

*IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
c. I. 8, SECTION 268 and REGULATION 283/95*

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

PAFCO INSURANCE COMPANY

Applicant

- and -

WAWANESA MUTUAL INSURANCE COMPANY

Respondent

DECISION – ADJOURNMENT REQUEST

COUNSEL:

Eric Grigg and Nawaz Tahir for the Applicant

Kevin Mitchell for the Respondent

BACKGROUND & ISSUE:

1. Austin Henry, Jr. was involved in an accident on June 30, 2014. The vehicle that he was driving appears to have been uninsured at the time of the accident. The other vehicle involved in the accident was insured by Wawanesa Mutual Insurance Company (“Wawanesa”). Mr. Henry’s father, known as Austin Henry, Sr., was a named insured under an auto policy issued by Pafco Insurance Company (“Pafco”) at the time of the accident.

2. The Claimant submitted an application for payment of benefits under the SABS to Pafco. Pafco subsequently provided notice to both Wawanesa and the Motor Vehicle Accident Claims Fund (“the Fund”) of its intention to dispute its obligation to pay benefits to the Claimant, and commenced arbitration proceedings against them. The Fund was let out of the arbitration, and I was subsequently retained to arbitrate the dispute between Pafco and Wawanesa. The focus of the dispute to date has been on whether the Claimant was financially dependent upon his father, the Pafco insured, at the relevant time.

3. An arbitration date of January 16, 2017 was scheduled during the course of the second pre-hearing teleconference held with counsel. Counsel for Wawanesa now requests that this date be adjourned to a later date, in order to permit further investigation into the issues raised. The parties agree that the two-year deadline for completing the arbitration in accordance with the provisions in section 8(2) of Regulation 283/95 would be March 8, 2017. Counsel who will be arguing the matter for Pafco is not available between January 16 and March 8, 2017, and Pafco does not consent to extending the arbitration deadline beyond the two year point.

4. Counsel have filed extensive written submissions on this issue and provided me with a full documentary record of the contact between their clients and relevant other parties thus far. ***The sole issue for determination at this stage is whether or not the January 16, 2017 hearing date should be adjourned to a point beyond March 8, 2017.***

RESULT:

5. ***Wawanesa’s request to have the hearing date of January 16, 2017 adjourned is granted.*** My assistant will be in contact with both of your offices in order to reschedule the Arbitration to a date in spring or summer of 2017, on which all parties are available.

CHRONOLOGY OF EVENTS:

(i) Initial steps – pre arbitration

6. Pafco served a Notice to Applicant of Dispute Between Insurers to both Wawanesa and the Fund on September 8, 2014. Wawanesa responded shortly afterwards, and requested further information including evidence relating to the Claimant's financial circumstances. Pafco responded that Mr. Henry, Jr. was an excluded driver under its policy, and provided a copy of a signed statement obtained from the Claimant, as well as an accounting report obtained on September 4, 2014 that concluded that he was not financially dependent upon his father. In a letter dated November 4, 2014 the Wawanesa adjuster stated that "we are denying priority based upon insufficient information to disprove dependency".

(ii) Commencement of arbitration

7. Pafco then retained counsel and a Notice to Participate and Demand for Arbitration was forwarded to both Wawanesa and the Fund on March 5, 2015, received by Wawanesa on March 9th. That same day, Kevin Mitchell responded on behalf of Wawanesa, and advised that his client did not consent to the appointment of the Arbitrator suggested. He suggested that once counsel for the Fund was identified, the question of a suitable arbitrator could be revisited.

8. On March 20, 2015 counsel for the Fund wrote to both counsel for Pafco and the Wawanesa adjuster stating that "no useful purpose would be served by including the Fund in this DBI arbitration". He suggested that both insurers agree to release the Fund from the proceeding so that unnecessary costs could be avoided. Mr. Mitchell confirmed on March 25, 2015 that Wawanesa had a valid policy in place on the date of loss and that there was no requirement for the Fund to participate further. He asked counsel for Pafco to confirm his position in this regard, and to turn his mind toward selecting an arbitrator so that a pre-hearing call could be scheduled and EUOs arranged.

9. Counsel for Pafco, Wawanesa and the Fund then exchanged further correspondence, and on June 9, 2015, three months after the Notice commencing arbitration was sent, Mr. Tahir confirmed that Pafco was prepared to release the Fund from the Arbitration. He requested that Mr. Mitchell provide names of three Arbitrators that Wawanesa would be amenable to using, which Mr. Mitchell did on June 23, 2015. On August 25, 2015, over two months later, Mr. Grigg (on behalf of Pafco) advised that he had received instructions to agree to my appointment. My office was contacted on the following day.

10. Several email messages were then exchanged between my office and counsels' assistants in order to confirm a date for the initial pre-hearing call. Finally, on September 11, 2015 it was agreed that the initial pre-hearing call would take place on February 2, 2016. The fact that this date was five months into the future was due to the limited availability of both Mr. Mitchell and Mr. Tahir over the fall months. When the call proceeded in February, Mr. Grigg participated on behalf of Pafco rather than Mr. Tahir.

(i) *Steps in Arbitration process*

11. By the time the first pre-hearing call was convened in February 2016, almost eleven months had passed since the Notice commencing arbitration was delivered. Counsel for Pafco advised during the call that the Claimant was not a listed driver on his father's policy, and contended that he was not financially dependent upon him at the time of the accident. He advised that State Farm had insured the vehicle that the Claimant was driving at the time of the accident at one point, but that the information collected by his client indicated that no policy was in place on the date of loss. Mr. Grigg agreed to provide copies of the complete SABS file as well as any information in Pafco's possession regarding the State Farm policy to Mr. Mitchell.

12. These documents, and others, were forwarded to Mr. Mitchell in early April 2016. A further pre-hearing call was convened on April 29th. Mr. Mitchell was out of the country and one of his associates participated in the call in his place. She advised that Mr. Mitchell had not had the chance to review the productions received, and that she could not state whether EUOs were required or further parties added. The January 16, 2017 arbitration date was scheduled at that time.

13. A third pre-hearing call was convened on May 30, 2016. Mr. Mitchell advised that he had reviewed the productions received, and asked for some further information. He also requested that the hearing date scheduled at the last call be changed to another day in January or February, 2017. I noted that counsel would be in touch to determine their availability (and mine) in that regard.

14. On August 16, 2016 Mr. Mitchell wrote to Mr. Grigg and advised that he required copies of the Claimant's Ontario Works file, his file with FASTT (Fostering Aboriginal Success in the Trades and Technology), as well as copies of his pre-accident bank records for the year prior to the accident, in order to assess the financial dependency issue. Mr. Grigg responded that his client did not have these documents, and suggested that Mr. Mitchell attempt to obtain them from the Claimant. Mr. Mitchell made this request to Scott Tottle, counsel for the Claimant, on September 12, 2016.

15. A fourth pre-hearing call took place on September 14, 2016. Counsel confirmed that the exchange of productions between them was complete, but that Mr. Mitchell was awaiting a response from Mr. Tottle regarding the financial information outlined above. At Mr. Mitchell's request, an Examination Under Oath of the Claimant's father was scheduled to take place on November 7, 2016.

16. Mr. Mitchell then wrote to Mr. Grigg on September 21, 2016 advising that the SABS file received from Pafco contained very limited medical documentation and that there were no documents beyond November 16, 2015. He requested the complete and current SABS file, which was provided by Mr. Grigg on October 13, 2016.

17. Mr. Tottle responded to Mr. Mitchell's request for financial information on October 19th. He advised that he had requested the Ontario Works file and would provide a copy upon receipt. He stated that the FASTT file was no longer available and that the Claimant did not have a bank account during the year prior to the accident, so no bank records could be provided. I understand that the Ontario Works file has not yet been received.

18. The Examination Under Oath of the Claimant's father proceeded on November 7, 2016. I had also issued a Summons compelling the Claimant's attendance on that date, but Mr. Tottle called a few days prior to advise Mr. Mitchell that he would not agree to produce the Claimant, as he had already been examined by Mr. Tahir in October 2014.

19. Our fifth pre-hearing call took place on November 8, 2016. It was during this call that Mr. Mitchell requested that the January 16, 2017 hearing date be adjourned. He noted that he had only received the complete SABS file from Mr. Grigg's office a few weeks earlier, and that he was still awaiting receipt of the Ontario Works file. He advised that he was also awaiting instructions from his client regarding whether to seek a further examination of the Claimant, which would likely require Mr. Tottle's involvement in a pre-hearing call and my ruling on whether or not he should be required to attend.

20. Mr. Grigg subsequently advised by email that his client would not consent to an adjournment beyond the second anniversary of the commencement of the arbitration. As noted above, Mr. Tahir is not available to attend the hearing in February or early March 2017. Mr. Grigg also advised that the Claimant has been deemed to be catastrophically impaired under the SABS.

ANALYSIS & RULING:

21. Wawanesa contends that the January 16, 2017 hearing date should be adjourned to a later date, so that it can obtain further documentation and information necessary to make a proper determination of which insurer is in priority. Counsel notes that earlier arbitral decisions have held that the two-year deadline in which to complete an arbitration contained in section 8 of Regulation 283/95 is directory and permissive, rather than mandatory, and that an extension of time would be fair in the circumstances. Counsel for Wawanesa also states that Pafco has either caused or contributed to significant delays in the process thus far, and that it would accordingly be unfair to require Wawanesa to proceed to hearing in January 2017.

22. Pafco claims that it provided Wawanesa with substantially all of the evidence upon which it intends to rely in late September 2014, and that they have had more than enough time to complete any necessary investigations. Counsel submits that the regulation expresses a clear legislative intention that priority disputes are to be dealt with expeditiously, and that the hearing should proceed as scheduled.

23. I agree that the provisions in Regulation 283/95 are designed to promote the expeditious resolution of priority disputes. However, I also agree with Arbitrator Bialkowski that the timelines in section 8(2) of the regulation are procedural rather than substantive, and that they are intended to be permissive rather than mandatory (*Unifund v. Wawanesa*, April 2015). I note, as did Arbitrator Bialkowski, that no penalty is provided for the breach of these timelines, and that if no discretion was permitted in interpreting these provisions, a party intent on delaying the process in order to avoid an arbitration could achieve the intended result without consequence.

24. I therefore consider the parties' submissions with a view to procedural fairness. The first pre-hearing call in this case was convened eleven months after the Notice of commencement of arbitration was received by Wawanesa. That is almost half way through the two-year time line provided in section 8(2)5 of the regulation within which an arbitration is supposed to be completed. A review of the steps taken prior to that point suggests that that was largely, although not entirely, due to the time that it took Pafco and its counsel to navigate those steps.

25. It took Pafco almost three months from the time that Wawanesa advised that its policy was in force at the time of the accident to confirm that it would not be pursuing arbitration against the Fund. It then took a further two months – from June 23 to August 25, 2015 – for counsel for Pafco to advise counsel for Wawanesa that it agreed to one of

its proposed arbitrators. When attempts were made shortly thereafter to fix a date for the first pre-hearing call, the fact that it could not be scheduled until approximately five months later was partly due to Mr. Tahir's unavailability, despite the fact that he did not end up participating in the call (or any that followed).

26. I also note that Pafco did not require that the initial pre-hearing call take place within 120 days of the commencement of the arbitration, as provided in section 8(2)2. This would have required that a call be scheduled by early July 2015, well before I was appointed to arbitrate this matter. While this is not determinative of the issue, I find Pafco's insistence on strict compliance with the timelines at this later stage in the process to be inconsistent with their earlier, more casual approach to moving through the initial steps in the arbitration process. This latter approach acknowledges the fact that counsel involved in these disputes often have busy schedules, and that compromises are required when attempts are made to schedule hearing dates with senior counsel.

27. Pafco points out that the statement from Mr. Henry, Jr. and its accountant's report that concludes that the Claimant was not financially dependent upon his father were provided to Wawanesa in the fall 2014, and that Wawanesa has had two years to complete any further investigation that it felt was required. While I appreciate that Pafco expended time and resources on the dependency question early in the process, in the hope that arbitration could be avoided, it is reasonable for a responding insurer to challenge the evidence provided.

28. In this context, I find that Mr. Mitchell's request for copies of the Claimant's Ontario Works file is reasonable, so that the amount of benefits he received can be confirmed for the time frame in question. The inconvenient fact is that third parties and government agencies often take a long time to respond to these types of requests. Mr. Tottle advised on October 19, 2016 that this file has been requested, but it may not realistically be received for several weeks.

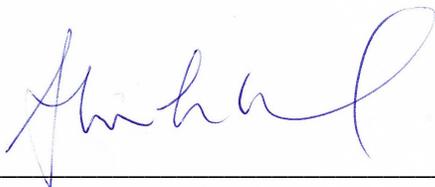
29. Mr. Mitchell could certainly have reviewed the productions that Pafco had sent in early April sooner, so that his mid-August request to Mr. Grigg for further financial information could have been made earlier, and the outstanding items then requested from Mr. Tottle earlier. I acknowledge, however, that counsel have active practices with several files vying for their attention, and they are not always able to review every stack of documents that lands on their desk or appears on their computer screen in short order.

30. Importantly, I also note that it took until October 14, 2016 for Mr. Mitchell to be provided with the complete and updated SABS file, despite his earlier requests for that from Mr. Grigg. Given all of the above factors, I find that fairness dictates that the January 16, 2017 hearing date be adjourned in order to permit Wawanesa to complete its investigations prior to proceeding to hearing.

31. Finally, I note that Mr. Grigg has advised that Mr. Tahir is not available to attend a hearing in February or March 2017. If Pafco had consented to the adjournment of the January hearing date, but took the position that the matter should be scheduled before the two year anniversary of the commencement of the arbitration, I may have approached the analysis differently. However, in view of the fact that counsel for Pafco is unavailable for seven potential weeks (between January 16 and March 9, 2017) of hearing before the two-year anniversary date, I find that cogent and compelling evidence exists to support Wawanesa's request that the January 16th hearing date be adjourned.

32. Accordingly, I will remove the January 16, 2017 hearing date from my calendar. As previously agreed, no cancellation fee will be charged for that date. As set out above, I will ask my assistant to be in touch with both of your offices so that a further call can be scheduled in order to move the matter forward.

DATED at TORONTO, ONTARIO this __22nd__ DAY OF NOVEMBER, 2016.



Shari L. Novick

Arbitrator