FSCO A03–001571

BETWEEN:

CORADINA BIANCA

Applicant

and

WAWANESA MUTUAL INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Lorne Slotnick

Heard: November 12, 2004, at the offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Tripta Chandler for Mrs. Bianca
Donald G. Cormack for Wawanesa Mutual Insurance Company

Issues:

The Applicant, Coradina Bianca, was injured in a motor vehicle accident on January 25, 2001. She applied for statutory accident benefits from Wawanesa Mutual Insurance Company ("Wawanesa"), payable under the *Schedule*.[1] Wawanesa returned the application to Mrs. Bianca, saying it would not accept the claim. The parties were unable to resolve their disputes through mediation, and Mrs. Bianca applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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[1]The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

The preliminary issue is:

Is Wawanesa required to respond to the Applicant's claim for statutory accident benefits?

Result:

Wawanesa is required to respond to Mrs. Bianca's claim for statutory accident benefits.

EVIDENCE and ANALYSIS:

This application for benefits has a rather complex history. However, the relevant facts are agreed between the parties, with one exception.

Mrs. Bianca was walking across Danforth Avenue in Toronto on January 25, 2001, when she was knocked down by a 1987 Dodge van owned by a man named Vito Morelli and driven by a woman named Wilma Little. Mrs. Bianca was not an insured person under any auto insurance policy. The van that hit her was not insured at the time of the accident. The driver, Ms. Little, had had insurance with Wawanesa covering other vehicles. The one fact in dispute is whether Ms. Little had any liability insurance in effect with Wawanesa at the time of the accident. Wawanesa asserts there was no liability insurance in place (which would include statutory accident benefits). Mrs. Bianca argues there was.

A few weeks after the accident, the Applicant's counsel advised Wawanesa that Mrs. Bianca would be claiming statutory accident benefits from Wawanesa. After some correspondence and several months, Wawanesa replied on September 21, 2001, that the van that hit Mrs. Bianca was not insured, but that Wawanesa provided insurance for the driver, Ms. Little, on another vehicle. This letter did not say that Wawanesa would not accept the claim. Mrs. Bianca submitted her application for accident benefits,

which was marked received by Wawanesa on October 15, 2001. On October 26, a Wawanesa adjuster returned the application with a letter saying, "As per my September 21, 2001, letter, we are not accepting the claim for Mrs. Bianca."

Mrs. Bianca's counsel then submitted her application to the Motor Vehicle Accident Claims Fund, requesting the Fund to respond and noting that Wawanesa had denied coverage. While waiting for a response from the Fund, Mrs. Bianca filed an application for mediation against Wawanesa. The mediation took place in September, 2002, and Mrs. Bianca's counsel wrote to Wawanesa's counsel afterwards confirming that the Applicant was withdrawing the application for mediation pending receipt of a response from the Fund, but reserving the right to reapply for mediation if the Fund denied coverage.

A lawyer for the Fund replied to the application in November, 2002, saying Wawanesa, not the Fund, was responsible for paying benefits, and that "it was improper for Wawanesa to 'deflect' the application back to the claimant."

Mrs. Bianca's counsel then requested that Wawanesa respond to the application. With no response, and the two-year limitation period approaching expiry, Mrs. Bianca's counsel again applied for mediation against Wawanesa. This mediation failed in June, 2003, resulting in this application for arbitration.

Despite its earlier assertion to the contrary, Wawanesa now says it did not insure Ms. Little, the driver, at the time of the accident. Therefore, it says, it is not an "insurer" and thus not required to respond to Mrs. Bianca's application for statutory accident benefits.

Evidence pertaining to the confusion over whether Ms. Little was insured at the time of the accident was given by Josie Porto, a senior team leader in Wawanesa's underwriting section. Ms. Porto produced documents showing that Ms. Little had instructed her broker to delete all liability coverage on

her vehicles effective January 22, 2001 – three days before the accident in which Mrs. Bianca was injured. The note from the broker to Wawanesa confirming the change is dated February 5, 2001, but Ms. Porto testified that a broker in this situation is entitled, as the insurer's licenced representative, to bind Wawanesa effective earlier, in this case January 22. Ms. Porto said there is some time lag before changes are entered into Wawanesa's computer system, and that when a Loss Notice related to the accident was faxed by the broker to Wawanesa on February 8, the company assigned an adjuster, believing Ms. Little's liability insurance still to be in force. This was incorrect, Ms. Porto said.

(There was no clear evidence on why a Wawanesa adjuster would write in September, 2001, to Mrs. Bianca's counsel saying that Ms. Little did have coverage, although Ms. Porto speculated that it could simply be the result of someone looking at the computer printout that was generated when the Loss Notice came in – after the accident but before the change to Ms. Little's coverage was entered into Wawanesa's system.)

Counsel for Mrs. Bianca does not accept that the changes were effective prior to the accident, and argues that Ms. Little had liability coverage at the time of Mrs. Bianca's injury.

For the reasons below, I have concluded that it is not necessary for me to decide whether Ms. Little had liability coverage on the date of the accident. This question might be relevant if this hearing were deciding a priorities dispute between insurers, but those disputes are not in the jurisdiction of an arbitrator at the Financial Services Commission. The only issue before me is whether Wawanesa was required to respond to the application, rather than returning it.

Wawanesa's position is that the proper place for the application is the Fund, which is the benefits provider of last resort under the priority rules in section 268 of the *Insurance Act*. Mrs. Bianca argues that Wawanesa, as the first recipient of the application, was under an obligation to respond to it, adjust the file, and initiate a priorities dispute if it felt it was not ultimately liable for payment of the benefits.

Section 268 and the related Regulation 283/95 (Disputes between Insurers) have been the subject of comment in numerous cases. The 1999 appeal ruling in *State Farm Mutual Automobile Insurance Company and Mohamed and American Home Assurance Company* (FSCO P99-00022, December 1, 1999) summarizes these statutory provisions and their purpose. The decision notes that one of the key aims of the statutory accident benefits system is to ensure that people injured in motor vehicle accidents receive assistance quickly without having to wait until disputes about fault or other liability issues are sorted out.

Section 268 (together with a wide definition of "insured person") sets out a hierarchy of insurers that guarantees availability of benefits regardless of whether the injured person has insurance – either from the insurer of any vehicle involved in the accident, or, as a last resort, the Fund. Regulation 283/95 provides a mechanism to resolve disputes where two insurance companies disagree about who is liable to pay benefits under section 268. Again, the emphasis is on guaranteeing that injured people receive their entitlements without waiting for priorities disputes to be solved. The regulation says simply (in Section 2) that "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." The regulation then mandates a private arbitration process for resolving disputes between insurance companies. In addition to prompt payment of benefits to injured people, this process also largely relieves applicants from having to spend legal fees participating in disputes among insurance companies over which is ultimately liable for the benefits. As the *Mohamed* case makes clear, the first insurer to receive an application must pay accident benefits even if it believes it is not the priority insurer under section 268 (assuming the insured person has established entitlement). If the insurer believes it is not the priority insurer, it must use the procedures in Regulation 283/95 in order to contest its obligation to continue paying benefits.

In Mrs. Bianca's case, it is not disputed that Wawanesa was the first to receive an application for benefits.

To avoid the procedures set out in Regulation 283/95, Wawanesa argued that it was not an insurer on the date of the accident and that it could therefore not be regarded at the "first insurer" to receive Mrs. Bianca's application. This argument was rejected in *Brown and Allstate Insurance Company of Canada* (OIC A97-000579, May 29, 1997), a decision upheld by the Divisional Court (1998) 40 O.R. (3d) 610. In the *Brown* case, the applicant applied to Allstate first, but Allstate said the relevant policy had expired before the accident. The arbitrator stated (at page 4):

> Allstate claims that it is in the same position as it would be if an applicant for benefits arbitrarily chose to apply to it for accident benefits in the absence of any contract of insurance. It need not respond to the application. The applicant first has the onus of establishing that Allstate is an "insurer" within the meaning of the *Act*, before any statutory duty or obligation to respond to the application can be invoked.
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> Allstate's argument may have some merit in a situation where an applicant candidly admits that he or she has simply applied for accident benefits from a randomly selected insurance company, without asserting any contractual relationship or nexus. In that situation, it may be that the company need not respond to the application. However, this is not the fact situation in the present case.
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> In the present case, Mr. Brown is asserting that a valid contract exists. Allstate concedes that it provided coverage on the vehicle up to four months before the accident in question. In my view, these facts, *prima facie*, create enough of a connection between the parties to generate an obligation, on the part of Allstate, to respond to this application. ...

In dismissing an application for judicial review of this decision, the Divisional Court said there was "sufficient nexus between the claimant and Allstate" to require Allstate to respond to the application.

The relevant point in this case (and in *Rozmeretz and Goncerneco and Wawanesa Mutual Insurance Company* (FSCO A01-000579, July 22, 2002), a similar case with the same result) is that the "sufficient nexus" between an applicant and an insurance company need not necessarily require an insurance contract to be in effect.

In Mrs. Bianca's case, Wawanesa acknowledges that it was not chosen at random. Still, the company argues, there is not enough of a connection for it to be considered an insurer, requiring it to respond. Wawanesa points to the Applicant's decision to withdraw the application for mediation once Wawanesa pointed out it believed it had mistakenly said Ms. Little was insured at the time of the accident. This, Wawanesa says, is an acknowledgment that the claim ought to have been dealt with by the Fund. Wawanesa points out that when the Fund responded that Wawanesa was the first insurer, it did so on the basis that Ms. Little was covered at the time of the accident.

In my view, Wawanesa must fail in its argument that it is not an "insurer." I find that in the circumstances, there is sufficient connection between Wawanesa and the Applicant for me to conclude that it is an insurer. The key problem with Wawanesa's argument is that Wawanesa itself created a connection by advising Applicant's counsel that the driver, Ms. Little, was insured with the company. Having provided this information, whether or not it was correct, Wawanesa in effect represented itself as an "insurer" for the purposes of statutory accident benefits, and in particular Regulation 283/95, requiring the "first insurer" to respond to an application. Shortly after it advised Applicant's counsel that Ms. Little was covered, Wawanesa received the application. As the first insurer, it was under an obligation to respond, pursuant to the regulation. Wawanesa refused to respond, even though it apparently believed at the time it had insured Ms. Little at the time of the accident. When it returned the application, Wawanesa said its reason was that the actual vehicle involved in the accident was not insured by Wawanesa. This is an improper response. Having advised the Applicant that it insured Ms. Little, and believing so itself, Wawanesa was obliged to respond to the application, and to initiate a priorities dispute under the regulation if it felt another insurer should pay. The after-the-fact belief that Ms. Little was not in fact insured does not change Wawanesa's duty to respond, and Mrs. Bianca's right to receive in a timely way the benefits to which she is entitled.

I do not attach any significance to the Applicant's withdrawal of the mediation application in September, 2002. It was clearly done on a without-prejudice basis in the hope that the Fund would pay benefits. Applicant's counsel wrote that if the Fund denied coverage, I will have no alternative but to re-apply for mediation and I hereby reserve my right to do so." When the Fund took the position – correctly, in my view – that it was not obliged to respond to the application, the Applicant took the only sensible course, namely, pressing the issue again with Wawanesa, the first recipient of the application.

In summary, Wawanesa effectively stepped forward as an insurer by advising Mrs. Bianca's counsel that Ms. Little was insured. Having acknowledged this connection between itself and the Applicant, even though it now says it was a mistake, Wawanesa cannot argue successfully that there was no connection. That would be, in my view, manifestly unfair to the Applicant, who had good reason to believe that Wawanesa was the proper recipient of her application for benefits.

My conclusion, therefore, is that Wawanesa, as the first insurer to receive Mrs. Bianca's application, must respond to it.

EXPENSES:

On the basis of her success in this matter, I exercise my discretion to award Mrs. Bianca her expenses incurred in this preliminary issue hearing. If the parties cannot agree on the amount of expenses, a hearing can be arranged through the case administrator at the Commission.

December 20, 2004

Lorne Slotnick
Arbitrator

Date

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BETWEEN:

CORADINA BIANCA

Applicant

and

WAWANESA MUTUAL INSURANCE COMPANY

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Wawanesa shall respond forthwith to Mrs. Bianca's application for benefits.

2. Wawanesa shall pay Mrs. Bianca's expenses for this preliminary issue hearing.

December 20, 2004

Lorne Slotnick
Arbitrator

Date