IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8 (as amended) 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

B E T W E E N :

WAWANESA MUTUAL INSURANCE COMPANY

Applicant

- and –

UNIFUND ASSURANCE COMPANY

Respondent

DECISION WITH RESPECT TO PRELIMINARY ISSUE

COUNSEL

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Counsel for the Applicant, Wawanesa Mutual Insurance Company
(hereinafter referred to as "Wawanesa")

Derek Greenside – Kostyniuk & Greenside
Counsel for the Respondent, Unifund Assurance Company
(hereinafter referred to as "Unifund")

ISSUE - AUTHORITY TO INITIATE ARBITRATION IN ABSENCE OF AN OCF-1

[1] In the context of a priority dispute pursuant to s.268 of the *Insurance Act*, R.S.O. 1990, c. I.8 and Ontario Regulation 283/95, the issue before me is to determine which insurer stands in priority to pay statutory accident benefits to or on behalf of the claimant, Carmen McNally, with respect to personal injuries sustained in a motor vehicle accident which occurred on January 14, 2017.

[2] The Respondent Unifund brings this motion to dismiss the Applicant Wawanesa's priority claim on the basis that no authority exists to initiate a priority dispute pursuant to s. 268 of the *Insurance Act* where an OCF-1 has not been submitted by the insured to such insurer.

PROCEEDINGS

[3] This motion was heard on June 27, 2019.

FACTS

[4] The claimant (Carmen McNally) was an 85-year-old passenger in a vehicle insured with Wawanesa Mutual Insurance Company (hereinafter the "Applicant") when it was involved in a motor vehicle accident on January 14, 2017. The claimant was living with her daughter and son-in-law who had an automobile insurance policy with Unifund Assurance Company (hereinafter the "Respondent") at the time of the accident.

[5] The Applicant has never received a completed OCF-1 from the claimant but opened an accident benefits claims file and engaged in the administration of the claimant's accident benefits claim.

[6] The Applicant has not paid the claimant any accident benefits and has not incurred any expense in relation to medical assessments.

[7] However, the accident was reported to Wawanesa. On January 19, 2017, a Wawanesa accident benefits adjuster took a statement from the claimant at her home which contained information as to possible dependency on her daughter and son-in-law insured with Unifund. The statement also indicated that Ms. McNally attended hospital and did sustain injuries in the accident.

[8] Wawanesa received an OCF-23 dated January 20, 2017, completed by Diane Dufour, Physiotherapist. The OCF-23 is commonly referred to as the "Treatment Confirmation Form" informing the insurer that treatment is being commenced. Ms. McNally's full name, date of birth, telephone number, and complete address are noted on the first page. The complete contact information of the physiotherapist, including phone number and address, is noted on the second page. Ms. McNally's injuries are listed as sprains/strains of the thoracic spine, ribs, sternum, and lumbar spine.

[9] Wawanesa also received an OCF-3 dated February 7, 2017, completed by Dr. Saleh, GP. The OCF-3 is commonly referred to as a "Disability Certificate". Ms. McNally's full name, date of birth, telephone number, and complete address are noted on the first page. Bruising to Ms. McNally's left side of the body, nerve pain in the leg/back, and chest pain are noted on the second page. The information contained in the OCF-3 would suggest possible claims for non-earner benefits and housekeeping and home maintenance benefits. The complete contact information of the GP, including phone number and address, is noted on the last page. Ms. McNally signed the OCF-3 at the bottom of page 2.

[10] The Applicant advised the claimant, in correspondence sent on March 7, 2017 and delivered as an e-mail attachment to the claimant's daughter, that:

> "We require you to submit a completed OCF-1, Application for Accident Benefits. We cannot consider you for receipt of any benefits under the SABS until this is received."

[11] The claimant did not have a legal representative.

[12] The Applicant served the Respondent with their Notice of Initiation of Arbitration (by facsimile transmission to 905–819–2195) on June 5, 2017, proposing the appointment of Kenneth J. Bialkowski to act as Arbitrator for the purpose of resolving a priority dispute based on dependency.

[13] The Applicant proceeded with the appointment of Kenneth J. Bialkowski as Arbitrator on July 5, 2017.

[14] Respondent's counsel corresponded with Applicant's counsel, by facsimile transmission on July 17, 2017, confirming their appointment as counsel on behalf of the Respondent and consenting to the appointment of Kenneth J. Bialkowski as Arbitrator.

[15] The initial pre-arbitration hearing was conducted on November 7, 2017, at which time Arbitrator Bialkowski confirmed that the non-privileged portions of the Applicant's AB claims file were to be produced and that the proposed EUOs were likely to take place in January 2018 with respect to the dependency issue.

[16] Applicant's counsel produced the AB claims file on February 26, 2018, just four days before the already scheduled EUOs were to take place. The AB file did not contain an OCF-1. The contents of the AB file demonstrated the Applicant's position that they require a completed OCF-1 from the claimant and that they would not consider any claims under the SABS until it was received.

[17] The Examinations Under Oath of the claimant, her daughter and son-in-law took place on March 2, 2018.

[18] Counsel for Unifund continued to request a copy of the OCF-1.

[19] The second pre-arbitration hearing was conducted on May 31, 2018, at which time Applicant's counsel advised Arbitrator Bialkowski that there were still unsatisfied undertakings relating to the EUOs.

[20] The third pre-arbitration hearing was to have been conducted on November 20, 2018 but was adjourned, at the request of Applicant's counsel, to February 12, 2019. Respondent's counsel consented to the adjournment and requested, amongst other things, that the Applicant produce a copy of the OCF-1 and produce evidence of service of the DBI Notice on the claimant or her legal representative. Again, the Respondent confirmed that

they would be insisting on compliance with section 8(2)5 of Ontario Regulation 283/95, that is notice to the insured of Wawanesa's dispute of priority.

[21] Respondent's counsel sent an e-mail to Applicant's counsel, on March 29, 2019, reiterating their request for a copy of the OCF-1 and evidence of service of the DBI Notice on the claimant or her legal representative. Applicant's counsel responded with confirmation that there had been no OCF-1 submitted and attaching a copy of the DBI Notice, but no evidence that the DBI Notice had been served on the Applicant or her legal representative.

[22] The third pre-arbitration hearing was postponed, at the Arbitrator's request, until April 2, 2019. Respondent's counsel raised the issue as to whether the Applicant had authority to initiate arbitration, pursuant to Ontario Regulation 283/95, in the absence of a completed OCF-1, and raised the apparent issue with respect to noncompliance under section 4(1) of Ontario Regulation 283/95, in addition to the issue of dependency which the Applicant was asserting. A timetable was agreed upon with respect to all three issues.

[23] Applicant's counsel sent an e-mail to the Arbitrator and Respondent's counsel, on April 18, 2019, confirming that the court reporter was unable to produce the transcripts corresponding to the EUOs and that an IT technician was investigating the possibility of recovering the digitally stored file from the reporter's hard drive.

[24] Applicant's counsel sent an e-mail to the Arbitrator and Respondent's counsel, on May 8, 2019, confirming that over 400 files of raw data had been located and that the court reporter was reviewing the files for the purpose of locating the transcripts. Respondent's counsel responded by indicating that the hearing could still proceed on two of the three issues which were identified at the pre-hearing on April 2, 2019, namely authority to dispute priority in the absence of an OCF-1 and whether notice of the priority dispute was provided to the insured as required by s. 4(1) of O. Reg. 283/95. The dependency issue would be held in abeyance pending the transcript issue.

[25] Prior to the motion to dismiss herein, a copy of the notice to the insured was produced by Wawanesa removing that issue as an issue in the outstanding priority dispute.

ANALYSIS AND FINDINGS

[26] A priority dispute arises when there are multiple motor vehicle liability policies which might respond to a statutory accident benefits claim made by an individual involved in a motor vehicle accident. Section 268 (2) of the *Insurance Act* sets out the priority rules or hierarchy of priority to be applied to determine which insurer is liable to pay statutory accident benefits.

[27] Since the claimant was an occupant of a vehicle at the time of the accident, the following rules with respect to priority of payment apply:

(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 (1), the occupant has recourse against the insurer of the automobile in which he or she was an occupant;*

(iii) *If recovery is unavailable under (1) or (2), 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 (1), (2) or (3), the occupant has recourse against the Motor Vehicle Accident Claims Fund.*

[28] Section 3(1) of O. Reg 34/10 Statutory Accident Benefits Schedule defines "insured person" as follows:

"insured person" means, in respect of a particular motor vehicle liability policy,

(a) the named insured, any person specified in the policy as a driver of the insured automobile and, if the named insured is an individual, the spouse of the named insured and a dependant of the named insured or of his or her spouse,

(i) if the named insured, specified driver, spouse or dependant is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or

(ii) if the named insured, specified driver, spouse or dependant is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse's dependant,

(b) a person who is involved in an accident involving the insured automobile, if the accident occurs in Ontario, or

(c) a person who is an occupant of the insured automobile and who is a resident of Ontario or was a resident of Ontario at any time during the 60 days before the accident, if the accident occurs outside Ontario; ("personne assurée")

[29] Section 3(7)(b) of O. Reg 34/10 Statutory Accident Benefits Schedule defines "insured person" as follows:

(7) For the purposes of this Regulation,

(b) a person is a dependant of an individual if the person is principally dependent for financial support or care on the individual or the individual's spouse;

[30] On the basis of the aforesaid, if Wawanesa had authority to access the priority dispute process and could prove that the claimant was dependent on Unifund's insured, then

Unifund would stand in priority. The issue before me is whether, in the absence of receipt of an application for benefits OCF-1, can Wawanesa access the priority dispute process.

[31] The rules for disputing priority are set out in Ontario Regulation 283/94 – Disputes Between Insurers.

[32] Section 2(1) of Ontario Regulation 283/95 states:

> *"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."*

[33] Section 3(1) of Ontario Regulation 283/95 states:

> *"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 he claims is required to pay under that section."*

[34] At risk of oversimplification, I will outline in the paragraphs to follow the positions taken by the parties with respect to this motion to dismiss brought by Unifund.

[35] The Respondent Unifund in the motion before me has taken the position that in the absence of an OCF-1, the Applicant Wawanesa was under no obligation to pay accident benefits to the claimant and therefore in no position to dispute priority.

[36] In response to the motion to dismiss with which it is faced, Wawanesa advanced several arguments. They have claimed that "Ontario Regulation 283/95 - Disputes Between Insurers" legislation does not contain any provision that bars an insurer from commencing a priority dispute until receipt of an OCF-1. They have claimed that an insurer has a duty to adjust a claim prior to receipt of an OCF-1 and that it would be unfair to be saddled with the costs of claim adjustment when another insurer is likely to stand in priority. They have also claimed that Unifund has ceded to the priority dispute process by proceeding with Examinations Under Oath in the priority dispute process after having received a copy of the Wawanesa accident benefits file that did not contain an OCF-1.

[37] The facts in this case are clear that Wawanesa, with receipt of the OCF-3 Disability Certificate and OCF-23 Confirmation of Treatment Form, had notice of a potential accident benefits claim arising from the motor vehicle accident of January 14, 2017. What is also clear is that no claim for accident benefits was ever made. Wawanesa was never provided with an OCF-1 Application for Accident Benefits by Ms. McNally.

[38] Having considered the positions advanced by the parties, I am satisfied that no authority exists to invoke the provisions of the Disputes Between Insurers legislation, O. Reg. 283/95, until such time as an insurer receives an OCF-1 Application for Accident Benefits. In my view, there can be no dispute until such time as there is a claim. Section 3(1) of the Regulation states:

> *"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)."*

[39] "Application" is defined in the Regulation as the OCF-1. I believe that if receipt of notice of an accident benefits claim were meant to invoke the dispute process set out in O. Reg. 283/95, then the legislators would have stated that written notice to other insurers thought to be in priority would be required to be sent within 90 days of receipt of notice of a claim.

[40] In my view, the industry requires certainty and to hold that the dispute process can only be invoked once an OCF-1 is provided, provides such certainty. Furthermore, to so hold also avoids the incurring of unrecoverable costs by the insurers put on notice of a priority dispute before a claim for benefits is made. For example, an insurer whose insured is involved in an accident with several passengers and in anticipation of accident benefits claims, may complete Autoplus searches with respect to all those involved. If the insurer then puts all insurers shown on the Autoplus on notice, it is likely that those insurers will complete a priority investigation and may even retain counsel to deal with the priority claim. If no accident benefits claim is ever presented and no arbitrator is therefore appointed, the costs incurred would be unrecoverable. This situation ought be avoided. Most importantly, as in the case here where given the passage of time it is unlikely that Ms. McNally will ever present an accident benefits claim, what useful purpose would there be in completing a full blown arbitration hearing on dependency where considerable legal costs and expert accounting report costs would be incurred? I am strongly of the view that those considerable costs should be avoided when there exists only a potential claim.

[41] I will deal with the estoppel issue raised by Wawanesa. Wawanesa has claimed that Unifund is estopped from raising the present preliminary issue as it proceeded to EUOs after having received a copy of the AB file where no OCF-1 was contained. They take the position that Unifund has therefore ceded to the priority dispute process by taking part in the EUOs. I find that Unifund is <u>not</u> estopped from proceeding with this motion to dismiss on that basis. The AB file was only served some four days prior to the already scheduled EUOs. Unifund continued to request a copy of the OCF-1, as one is normally found in the AB file. In my view, it would have made no sense to abandon the already scheduled EUOs to deal with the dependency issue. Most importantly, there is no evidence of prejudice suffered by Wawanesa on the understanding that all three identified issues (dependency, notice to insured and authority to dispute priority in the absence of an OCF-1), would be dealt with at the ultimate arbitration hearing.

[42] I have considered Wawanesa's submission that the Dispute Between Insurers contains no wording barring a priority dispute before an OCF-1 is submitted, but remain of the view that there must be a claim presented before there can be a dispute as to which insurer ought be paying such claim. As I have said, I do not believe that the existence of a potential claim is sufficient to invoke the dispute resolution process. Again, the wording of s.

3(1) of the Regulation suggests it is the receipt of an OCF-1 that sets into motion the dispute resolution mechanism.

[43] I have also considered the submission by Wawanesa that there is a duty to adjust a potential claim once notified by the insured. I accept that such a duty exists as set out in *TN v. Personal*, FSCO A06-000399, with respect to claims of *claimant v. insurer*, but remain of the view that it is the actual submission of a claim (OCF-1) that creates the authority for invoking the dispute resolution mechanism. I further recognize that there would be costs incurred in so adjusting while waiting for the claimant to make an accident benefits claim. However, it should be kept in mind that in the long run each insurer will be negatively affected by such exposure as often as they benefit depending on whether they are the insurer claiming another in priority or the insurer against which priority is being sought. As I have indicated above, there would be unrecoverable costs exposure to those insurers put on notice of a priority dispute in the absence of an OCF-1 where no accident benefit claim is ever made. To allow access to the dispute resolution process in the absence of an actual claim would simply add an additional layer of costs to the industry which I am sure the industry would prefer avoiding.

[44] Above all, the insurance industry deserves certainty and making the submission of an OCF-1 as a starting point for initiating the dispute resolution process, as set out in Ontario Regulation 283/95, provides such certainty. Simply stated, I find that there must be a claim presented by the insured and not simply notice of a claim before an insurer can invoke the dispute resolution process.

ORDER

[45] On the basis of the findings aforesaid, I hereby order:

1. That the application for priority brought by Wawanesa is hereby dismissed without prejudice to making a further application in the event Ms. McNally makes a claim for accident benefits ;

2. That Wawanesa pay to Unifund the costs of this arbitration on a partial indemnity basis;

3. That Wawanesa pay the Arbitrator's fees.

DATED at TORONTO this 3rd)

day of July, 2019.)

KENNETH J. BIALKOWSKI
Arbitrator