IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, Sub rule 268 (2) and ONTARIO REGULATION 283/95, as amended

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

WAWANESA MUTUAL INSURANCE COMPANY

Applicant

- and -

THE HARTFORD CANADA

Respondent

DECISION

COUNSEL:

Kevin Mitchell for the Applicant

Mark Donaldson for the respondent

ISSUES:

1. Were the accident benefits paid to or on behalf of the claimant, Sami Sa'd, by Wawanesa reasonable in the circumstances?

2. What amount, if any, of the benefits paid to or on behalf of Mr. Sa'd by Wawanesa is Hartford responsible to pay?

3. What is the amount of interest, if any, payable on any amounts found owing and to be reimbursed by Hartford to Wawanesa?

4. Is Wawanesa entitled to its' costs of bringing an application to appoint the arbitrator?

RESULT:

1. The accident benefit payments were reasonable in the circumstances.

2. Hartford is responsible to pay all the benefits paid by Wawanesa.

3. The question of interest has not been dealt with.

4. Wawanesa is entitled to half its' costs of bringing the application.

HEARING:

This arbitration was held on April 12, 2003 in the city of Toronto, in the province of Ontario, before me, M. Guy Jones, pursuant to the provisions of the Arbitration Act, 1991.

EVIDENCE:

The parties submitted an agreed statement of facts and no witnesses were called to give evidence.

THE FACTS:

The claimant in this matter, Mr. Sami Sa'd, was employed by Team Chrysler Dodge on December 8, 2000 when he was injured while driving a car owned by his employer and insured by Hartford. The claimant's personal vehicle, not involved in the accident, was insured by Wawanesa Mutual Insurance Company. Wawanesa paid accident benefits to or on behalf of the claimant until approximately late May 2001, when the file was transferred to Hartford who agreed that it was responsible for payment of any further accident benefits to or on behalf of Mr. Sa'd.

What is in dispute is the responsibility of Hartford to pay accident benefits paid to or on behalf of Mr. Sa'd prior to the transfer of the file.

The Wawanesa has brought this dispute to arbitration pursuant to Regulation 283/95, claiming that Mr. Sa'd had the regular use of the Team Chrysler Dodge motor vehicle at the time of the accident, which was insured by Hartford, and therefore Hartford, pursuant to sub-provisions of section 66 of Bill 59 should be responsible for payment of the accident benefits. Section 66 states:

> (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;…

Section 66 has the effect of making Mr. Sa'd a "named insured" for the purposes of the priority provisions as set out in section 268 (2) of the Insurance Act. If Mr. Sa'd is a "named insured", Hartford stands in priority to Wawanesa with regard to the payment of accident benefits paid to or on behalf of Mr. Sa'd. As indicated above, Hartford accepted priority and took over adjudication of the file in late May 2001. The evidence confirms that Mr. Sa'd had the company vehicle available for his regular use, and, as such, was a deemed named insured pursuant to section 66 of Bill 59. Therefore, Hartford stands in priority to Wawanesa for the purposes of the payment of the accident benefits. The real dispute in this matter involves a question of whether Mr. Sa'd was in the course of his employment at the time of the accident and therefore entitled to W.S.I.B benefits. Hartford takes the position that Mr. Sa'd was entitled to claim W.S.I.B. benefits and therefore section 59 of Bill 59 applies. It further argues that Wawanesa did not comply with section 59 and accordingly the payments made by Wawanesa prior to the file being transferred to Hartford in May 2001 were not reasonable and necessary in the circumstances and accordingly Hartford is not obligated to pay Wawanesa for benefits paid until the time of the transfer of the file.

DEFLECTION ISSUE:

Prior to examining the issue of the applicability of and compliance with section 59, there is a preliminary matter to be addressed.. Wawanesa takes the position that Hartford, in essence, received the first application for accident benefits and deflected the claim to Wawanesa and, as such, ought not to be allowed to raise defenses

when they themselves should have paid the claim in the first place. On the evidence, it appears that the accident and property damage were first reported to Hartford. Hartford apparently advised the claimant that he should claim accident benefits from his personal motor vehicle insurer, Wawanesa. Insurers "deflect" accident benefit claims at their peril. In certain circumstances, if an insurer does deflect an accident benefit claim to another insurer, that company may lose the right to raise objections regarding compliance with procedural aspects of the priority regulation. (see: Liberty Mutual Insurance Company vs. The Commerce Insurance Company, unreported decision, Arbitrator Jones, July 6, 2001, upheld by Lissaman J. [2001] O.J.No. 5479). The onus to prove deflection is upon the party alleging it and on the facts of this case I am not satisfied that the onus has been met. While I accept that someone from Hartford knew that there had been an accident and that there was a claim for accident benefits it is not clear what Hartford knew regarding the factual situation concerning the employment and regular use issues at the time that it apparently suggested that the claimant go to Wawanesa for payment of accident benefits. Not every instance where an insurer tells a potential claimant to go to another insurer for payment of accident benefits, even when done incorrectly, constitutes deflection. It may well be that the initial insurer reasonably believed in a set of facts, which, if true, would have meant that the other insurer should have paid the accident benefits. The mere fact that Hartford was the priority insurer does not automatically mean that Hartford wrongfully deflected the claim to Wawanesa. There are simply insufficient facts in this case to conclude that the application was wrongfully deflected.

W.S.I.B.- SECTION 59 ISSUES:

As indicated above, the core of Hartford's refusal to pay Wawanesa for accident benefits paid to or on behalf of Mr. Sa'd is contingent upon whether Mr. Sa'd was entitled to receive benefits under any workers' compensation law or plan and whether the provisions of section 59 of Bill 59 were complied with.

Section 59 states:

> (1) the insurer is not required to pay benefits under this Regulation in respect of any insured person who, as result of an accident is entitled to any worker's compensation law or plan.
>
> (2) subsection (1) does not apply in respect of an insured person who elects to bring an action referred to section 10, of the workers' compensation act so long as the election is not made primarily for the purpose of claiming benefits under this Regulation.
>
> (3) if a person is entitled to receive benefits under this Regulation as a result of an election made under section 10 of the Worker's Compensation Act, no income replacement, caregiver or non earner benefit is payable to the person in respect of any period of time before the person makes the election …
>
> (5) despite subsection 1, if there is a dispute about whether subsection applies to a person, the insurer shall pay full benefits under this Regulation pending resolution of the dispute if,
>
> (a) the person makes an assignment to the insurer of any benefits under any workers' compensation law to which he or she is or may become entitled as a result of the accident; and
>
> (b) the administrator or board responsible for the administration of the workers' compensation law or plan approves the assignment.

As noted above, Mr. Sa'd was injured in a motor vehicle accident which occurred on December 8, 2000. Mr. Sa'd completed an application for accident benefits on or about December 18, 2000 and submitted it to Wawanesa who received it, along with the Activities of Normal Life form and an authorization and direction on December 28, 2000. The employer's Confirmation of Income was not received by Wawanesa until January 7,

2001 and Wawanesa paid the first income replacement benefit installment on January 19, 2001. Payments continued to be paid by Wawanesa until May 29, 2001 when the file was taken over by Hartford.

If Hartford is to succeed in their argument that Wawanesa ought not to have paid the benefits until May 29, 2001, it must show that the payments were not reasonable or necessary. In order to do so, it must show that there was non-compliance with section 59 of Bill 59 and that it was unreasonable to make the payment in light of the non-compliance.

When the current accident benefit schedule was established, the basic idea was to have other insurance schemes and laws primary to it. That is, if other insurance was available, it should be accessed before the motor vehicle accident benefits were provided. This approach as it relates to accident benefits and W.S.I.B. benefits was co-defied in section 59(1) of Bill 59, which states:

> "the insurer is not required to pay benefits under this Regulation in respect of any insured who, as a result of an accident, is entitled to receive benefits under any Worker's Compensation law or plan".

There are, however, two exceptions to this rule. Section 59 (2) provides that subsection (1) does not apply if the insured person makes an election under section 10 of the W.S.I.B. Act as long as the election is not made primarily for the purposes of claiming benefits under the Regulation. In the event that a section 10 election is made, no accident benefits are payable pursuant to section 59 (3) for any period prior to the election being made. The second exception is covered by section 59 (5) where if there is a dispute about whether subsection (1) applies, in other words, if there is a dispute as to entitlement to W.S.I.B. benefits, then accident benefits shall be

paid if (a) the person makes an assignment to the insurer of any benefits under any W.S.I.B. law or plan to which he or she is or may become entitled, and (b) the Board responsible for the administration for the W.S.I.B. law or plan approves the assignment.

When we examine the facts of this case, it is clear that at the beginning of the claim there was no good reason for the adjustor from Wawanesa, Ms. DeSousa, to think that the injured party was entitled to W.S.I.B. benefits. The application for accident benefits submitted by the claimant indicates that the accident did not occur while at work and that he had not filed a W.C.B. claim.

On January 9, 2001 the adjustor spoke to the claimant who advised that he used the company automobile mostly for business as he was a car salesman working six days a week but that he also used the car for personal use and the accident occurred on his day off.

The adjustor was reinforced in her view that the claimant would not be entitled to W.S.I.B. as a result of talking to a representative of the claimant's employer on January 13, 2001, who advised that in their view the claimant could not claim accident benefits through the employer's motor vehicle liability policy as the claimant was not supposed to be using the vehicle for personal use. While this may have been a misstatement of the law, it would have certainly reinforced the adjustor's view that this was not a situation where the claimant would have been entitled to W.S.I.B. benefits.

Despite early requests, the adjustor was unable to get the claimant's lawyer to agree to provide a signed statement. Instead she received a statutory declaration dated January 18, 2001, which did not address the issue of whether he was in the course of employment when injured.

It was not until February 22, 2001 that Ms. De Sousa was able to obtain a signed statement from the claimant. I find that any delay in obtaining this statement was not as a result of the actions by the adjustor, but rather the lack of cooperation by the claimant's representative. In any event, when Ms. DeSousa took the statement she was advised by the claimant that while it was his day off, he was in fact at work that day and had just returned home to pick up some paperwork for the owner of the company and was returning to work when the accident occurred. While the signed statement does not indicate this, it was the adjustor's view, as stated at her examination for discovery which was filed at the hearing, that he was simply doing his employer a favour by picking something up at his home. No further inquires were made regarding the potential entitlement to W.S.I.B.

On the following day, February 23, 2001 Wawanesa forwarded to Hartford a Notice of Dispute Between Insurers. Hartford acknowledged receipt of the Notice on or about March 7, 2001 and took over the handling of the file on or about May 29, 2001. At no time prior to the transfer of the file did Wawanesa pursue either a W.S.I.B. assignment or confirmation that the claimant had elected to bring an action with regard to the motor vehicle accident.

The first question to be addressed is whether section 59 (1) applies. That is, was the claimant entitled to receive benefits under a W.S.I.B. law or plan. In my view, at least up until the taking of the signed statement there was no reason to believe that there was entitlement to W.S.I.B benefits. Everything up to that time pointed to the contrary. Indeed, there was not even any dispute about possible entitlement up to that point. I am satisfied that up until at least February 22, 2001 section 59 (1) and (5) do not apply and that the payments up until that time were reasonable and necessary. As such, Hartford is responsible for those payments.

I am unwilling to accept that the mere fact that the claimant was in a company vehicle is sufficient to create a situation where an injured party must either give an assignment of potential W.C.B. benefits and have the assignment approved by the Board, prior to receiving accident benefits or make an election under section 10 of the Worker's Compensation Act. It is a fundamental principle of accident benefits that they are to be made as soon as possible to the injured party and interpreting section 59(1) to in such a way as to potentially seriously delay such payment is not desirable. In my view, Wawanesa rightfully paid the benefits until at least February 22, 2001.

The question of what should have been done after February 22, 2001 until Hartford actually took over the file on May 29, 2001 is somewhat more troublesome.

Certainly, on the face of it, the signed statement of the claimant taken by Ms. DeSousa would reasonably raise an issue regarding the possible entitlement to W.S.I.B. benefits. While Ms. DeSousa may have been of the view that the trip to the office by the claimant that resulted in the accident was simply the doing of a favour rather than constituting being in the course of employment, I am in the view that at the very least further inquiries should reasonably have been made at that time. I accept that one should not, when reviewing these matters, expect perfection. Adjustors are extremely busy individuals, dealing with a multitude of complex matters. Nonetheless, in the particular circumstances of this case, I am of the view that further investigation or questioning would have been reasonable.

Having said that, the question arises as to whether or not this created a situation where section 59 (1) applies, where the claimant was entitled to receive benefits under a Workers' Compensation law or plan, and if so, what is the effect of section 59 (2) and (3) of the Act, if any?

While the entitlement should have been investigated further after obtaining the signed statement, that does not necessarily mean that there was automatic entitlement such that section 59(1) applied. All of the facts up to that point suggested to the contrary, and the information in the signed statement is simply one piece of additional information to be fitted into the overall picture. It is worth noting that there was no evidence in the W.S.I.B. file submitted as an exhibit at the hearing, that the claimant had filed a claim (Form 7) or a health care practitioner (Form 6) which they are required to do by law. The Board had not even established a claim number with regard to the loss nor did it have any information pertaining to the matter until it was advised by a representative by Hartford after taking over carriage over the file. While these facts are not determinative of the issue, they provide some evidence when examining the issue.

In addition, it is worth noting that at no time did the claimant himself proceed with the W.S.I.B. matter, other than to do what was requested of him by Hartford, presumably in order to allow to him to continue to receive accident benefits. No W.S.I.B. benefits were ever paid and no application to the W.S.I.B. Appeals Tribunal was proceeded with in order to determine entitlement to W.S.I.B benefits.

Accordingly, on all of the facts presented to me I am satisfied that Mr. Sa'd was never entitled to W.S.I.B. benefits as contemplated by section 59 (1) of Bill 59. In the event, however, that I am mistaken in this regard, it

is worthwhile examining whether sections 59 (2) and (3) would have applied, and if so, what are the consequences?

Pursuant to section 59 (2), the claimant is, of course, allowed to receive accident benefits if he elects to bring an action referred to in section 10 of the Worker's Compensation Act, so long as the election was not made primarily for the purpose of claiming accident benefits. In our case, there does not appear to be any significant evidence to suggest that an election, if it was made, was simply to claim accident benefits. We know that the claimant was rear-ended and he suffered injuries. We know that Mr. Sa'd sent a tort notice letter, albeit not until November 26, 2001, to the potential tort defendant. In addition, by way of letter from a representative of Wawanesa to a representative of Hartford, dated October 19, 2001 (exhibit 1, tab 69) both parties to this proceeding knew of Mr. Sa'd's intention to elect as per section 10, as of that date.

The issue of when a person has made or has deemed to have made an election under section 10 was reviewed in detail by Arbitrator Renehan in Gebreu vs. Coseco Insurance Company [2001] O.F.S.I.D. No. 133 with whose reasoning in that case I agree. He held that the question of when an election is made is determined by the facts of each particular case and is not limited to the time when the tort action is actually commenced.

In our case, as I understand it, no tort action was actually commenced as Mr. Sa'd died for reasons unrelated to this accident. It is worth noting that pursuant to section 30 of the W.S.I.B. Act, the successor to section 10 of the Workers' Compensation Act, a person is to elect within three months of the date of the accident. If no such election is made they shall be deemed, in the absence of any evidence to the contrary, to have elected not to receive W.S.I.B. benefits. My review of the facts of this case indicates that there was no evidence prior to the

three-month anniversary of the accident to suggest that Mr. Sa'd was going to elect W.C.B. Indeed the evidence is to the contrary. Accordingly by March 8, 2001, at the very latest, a deemed election not to choose W.S.I.B. benefits was made.

Given that I have found that at least up until the taking of the signed statement on February 22, 2001 it was reasonable for Wawanesa to make accident benefits payments and that the deemed election was no later than March 8, 2001, we are concerned with accident benefit payments of a period of approximately two weeks.

In the event that I am incorrect and section 59 (1) applied, the question would arise as to Hartford's obligation to pay accident benefits to Wawanesa for that period prior to the deemed election of March 8, 2001. Section 59 (3) states that no income replacement benefit is payable to the person in respect of any period of time before the person makes an election. While I do not think, strictly speaking, that I need to deal with this question given my findings above, since counsel spent a considerable period of time addressing this issue, I will comment upon it at this time. Hartford takes the position that payments cannot be made for the period prior to the election, in this case, March 8, 2001. Wawanesa on the other hand submits that once the election is made, the election in effect allows for retroactive payment of the accident benefits. Counsel were unable to direct me to any case law with regard to this issue. On balance, I am of the view that in the appropriate circumstances retroactive payments of accident benefits can be authorized by the subsequent election. One of the basic principles behind accident benefits is to get benefits to injured parties as soon as possible. To interpret the legislation in such a way to defeat this purpose is not desirable. In cases such as this, where there was a clear need for accident benefits and no W.S.I.B. benefits were paid to Mr. Sa'd, it makes no sense to continue the non-payment of accident benefits. Thus, the election allows for retroactive payment of the benefits in this particular case.

Counsel also made submissions with regard to the applicability of section 59 (5) of Bill 59, which states:

> Despite subsection (1), if there is a dispute about whether subsection (1) applies to a person, the insurer shall pay full benefits under this Regulation pending resolution of the dispute if,
>
> (a) the person makes an assignment to the insurer of any benefits under Workers' Compensation law or plan to which he or she is or may become entitled as a result of the accident; and
>
> (b) the administrator or Board responsible for the administration for the Workers' Compensation law or plan approves the assignment.

This, in my view, has more applicability to this situation than section 59 (2) and (3) as in my reading of the facts there was a dispute of whether section 59 (1) applied, although the applicability of this subsection is tenuous up until the time that Hartford took over the file.

In any event, the facts pertaining to this argument are that no such assignment of W.C.B. benefits was made until July 31, 2001 when Underwriters Adjustment Bureau Ltd., acting on behalf of Hartford, submitted an assignment of W.S.I.B. benefits to the W.S.I.B. on behalf of Mr. Sa'd. On August 1, 2001, the Board responding to Hartford's representative advised that they had approved the assignment thereby complying with the second requirement of section 59 (5).

It is important to note that up until the time that the assignment was filed and the approval given by the W.S.I.B., no W.S.I.B. benefits had been paid. Furthermore, on November 26, 2002 Ms. Vera Radicevic, Legal/Policy Analyst for the W.S.I.B. wrote a letter on this matter stating:

> In a claim where no benefits have been paid by the W.S.I.B. and an Assignment of Workplace Safety and Insurance Benefits form is received and approved by the W.S.I.B at a later date, the W.S.I.B. would divert the appropriate funds to the appropriate insurance company who submitted the approved assignment should this claim be allowed. The date of the approved assignment would not impact the effective date of the assignment for reimbursement purposes if no benefits have previously been paid by the W.S.I.B. (Exhibit 1, tab 84)

Thus, in this case, the date of the assignment and the approval are of no consequence. The assignment is, in effect, retroactive and has been confirmed as such by the W.S.I.B. Accordingly, there has been compliance and Hartford should therefore pay Wawanesa the accident benefits paid out up to the date that Hartford took over carriage over the file.

COSTS OF BRINGING THE ARBITRATION APPLICATION:

Counsel for both parties made submissions at the conclusion of the hearing as to the costs that were incurred in bringing the application for arbitration itself. After hearing submissions from the parties I am of the view that while it was necessary to bring the Application, it would appear that the matter was made unduly difficult by Wawanesa. I would award Wawanesa only half of the costs associated with the actual Application for Arbitration.

The parties agreed, prior to the arbitration that costs were to be in the cause, with discretion left to the arbitrator as to the scale. In light of the facts of this case, I award costs to Wawanesa on a partial indemnity basis. While the issue of the amount of interest owing on the monies to be paid by Hartford was before me, I received no submissions in this regard. In the event that the parties are unable to resolve this issue I may be spoken to.

Dated this _____ day of December, 2003, in the city of Toronto.

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M. Guy Jones
Arbirator