IN THE MATTER OF
THE INSURANCE ACT, R.S.O. 1990, c. I.8, as amended,
and Regulation 403/96, section 33(1.1), as amended

BETWEEN:

WAWANESA MUTUAL INSURANCE COMPANY

Applicant/
Respondent on Motion

- and -

THE COMMONWELL MUTUAL INSURANCE GROUP

Respondent/
Moving Party

DECISION RE MOTION FOR EUO

Counsel Appearing:

Linda Matthews and Saro Setrakian: Counsel for The Commonwell Mutual Insurance Group, Respondent / Moving Party (hereinafter referred to as Commonwell)

Julianne Brimfield: Counsel for Wawanesa Mutual Insurance Company, Applicant / Respondent on Motion (hereinafter referred to as Wawanesa)

Background:

ST was seriously injured in a motor vehicle accident that occurred on April 13, 2015. There was a priority dispute as between Commonwell and Wawanesa with respect to which insurer was responsible for paying Accident Benefits to ST.

The priority issue was whether ST was principally dependent for financial support or care on her mother. This proceeded to a hearing. I issued my decision on May 8, 2019 concluding that Commonwell was the priority insurer as ST was not principally dependent for financial support or care on her mother.

Commonwell initially served a Notice of Appeal on June 7, 2019. Ultimately, on July 27, 2020, Commonwell advised Wawanesa that it was abandoning the Appeal.

In the meantime, pending the Appeal, Wawanesa continued to adjust the Accident Benefit file of ST.

In December of 2017, a LAT Application was commenced by ST disputing a denial of Post 104 Week Income Replacement Benefits.

An Application for catastrophic impairment was made on January 18, 2018. This issue was added to the LAT dispute in April of 2019.

On April 14, 2019, Counsel for Wawanesa wrote to Commonwell with respect to the possibility of an informal settlement meeting or global mediation to resolve the claim. In the meantime, a LAT Case Conference was held on August 13, 2019 and the Hearing was set down for May 11 to 22, 2020.

There were various communications between counsel for Wawanesa and counsel for Commonwell with respect to the mediation. The mediation was ultimately scheduled to take place on October 28, 2019. Commonwell did not participate in any discussions with respect to settlement ranges. As ST had been found to lack capacity the settlement did require court approval.

It is also relevant to note that on August 12, 2019, prior to the mediation taking place, counsel for Commonwell advised counsel for Wawanesa that it was "not advisable or entirely appropriate" for the Accident Benefit claim to be settled by Wawanesa and that Commonwell reserved its right to contest any settlement at a later date.

Counsel for Commonwell was clearly clairvoyant as while there is no longer a priority issue there is now an issue with respect to what monies should be paid by Commonwell to Wawanesa now that they have accepted that they are the priority insurer.

Counsel confirmed at the most recent pre-hearing that the nature of the dispute between the parties now is whether or not the settlement entered into by Wawanesa with ST is one that can be challenged by Commonwell and if successfully challenged, what is the proper amounts that Commonwell should pay to Wawanesa as indemnity for the Accident Benefits claims of ST.

It is to be noted that ST prior to settlement received $147,596.35 in benefits and the file itself was settled at the mediation for $425,000.00.

Commonwell claims that the settlement is not quantified or supported internally by Wawanesa. Commonwell claims particularly that there is nothing that has been provided to support why payments were made in the amounts that were for housekeeping, attendant care or medical

rehabilitation. According to the Settlement Disclosure Notice, medical rehabilitation was paid in the amount of $200,000.00, attendant care of $50,000.00, income replacement benefits of $50,000.00, housekeeping and cost of assessments of $25,000.00. It is these payments that Commonwell are disputing and that will ultimately form the subject matter of an Arbitration hearing before me.

However, this motion is about productions, what should reasonably be provided to Commonwell taking into consideration the nature of the dispute and what has been produced to date, and whether an EUO is reasonably required.

Issue – Disputed Productions, Right to an EUO:

When this motion was first set down and indeed the materials provided to me indicated that the relief being sought by Commonwell was:

1. The log notes of Wawanesa should be produced; and,
2. That an EUO of the Wawanesa adjuster was required to assess the reasonableness of Wawanesa's payments.

However, prior to the oral submissions being heard on this motion counsel for Wawanesa produced the log notes and that dispute was therefore no longer before me. The motion proceeded solely on the basis of whether Commonwell had the right, in the circumstances of this case, to request an conduct an EUO of the Wawanesa adjuster who was tasked with the responsibility of settling ST's file on a full and final basis.

Documents Filed:

The parties filed extensive written materials in support of their respective positions on the issue of the EUO. I received and reviewed copies of the LAT application, various medical reports with respect to ST, written communications between Wawanesa and Commonwell, the Full and Final Release and Settlement Disclosure relating to the settlement, emails and communications between counsel for Wawanesa and Commonwell, and the log notes. In addition, counsel asked for an opportunity to make oral submissions, which they did on January 13, 2021. At the conclusion of having heard their submissions and review of the documents, I provided brief oral reasons indicating that I was ordering that Wawanesa produce the relevant adjuster for the purposes of an EUO. However I indicated that some written reasons would follow that would explain the reason for my order and also to provide some guidelines/restrictions as to the nature and extent of the questions and information that could be asked of the adjuster at the EUO.

I am cognizant of the fact that Commonwell's delay in pursuing and ultimately abandoning an Appeal, delay in paying benefits it acknowledged it owed to Wawanesa and Commonwell's declining to participate in the settlement of ST's claim has resulted in some considerable animosity between the parties. One of the reasons for outlining the parameters of the EUO is to

try to ensure that this matter continues to move forward and that counsel are not back before me with a further motion based on refusals of various topics during the course of the adjuster's EUO.

Relevant Evidence:

Much of the evidence that was put before me was what I would describe as putting the cart before the horse. There was a great deal of evidence submitted with respect to the two insurers' behaviour and interaction leading up to the mediation and the settlement. There was some considerable evidence about the delay. However at the end of the day the only relevant evidence that I considered is what reasonable information is required to be put before the Arbitrator in order to make a decision as to whether the monies paid by Wawanesa are properly payable by way of indemnity by Commonwell.

The evidence provided by Commonwell indicates that there are questions as to the attendant care that was paid. Commonwell pointed to evidence that there was no indication that there had been a professional provider. Commonwell raises issues as to whether or not attendant care had been incurred. The same is true with respect to housekeeping. The evidence indicates that no housekeeping was paid prior to the settlement and attendant care was only paid in the amount of $5,981.14. In addition I had before me a log note made on October 9, 2019 by the adjuster indicating a breakdown of Wawanesa's settlement thoughts. There was an analysis as to the basis on how a proposed settlement authority of up to $500,000.00 was being considered. This included the following:

1. Med Rehab: limits are reached using a number of $2,000.00 a month for 10 years equals $240,000.00: Physio Massage prescriptions medical rehabilitation case management
2. Attendant Care last form 1 $414.05 for a 10 year period is $49,758.00
3. House Keeping $50.00 a week for 10 years equals $26,000.00
4. IRB $250.59 per week for a 10 year period is $161,000.00.

From the evidence before me this is the only information provided by Wawanesa to Commonwell with respect to the thoughts or background of Wawanesa's approach to the file and the ultimate settlement for $425,000.00.

The documents before me also indicated that a Full and Final Release and Settlement Disclosure Notice was signed and as well that the matter received court approval on January 31, 2020.

Position of the Parties:

Commonwell submits that the central issue to be determined in this Arbitration is whether the payments made by Wawanesa to ST are reasonable. Commonwell submits that a second party insurer has the right to contest the reasonableness of the payments made by the first party insurer seeking indemnity. Commonwell submits that an EUO of a representative of Wawanesa

to explore and understand the basis upon which authority was sought and the settlement was entered into is relevant to that determination.

Commonwell relied on a decision of Arbitrator Bialkowski in *Unifund and Travelers* (decision dated April 13, 2020). In that case, Travelers sought production of Unifund's log notes and an EUO of the Unifund's claims representative who had settled the file. Arbitrator Bialkowski found that:

> "When an insurer is disputing the reasonableness of payments that under normal circumstances that that insurer should have the right to examine a representative of the insurer who paid the accident benefits".

Arbitrator Bialkowski pointed out that that EUO would involve exploring what was paid under each heading, what document and information was in possession of the paying insurer at the time the payment was made and what was considered and relied upon in making the decision to pay such benefits. (See paragraph 18 of Unifund and Travelers supra).

Wawanesa agrees that an Arbitrator can order an EUO of a party under the *Arbitration Act.* Wawanesa submits, however, that that power is discretionary and that Commonwell has not established that an EUO is necessary and relevant in this case. Wawanesa submits that it is a fishing expedition and to allow it would potentially infringe on privileged communication between Wawanesa and its counsel.

Wawanesa points out that Commonwell had an opportunity to participate in the settlement of ST and declined to do so. Wawanesa points out that while Commonwell objected to Wawanesa settling the file in the way it did but Commonwell does not provide any case law that suggests that Wawanesa should not have proceeded to settle the claim. Commonwell does not provide any case law that says a first party insurer cannot lump sum settle a claim when a second party insurer is actively refusing the settlement or appealing the priority for that claim.

Wawanesa submits that Commonwell had two options once the decision on the priority dispute was released. It could take over handling the claim and deal with any settlement negotiations on its own. Or it could pursue an appeal and leave the claims handling in the hands of Wawanesa. Wawanesa submits Commonwell chose the second option and now cannot raise an issue with respect to the reasonableness of the Wawanesa settlement.

Wawanesa points out that in an earlier decision of mine (*Economical vs Echelon* Arbitrator Samworth December 7, 2017) I set out a basis upon which a second party insurer in a priority dispute could question the reasonableness of the payments. The Criteria I set out were as follows:

The second party insurer can dispute the reasonableness of the payments but the inquiry is limited to confirming that the first party insurer did not:

1. Act in bad faith
2. Make payments that were not covered under the Statutory Accident Benefits schedule in existence at the time of the loss i.e. pay for weekly benefit where there is no such entitlement; or,
3. In general so negligently handle the claim that payments were made greatly in excess of that which the insured would have been entitled had the file been managed by a reasonable claims handler

Wawanesa submits that there is no evidence of these three criteria that has been provided by Commonwell and accordingly as the onus is on Commonwell to prove this on a balance of probabilities, the EUO should not be permitted.

The final issue raised by Wawanesa is a concern that as the settlement itself was entered into at a global mediation where Wawanesa was represented by legal counsel that any information that was developed between Wawanesa and its legal counsel and it resulted in the settlement at the global mediation being bound by both solicitor and client privilege and/or mediation privilege. Wawanesa submits that any effort by Commonwell to explore how and why the settlement was entered into would invariably result in questions being asked that would be prohibited on the basis of privilege.

Wawanesa also submits that Commonwell already has all of the non-privilege documentation information it will need prior to the claim being settled. Wawanesa points to the log note, which they allege clearly sets out the analysis and reasons of the Wawanesa adjuster in reaching the proposed settlement authority.

Wawanesa also submits that an EUO of the handling adjuster is not mandatory in every case such as this where quantum is in dispute. Wawanesa suggests that this request needs to be supported by appropriate facts in each case and establishing that there are valid concerns regarding the claims handling. In fact, Wawanesa suggested there are policy reasons for not having an EUO in each case as this adds extra steps, costs and delays progressing the matter towards a hearing.

With respect to Arbitrator Bialkowski's decision in *Unifund and Travelers* (supra) Wawanesa points to the fact that the settlement in that case did not involve a global mediation and did not include the insurer being represented by legal counsel.

By way of reply on the issue of privilege, Commonwell takes the positon that they are not seeking to explore any solicitor client communications. From the oral submissions provided at the motion it also appears that Commonwell is not attempting to pierce mediation privilege to the extent that would involve solicitor client matters. Commonwell submits that what it wants to do is have Wawanesa's adjuster provide her own account as to the basis of the settlement without referring to solicitor client communications.

Analysis and Reasons:

There is no dispute between the parties that I have jurisdiction to make the Order as requested by Commonwell. There also does not appear to be a dispute between the parties as to the right of a second party insurer to question the "reasonableness" of the payments made by the first party insurer in a priority dispute whether that be with respect to past benefits paid or with respect to a lump sum settlement. The disagreement between the parties in this case is whether in the circumstances of this priority dispute it is reasonable to require the Wawanesa adjuster to attend to give evidence under an EUO with respect to the nature of the payments made and what the parameters of that EUO might be.

I have carefully reviewed the decision of *Unifund and Travelers*: Arbitrator Bialkowski (supra). In that case Travelers, as does Commonwell here, took the position that the issues in dispute will focus on what medical information was obtained and considered by Unifund, the rational for Unifund's decision to settle the claim on a full and final basis taking into consideration the information available to them at the time.

In the matter before him, Arbitrator Bialkowski was asked to consider whether that information should not be provided on the grounds of settlement privilege. There had been litigation in existence prior to the settlement and Unifund took the position that the agreement was protected by such privilege. Arbitrator Bialkowski disagreed and concluded that the legal doctrine of "settlement privilege" did not apply to production requests made in a priority dispute. He concluded that the settlement of the Accident Benefits claim between Unifund and the claimant was not made with the express or implied intention of not being disclosed in a subsequent priority dispute. I agree with Wawanesa that in reaching this conclusion Arbitrator Bialkowski was not considering the set of circumstances as to what privilege may apply when counsel are involved and there is a global mediation. Despite that, I do agree with Arbitrator Bialkowski that in order for there to be a proper analysis of the reasonableness of payments in dispute in issue in a priority dispute the second party insurer must have the right to question and analyze the rationale behind the first party insurer's settlement. They have the right to ask questions and have it explained to them on what basis that insurer felt there was, for example, attendant care exposure, housekeeping exposure, income replacement exposure or catastrophic exposure where there are section 44 assessments confirming that those benefits may not be payable or whether there is some evidence that those benefits were never incurred in the past. This has nothing to do with what occurs at the mediation nor indeed what counsel advise. This is purely a matter how one insurer values the claim, sets its reserves and/or authority and ultimately makes a decision for settlement.

For those reasons, I find that it is appropriate to have the Wawanesa adjuster attend an EUO and answer questions with respect to the handling of the Accident Benefit file including the Accident Benefit file of ST. The parameters of that EUO would include the following areas:

1. What medical reports were available to the adjuster when a decision was made with respect to the settlement
2. What evidence or information was available to the adjuster to support past attendant care payments or future attendant care payments with specific reference to entitlement, quantum and incurred
3. What evidence or information was available to the adjuster to support past housekeeping payments or future housekeeping payments with specific reference to entitlement, quantum and incurred
4. What type of treatment had been approved in the past
5. What expectations were there for future treatment
6. Rational for applying a burn rate of $2,000.00 as set out in the log note for medical rehabilitation
7. What evidence and information the adjuster had to indicate that there was exposure for catastrophic risk to justify the payments in the settlement that would have been predicated on catastrophic risk
8. To ask questions of the adjuster with respect to her log note outlining how she comes up with the range of authority.

However, the following areas are <u>not</u> to be the subject matter of any questions on the EUO:

1. Any questions that would relate to advice given to Wawanesa by their counsel
2. Questions concerning what happened at the mediation.

In that regard I do not find what occurred at the mediation to be relevant in terms of how Wawanesa determined what settlement authority range it would consider. It is to be noted that the settlement entered into was less than the authority recommended by the adjuster in her log note and to that end I find questions with respect to the conduct of the mediation settlement offers exchanged or discussions at mediation not to be relevant. In my view, the mediation agreement and the assumptions of the parties are that "what happens at mediation will stay at mediation". The parties at mediation should feel comfortable that all their exchanges of information, offers and discussions would be confidential and in my view they should remain so in the context of a priority dispute. This is not about what happened at mediation but why Wawanesa felt this file was worth up to $500,000.00 for the purposes of a resolution.

I am mindful of the length of time it has taken to get to where we are today. I have asked counsel to move the EUO along as quickly as possible. I am also ordering that the EUO be limited in terms of time. Counsel should be able to complete their questions in no more than 2 hours.

<u>Order:</u>

Wawanesa is therefore ordered to produce AM (adjuster) for the purposes of an EUO which will be conduced based on the parameters I have outlined in this decision and for which no more than 2 hours is allocated.

With respect to the log notes I understand that these had been produced but an agreement was made at the mediation that as the log notes are significantly redacted that Wawanesa will provide the date of the log note, who the log note is made by and the basis for the redaction. I am hopeful that no further motion will be required once that information is provided but if there is a dispute as to whether those log notes should remain redacted counsel can advise me at the next pre-hearing and we can consider whether a further motion is required.

Costs:

Given the outcome of this motion Commonwell is entitled to recover its costs related to the motion only on a partial indemnity basis. Wawanesa will also be responsible for the Arbitrator's costs with respect to the motion. If counsel cannot agree on the quantum owing in terms of costs I can be contacted so we can schedule a further teleconference.

I would ask counsel to advise when the date of the EUO is scheduled so that a further pre-hearing can be set up.

DATED THIS 9th day of February 2021 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP