concept of what the employment entailed before embarking upon that process. Nonetheless, Kuldip M.'s version of events is that he accompanied Jasbir K. not for any financial purpose, but simply as a furtherance of his own education about the possibility of becoming a truck driver as his primary occupation. I can certainly see that there would be financial motivation for Kuldip M. to pursue this career alternative as he might have earned a great deal more than the $12.00 an hour that he earned in his labouring job.

According to Kuldip M.'s testimony, he was going on this trip on a "one time" basis to get a sense of whether or not he liked the employment or not. My impression of Kuldip M.'s testimony is that he would have us understand that there was no concept of any further relationship between Kuldip M. and the vehicle owner or between Kuldip M. and Jasbir K. necessarily.

I do think that Kuldip M. has some reason to shape his testimony in this case. He was an ongoing claimant for statutory accident benefits. His entitlement to those benefits might be prejudiced if he turned out to be a person entitled to Workers' Compensation Benefits and, that possible entitlement would be determined by reference to the relationship between Kuldip M. and Jasbir K. and the operation of the vehicle. Hence, we may be able to best understand Kuldip M.'s testimony in that light. It now becomes possible to see a motive for Kuldip M. to deny any financial reward associated with this involvement with the long haul trip out west with Jasbir K.

There were other aspects of Kuldip M.'s testimony that caused some difficulty, not the least of which was his protestation that he thought this trip to Alberta and back was going to take two days. He denied having any concept about how far away Alberta was. He describes a level of ignorance with respect to Canadian geography which is hard to accept in the context of a person who is being asked to travel that distance, and drive a good deal of it, and to do so within a fairly narrow time constraint.

Having noted that Kuldip M.'s testimony was presented in a way to protect his pecuniary advantage to an ongoing claim, and with the assertion of surprising statements about the financial arrangements, his progression into the world of being a truck driver, and his knowledge about the nature and extent of the trip, I have doubts about the accuracy of this witness' testimony. I didn't find him particularly persuasive in his demeanor or attitude towards the proceeding. It is entirely possible that he was presenting the hearing with a version of events that suited his interest first and foremost, and served the interest of truth and justice secondarily, if at all.

Evidence of Jasbir K.

Jasbir K. is the individual who was primarily the contact for Kuldip M. in respect to his activities with the vehicle insured by Markel. According to Jasbir K.'s testimony, he was recruited to work with the numbered company that operated the vehicle only a few days before the accident. He described having contact with the representative of the numbered company, Fayyaz M., and having met with him in a donut shop and having determined the terms of the proposed business relationship. Jasbir K. indicated that the nature of the assignment required him to have a driving team consisting of two drivers. Jasbir K. acknowledged that he thought he would engage his longtime friend Kuldip M. for this purpose. He acknowledged contacting Kuldip M. and inviting him to come on the trip.

In material respects, Jasbir K.'s testimony about this arrangement differs from that of Kuldip M. Jasbir K. says that there was a clear financial arrangement involved. The remuneration to the team was going to be $0.42 per mile and it was Jasbir K.'s testimony that Jasbir K. would receive $0.22 and that Kuldip M. would receive $0.20 per mile. There doesn't seem to be of any doubt in Jasbir K.'s mind about this arrangement and it seems entirely logical to me that there would have been such an arrangement before the parties embarked on such an extensive journey.

Jasbir K. did confirm that the relationship was not a long term relationship. He indicated that it was exploratory in nature. My understanding of Jasbir K.'s view is that Jasbir K. thought that Kuldip M. was giving the trip a try and that he would become part of the team if he found the experience suitable. Interestingly, Jasbir K. reported that Kuldip M. was under the influence and pressure from his wife who was concerned about him taking on a long haul trucking job in the winter months, without having any prior experience. This seems to have been the most prominent barrier to a future relationship, at least as perceived by Jasbir K. This was never mentioned by Kuldip M. in his testimony.

Testimony of Fayyaz M.

Fayyaz M. was called to testify in this matter and was affirmed before me. He described himself as a manager for corporate entity 6840981 Canada Inc. He had that position for three to four months until January, 2009.

He described his relationship with Jasbir K. He says that he came to know Jasbir K. from internet ads for drivers. It seems that this relationship was fairly superficial. He says that he met him in person at a Tim Horton's donut shop.

Fayyaz M. testified that his company does trucking runs in the west. These were fairly long trips. It was expected that his drivers would recruit a second driver. It was the concept of this operation that there would be a team.

According to Fayyaz M.'s testimony, Jasbir K. said that he would bring a second driver. This was a critical part of the arrangement.

According to Fayyaz M., this was an arrangement that was expected to have a regular basis to go back and forth out west. They were to be provided with a 2005 Volvo vehicle. The understanding was that they would be paid per distance. The rate was either $0.40 or $0.42 and that it would be split between the team.

According to Fayyaz M., he met Jasbir K. on November 18, 2008. The next day Jasbir K. performed a test drive and started as a driver.

According to Fayyaz M., it was obvious that Kuldip M. shared the driving as the truck runs 24 hours. The truck made the run from Toronto to Alberta, which is about 60 to 70 hours of driving.

Importantly, Fayyaz M. indicated that he did have a discussion with Kuldip M. while the truck was heading back to Toronto. Fayyaz M. had called to see how they were doing when he heard that they had a load to come back. According to Fayyaz M., he spoke directly with Kuldip M.

Fayyaz M. said he was satisfied with Kuldip M. as a driver. He was vague as to the terms of employment but he expected that termination would involve giving of notice both for Kuldip M. and for Jasbir K. No such notice was given at any point. It was Fayyaz M.'s expectation that Jasbir K. and Kuldip M. would continue as team drivers.

Under cross-examination, Fayyaz M. admitted that only Jasbir K. applied to him for employment. He had never met Kuldip M. before the accident, hence his relationship is based on these transactions and his knowledge about Kuldip M. is necessarily limited to what he learned in this brief timespan. Importantly, he understood that Kuldip M. had the necessary paperwork, including a CV and three years of employment documented.

There was no contract with Kuldip M. At least there was no contract that was evidenced by some document.

It is my impression from this witness that he offers the position that Kuldip M. was supposed to be somebody that had three years of experience, which he did not have. Fayyaz M. was unaware of that lack of experience.

Evidently the employment conditions were clearly communicated by Fayyaz M. to Kuldip M.

There was certainly no acknowledgement by Fayyaz M. that he was aware that Kuldip M. did not have the basic minimum qualifications which Fayyaz M. was looking for.

Based on the record before me, it is clear that Kuldip M. did not meet the criteria that Fayyaz M. set out. But Fayyaz M. did not know this. In that ignorance Kuldip M. was permitted to be part of the driving team.

In my view this is analogous to a case where consent to operate a vehicle is obtained by fraud. The basis for the consent is wrong, but the consent is obtained nonetheless.

The Regular Use Issue

If Kuldip M. is a person who, at the time of the accident, had a vehicle made available for his regular use by Markel's insured (or any other entity or person that could make the insured vehicle available) then Kuldip M. is to be treated as if he was a named insured. Further, if he was an occupant or the vehicle was made available at the time of the accident, that vehicle's insurance is the highest ranking insurance.

Section 268(2) of the *Insurance Act* provides as follows:

> **Liability to pay**
>
> **(2) The following rules apply for determining who is liable to pay statutory accident benefits:**
>
> **1. In respect of an occupant of an automobile,**
>
> **i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,**
>
> **ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,**
>
> **iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,**
>
> **iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.**
>
> **2. In respect of non-occupants,**
>
> **i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,**
>
> **ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,**
>
> **iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose,**
>
> **iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund. R.S.O. 1990, c. I.8, s. 268 (2); 1993, c. 10, s. 1; 1996, c. 21, s. 30 (3, 4).**

The statutory scheme also has a provision that directs priority when a named insured is injured while an occupant of the insured vehicle. In that circumstance, there is no priority debate. The insurer of the vehicle is the highest ranking. This makes very good sense as it eliminates any

possibility of a complicated and distracting priority investigation and dispute in a large number of accident situations.

Section 268 has the following provisions that set out this refinement to priority rules:

> **(5) Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant, as defined in the Statutory Accident Benefits Schedule, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy. 1993, c. 10, s. 26 (2); 1999, c. 6, s. 31 (9); 2005, c. 5, s. 35 (13).**
>
> **(5.1) Subject to subsection (5.2), if there is more than one insurer against which a person may claim benefits under subsection (5), the person, in his or her discretion, may decide the insurer from which he or she will claim the benefits. 1993, c. 10, s. 26 (2).**
>
> **(5.2) If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant. 1993, c. 10, s. 26 (2); 1999, c. 6, s. 31 (10); 2005, c. 5, s. 35 (14).**

The question of whether a person is a "named insured" is refined by the SABS regulation that provides a special status of individuals who are in the position of having a vehicle made available for their regular use.

The regulation contains the following direction:

> **Company Automobiles and Rental Automobiles**
>
> 66. **(1) An individual who is living and ordinarily present in Ontario shall be deemed for the purpose of this Regulation to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,**
>
> **(a) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity; or**
>
> **(b) the insured automobile is being rented by the individual for a period of more than 30 days.**

I am satisfied on the record before me that the Volvo tractor insured by Markel was made available for Kuldip M.'s regular use at the time of the accident. Fayyaz M. had effective control over the use of the vehicle. He knew that Kuldip M. was a driver. He was satisfied with that. The use was not longstanding, but it was certainly regular. It involved many hours of use of the vehicle on this particular trip and there was an expectation that, from Fayyaz M.'s point of view, that there would be future use.

I did not find Kuldip M.'s evidence about the one-time nature of the trip convincing. I find that it was more likely than not that he would have continued on with the arrangement with Fayyaz M. if he could continue to avoid discovery of his inadequate work history and experience.

There is some reluctance to find "regular" use in circumstances where the relationship is short-lived, as in this case. But duration of the relationship with the vehicle is not the direct issue. The

direct issue is whether the permitted usage was "regular". I am not satisfied that regular use requires use that is longstanding in nature -- although that certainly would be greater evidence of a use that is regular. However, I am satisfied that in the particular facts of this case, for the duration of the involvement of Kuldip M. with the Volvo vehicle, there was a relationship whereby the vehicle was made available for his regular use.

This case does come close to the fact situation anticipated by Justice D. M. Brown in *Zurich v Personal 2009 CanLII 26362* at paragraphs 43 and 44. Here I find the short pre-accident history demonstrates the regularity of the use at the time of the accident. If the accident had not occurred, absent any change in the relationships, there would be every expectation that the use of the vehicle would continue. The possibility of a change in the relationship was larger here because of the possible discovery of the lack of experience. But that discovery was not yet made at the time of the accident, and the predictable change in the relationship never occurred.

As I have noted previously, the regulation does not require that the use be frequent, exclusive or personal. The fact that there is some use available which can be said to be regular is sufficient. *[State Farm v Kingsway, October 1999].*

The vehicle was made available by Fayyaz M. on behalf of the company, and I find that that is sufficient to bring this usage within section 66 of the Statutory Accident Benefits Schedule and that Kuldip M. was a deemed named insured under the Markel policy. In view of the developments in the case law, in the Court of Appeal decision in *Security National v Markel 2012 ONCA 683*, it is no longer important whether the entity making available a vehicle is a corporation or a sole proprietor. I don't think it matters in this case either.

For these reasons, I conclude that Kuldip M. was to be treated as a deemed named insured under the Markel policy in force on the vehicle involved in the accident.

While Kuldip M. would indeed be treated as a named insured under the TD General policy, Kuldip M. was an occupant of the vehicle insured by Markel at the time of the accident. Subsections (5) and (5.2) of section 268 address this scenario and mandate that Kuldip M. claim his benefits from the insurer of the vehicle he occupied at the time. That insurer was Markel.

Accordingly Markel is the highest ranking insurer with respect to the payment of accident benefits.

Disposition of the Priority Dispute

Priority disputes can take many shapes. Not long after introduction of the OMPP program the legislature enacted O. Reg. 283/95 to set out a procedural framework for resolution of priority disputes.

Importantly, that regulation mandates timely Notice of Disputes and enacts a limitation provision with respect to commencement of proceedings.

Notice is addressed in section 3:

> **3. (1) No insurer may dispute its obligation to pay benefits under section 268 of the Act unless it gives written notice within 90 days of receipt of a completed application for benefits to every insurer who it claims is required to pay under that section. O. Reg. 283/95, s. 3 (1).**
>
> **(2) An insurer may give notice after the 90-day period if,**
> **(a) 90 days was not a sufficient period of time to make a determination that another insurer or insurers is liable under section 268 of the Act; and**
> **(b) the insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90-day period. O. Reg. 283/95, s. 3 (2).**
>
> **(3) The issue of whether an insurer who has not given notice within 90 days has complied with subsection (2) shall be resolved in an arbitration under section 7.**

Commencement of arbitration is addressed in section 7:

> **7. (1) If the insurers cannot agree as to who is required to pay benefits or if the insured person disagrees with an agreement among insurers that an insurer other than the insurer selected by the insured person should pay the benefits, the dispute shall be resolved through an arbitration under the Arbitration Act, 1991. O. Reg. 283/95, s. 7 (1).**
>
> **(2) The insurer paying benefits under section 2, any other insurer against whom the obligation to pay benefits is claimed or the insured person who has given notice of an objection to a change in insurers under section 5 may initiate the arbitration but no arbitration may be initiated after one year from the time the insurer paying benefits under section 2 first gives notice under section 3.**

The record in this proceeding is clear. Notice of a dispute was given by TD General on February 18, 2009. But the parties did not resolve their differences. TD General was obliged to commence arbitration within one year of February 18, 2009. It did not. The commencement document was delivered February 23, 2010.

The priority dispute arbitration by TD General was not commenced in a timely manner. The regulation requires the arbitration to be commenced within one year of the Notice of Dispute. It was not commenced within one year of the Notice of Dispute. I was offered no persuasive argument as to why the commencement 1 year and 5 days following the notification should be sufficient. I am mindful of the case law which favors a clear application of the procedural rules rather than providing for elasticity where none is provided for in the regulation. I accept the proposition of Justice Belobaba in *Pilot v Royal*[2] that "clarity and certainty of application are best served if ss. 2 and 7 (2) [of O. Reg. 283/95] are interpreted as written".

There are no statutory provisions that empower me to grant relief from a missed limitation.

I therefore conclude that TD General's priority dispute was not commenced in a sufficiently timely manner and therefore TD cannot prevail on the priority dispute.

The Loss Transfer Dispute

Markel's position that there is no entitlement to loss transfer as priority rests with Markel.

Section 275 of the *Insurance Act* applies that the scheme of loss transfer be in favour of "the insurer responsible under subsection 268(2) for the payment of statutory accident benefits…".

[2] (2006) 80 O.R. (3d)308

> **275. (1) The insurer responsible under subsection 268 (2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose.**

Section 268(2) is the first step in analysis of loss transfer obligations. For convenience I repeat the subsection. It has the heading "Liability to Pay" and provides as follows:

> **(2) The following rules apply for determining who is liable to pay statutory accident benefits:**
>
> **1. In respect of an occupant of an automobile,**
>
> **i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,**
>
> **ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,**
>
> **iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,**
>
> **iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.**
>
> **2. In respect of non-occupants,**
>
> **i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,**
>
> **ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,**
>
> **iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose,**
>
> **iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund. R.S.O. 1990, c. I.8, s. 268 (2); 1993, c. 10, s. 1; 1996, c. 21, s. 30 (3, 4).**

I observe the following with respect to this provision:

1. It seems to endeavour to create a hierarchy.

2. It uses ambiguous language when it employs the concept of "insured" as it is quite clear that the individuals described in clauses ii, iii, and iv are also "insured", yet the provision references these individuals as if they are different than the ones in clause i who are described as "an insured".

3. Subsection 2 of section 268 does not actually create the responsibility to pay benefits. In fact, this responsibility is mandated by subsection (3) of section 268 which provides as follows:

    > **(3) An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits.**

4. Subsection 2 of section 268 is not by any means a complete description of the priority scheme that applies in determining disputes between insurers. Subsections 4, 5, 5.1 and 5.2 of section 268 all are highly pertinent to determining priority for payment of statutory accident benefits. In particular subsection 5.2 is germane to these facts:

   > **(5.2) If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant.**

5. The definition of "insured" found in section 224 (1) of the Act provides as follows:

   > **(224 (1)) ""insured" means a person insured by a contract whether named or not and includes every person who is entitled to statutory accident benefits under the contract whether or not described therein as an insured person."**

6. The statutory accident benefits regulation (O. Reg 403/96 with respect to this accident) deems certain individuals to be the named insured under the policy. Section 66 of that regulation provides as follows:

   > **(66) "An individual who is living and ordinarily present in Ontario shall be deemed for the purpose of this regulation to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident, (a) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity;"**

7. Section 2(1) of he Disputes between Insurers Regulation, Ontario Regulation 283/95 provides as follows:

   > **2. (1) "The first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act. O. Reg. 283/95, s. 2."**

This array of statutory and regulatory provisions interact to result in a priority scheme that has allowed insurers, between themselves, to sort out their respective responsibilities for payment of statutory accidents benefits to victims of automobile accidents. With more than two decades of history, a substantial body of arbitral and judicial case law has led to a well understood custom in the trade of automobile insurance about priority with respect to payment of statutory accident benefits.

The specific issue that arises here is whether or not loss transfer is so limited that it does not apply to TD General in the context of this case. Coming to that conclusion would require me to conclude that TD General is not the insurer responsible under subsection 2 of section 268 of the *Insurance Act*.

One might not read section 275 of the Act as establishing or implying that there is only one "insurer responsible under subsection 268(2)" in all circumstances. There are many

circumstances where more than one insurer could potentially be responsible under section 268. This is clearly evidenced by the legislative action taken in subsections (4), (5), (5.1) and (5.2) of section 268. All of these provisions contemplate circumstances whereby a person might be an insured person under more than one contract, and hence there could be more than one insurer in respect of which that individual is "an insured". Hence, there are various devices to clarify which of those insurers, that are otherwise equally ranking, have the obligation to pay benefits.

I point this out to illustrate that when section 275 of the Act contemplates "the insurer responsible under subsection 268(2)", this may be argued to refer to more than one insurer.

I am mindful that principles of interpretation encourage me to interpret the provisions of the *Insurance Act* in a manner which will promote the legislative purpose, reflect the legislature's intent and produce a reasonable and just meaning.[3]

Some evidence of the legislative intent can be found in Bulletins issued by the Ontario Insurance Commission, subsequently known as the Financial Services Commission of Ontario. In Bulletin A-9/92, issued by Commissioner Donald Scott in July of 1992, the regulator describes the way loss transfer mechanism should operate. In an introductory description, it says:

> **"Loss transfer is a mechanism by which, under certain circumstances, automobile insurers who pay no fault benefits (the first party insurer) may be reimbursed by another insurer (the second party insurer) for all or part of a claim."**

In a subsequent Bulletin, #A-11/94, the regulator has again referred to loss transfer being available to the insurer who has paid first party benefits. In a chart attached to that Bulletin, the concept is again stated that loss transfer is a right that flows to the insurer who has paid statutory accident benefits.

Accordingly, there is secondary evidence to suggest a legislative intent that loss transfer flows in favour of the insurer who has paid statutory accident benefits and should not be read in some narrow way to defeat the remedial nature of the loss transfer concept.

In this case in particular, the claimant Kuldip M. was insured by TD General as his personal automobile insurer. Accordingly, within the strict language of subsection 2 of section 268, this is a relationship described in clause 1, sub-clause i. TD General is the insurer of an automobile in respect of which Kuldip M. is an insured.

But when one takes into account the "company automobile" section of the SABS that deems a regular user to be a "named insured", both TD General and Markel are insurers to respond at the highest level.

When we further analyze by applying subsection (5.2) of section 268, we see that the legislation calls for the application to be made to Markel, not to TD General. Accordingly, on the facts as I have now found them, and with the application of the law as I have done, Kuldip M. has recourse against Markel. In accordance with the custom in the trade and in many prior decisions, Markel would thus be the higher ranking insurer to respond.

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[3] *Haldenby v. Dominion of Canada General Insurance Company* (2001), Ontario Court of Appeal

Does this require me to conclude that TD General is not entitled to loss transfer, because TD General was not the highest ranking insurer? I would answer that question in the affirmative, if Kuldip M. did have recourse to a higher ranking insurer.

Section 268 (2) frames priority in terms of "recourse". In reality, until this decision, Kuldip M. did not have entitlement against the Markel policy because Markel denied that it was the highest ranking insurer. Markel raised a factual and legal issue as a barrier to Kuldip M.'s entitlement under the Markel coverage. This is evidenced by the correspondence in the record at Tab 3 of Exhibit 2, a letter dated June 22, 2009. Markel states "we are not in a position to accept any obligation to pay Statutory Accident Benefits at this time".

In the face of this position, I cannot conclude that Kuldip M. had an immediate entitlement in fact against the Markel policy.

But "recourse" implies a right that may be pursued, not a mere payment.

Kuldip M. might have pursued some proceeding against Markel. But how would this happen? He had already applied to TD General, and TD General, in accordance with the requirements of O. Reg. 283/95, was paying the benefits. Can it be said that Kuldip M. has recourse against Markel when he has no unpaid claims? This recourse is entirely theoretical. It might exist, but it would never be pursued.

But TD General did have a form of recourse, in the way of a priority dispute. As things turned out, this was imperfectly pursued.

There are compelling policy reasons to conclude that loss transfer is a right that should accrue only to the highest ranking insurer, after all of the priority rules are applied to the facts. Most importantly, O. Reg. 664 and section 275 of the Act both make it clear that loss transfer is not universally available – It only applies in favour of an insurer in some, not all, cases. A key determinant is the nature of the policy issued by the insurer asserting the loss transfer claim. Subsection 9(3) of O. Reg. 664 provides:

> **9 (3). A second party insurer under a policy insuring a heavy commercial vehicle is obligated under section 275 of the Act to indemnify a first party insurer unless the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a heavy commercial vehicle.**

Hence the characteristics of the policy affect the right to loss transfer. This is a critical feature. To determine liability for loss transfer, one must know the details of the policy where the claimant "has recourse". It would be irrational to look at the characteristics of anything other than the highest ranking insurer for this purpose. The liability of the insurer responding, Markel in this case, should not be randomly determined by which insurer the claimant made application to. The legislation must be read in a way which rationally advances the purposes of the legislation.

I must conclude that this means that priority needs to be resolved in order for loss transfer to follow. The insurer, and the characteristics of the policy, must be known before loss transfer can be determined. Therefore, section 275 should be read as conferring a right to loss transfer only on the highest ranking insurer.

Until that highest ranking insurer is known, and the features of its coverage revealed, loss transfer cannot be dealt with.

Therefore, I conclude that section 275 does not apply in favour of TD General in this specific case. In my view, this is not only consistent with the language of the statute, it is consistent with ancillary documentation referred to above, the other statutory provisions, and the regulatory scheme.

I have considered the two earlier decisions that touch on this issue. In *Kingsway v. Zurich* (April 4, 2011) I have alluded to this interpretation of section 275. In the decision of arbitrator Robinson in *RBC v Lloyds* a different conclusion was reached. Loss transfer was allowed to be exercised by an insurer that was not the insurer responsible under section 275. That decision might be distinguishable on its facts, but if it is not I choose not to follow it in this case. I am constrained by the language of the statute and the pragmatic need to have loss transfer available only to the highest ranking insurer, at least for the purpose of knowing whether the policy of the loss transferor meets the criteria set out in the regulation. Accordingly I cannot agree with arbitrator Robinson's conclusion that "it is not necessary on a Loss Transfer issue to make any determination of the priority matter".

As a result, I conclude that loss transfer is not available to TD General in the context of this case.

The Estoppel Argument

TD General argues that Markel should be estopped from denying TD General's right to loss transfer. Markel has, in the course of this claim, taken a position about priority.

That position has generally been to suggest that TD General is the highest ranking insurer. Now Markel effectively argues that there can be no loss transfer because TD General was not the highest ranking insurer. The inconsistency in these positions is striking.

The position that Markel was not accepting priority had been clearly communicated to TD General.

There is no evidence before me that TD General relied on the representation of Markel to its detriment. In fact the opposite is true. TD General did not accept the representations of Markel with respect to priority and put the matter into an internal process for commencement of arbitration. For unknown reasons, this was not done in time to meet the limitation provision.

As much as one may be tempted to apply some theory of estoppel to foist the loss on Markel, I decline to do so. I know of no theory of estoppel that would apply here where there is no reliance or detriment that flows from the position communicated.

Conclusion

For the foregoing reasons and based on the record before me, I have concluded that TD General is not entitled to succeed with a priority dispute in order to shift this loss to Markel. TD General is precluded from doing so from the procedural reasons set out.

TD General is not entitled to pursue loss transfer in accordance with section 275 of the *Insurance Act* and in accordance with the regulations that are applicable to loss transfer claims.

If the parties wish to make submissions with respect to costs, I would be pleased to hear from them by January 21, 2014.

Dated at Toronto this 13th day of December, 2013.

LEE SAMIS
Arbitrator