IN THE MATTER OF THE *Insurance Act,* R.S.O. 1990, c I.8, as amended, section 268, Regulation 38/10 and Regulation 283/95;
AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c. 17;
AND IN THE MATTER OF an Arbitration;

BETWEEN:

THE WAWANESA MUTUAL INSURANCE COMPANY

Applicant

- and -

PEMBRIDGE INSURANCE COMPANY

Respondent

DECISION

Counsel Appearing:

Amanda M. Lennox: Counsel for The Wawanesa Mutual Insurance Company (hereinafter called Wawanesa)

No one appearing for Pembridge Insurance Company (hereinafter called Pembridge) despite notice having been provided.

Background:

On February 22, 2018, SKW (the claimant) was struck as a pedestrian when crossing McLachlan Road at or near its intersection with Ray Lawson Boulevard in Brampton. She was struck by a vehicle owned and operated by Wawanesa's insured, BR.

The claimant did not have any access to any insurance policy of her own. She was not a named insured or a listed driver on any policy. However, Wawanesa claims that Pembridge is the priority insurer in this matter as Pembridge insured AB who is the claimant's mother. Wawanesa takes the positon that on the date of loss the claimant was principally dependent for financial support on her mother and accordingly Pembridge is the priority insurer.

The Arbitration in this matter proceeded before me on January 20, 2021. Written Submissions and a Book of Documents were filed by Wawanesa together with a Book of Authorities. Nobody attended on behalf of Pembridge.

Failure of Pembridge to attend:

The claimant submitted an OCF-1 to Wawanesa dated March 21, 2018. It was received by Wawanesa on March 28, 2018.

An EUO of the claimant was conducted on June 21, 2018. As a result of information provided at the EUO Wawanesa believed that the priority may rest with Pembridge who insured AB pursuant to policy number 258493966.

A Notice to Applicant of Dispute Between Insurers was delivered by Wawanesa to Pembridge on June 22, 2018. There is no issue that this fell within the required 90-day limitation period.

On August 10, 2018, Pembridge acknowledged receipt of the Notice to Applicant of Dispute Between Insurers. In a letter to Wawanesa and the claimant a representative of Pembridge indicated that they were unable to accept priority at that time as there was insufficient evidence on the dependency issue.

On June 20, 2019, Wawanesa commenced this Arbitration by way of a Notice of Submission. The Notice to Submit to Arbitration was served by fax on Pembridge and specifically addressed to the individual who had written the earlier letter on behalf of Pembridge.

Pembridge did not respond to the Notice to Submit to Arbitration and by default I was therefore appointed as the Arbitrator.

Efforts were made from my office to contact the representative of Pembridge. Ms. Lennox's office also made efforts to contact Pembridge. In an email dated September 19, 2019 to Pembridge a representative for Ms. Lennox's office confirmed information that had been provided to them that the previous individual who had been handling the file at Pembridge was now on maternity leave and a new adjuster had been assigned. Both my office and Ms. Lennox's office made a number of attempts to contact Pembridge. There has been no response.

Pembridge was notified by me and Ms. Lennox of my appointment. Pembridge was notified of all pre-hearing dates. Pembridge did not attend any of the pre-hearings. Ultimately, by Order dated November 11, 2020 I ordered the Arbitration to proceed on a default basis in accordance with the *Arbitration Act* Section 27(2) and (3).

It should also be noted that Pembridge was given Notice of the actual Arbitration and was served with the various materials that were filed with me. Pembridge did not respond to that either.

Therefore, this Arbitration proceeded in the absence of Pembridge on a default basis and the decision that follows is based on the materials submitted by Wawanesa as indicated in the introduction to this decision.

Relevant Facts with respect to the issue of dependency:

The claimant was born on October 29, 1994 making her 24 years old at the time of this accident. The claimant had attended a two-year program at Sheridan College and had received a Diploma to be a Social Worker. According to her Examination Under Oath, she finished school sometime she believes in 2016.

At the time of the accident, the claimant was living with her mother in Brampton together with her brothers. She had been residing there for at least 5 or 6 years.

The claimant was unable to secure employment as a Social Service Worker after graduation as she had additional volunteer hours to complete. Instead, she registered herself with some temporary employment agencies and from 2016 up until the accident in February of 2018 was sporadically employed. According to her Employer Certificate she worked from February 15, 2018 to February 22, 2018 as an order picker in a job provided through MAXSYX Staffing. She earned $218.40 in her first week of work, $436.80 in her second week of work for a total of $655.20.

She also submitted an Employer Certificate prepared by the Staffing Edge another temporary agency. This confirmed that the claimant had been employed with the Staffing Edge from November 13, 2016 to October 22, 2017 as a merchandise processor. She earned $4,143.63 over this time.

While there was no OCF-2 the claimant also submitted some pay stubs from Indigo Staffing Solutions. These were hard to read but there were six cheques covering a time period mostly in May of 2017, a week in September of 2017 and one in October 2017. When you add all the pay cheques they total $1,795.90.

On the material before me it would therefore seem that from November 13, 2016 to February 22, 2018 from the three staffing agencies who helped the claimant she earned a total of $6,594.73. If you average this out over the 12-14 month period it shows earning of $99.17 per week (66.5 weeks).

With respect to the claimants expenses there is some inconsistent evidence. She suggests that she provided her mother with $300.00 per week in order to pay for rent, food and electricity. Based on the information from the Employer Certificates there would be very few weeks where the claimant would ear $300.00 per week in order to provide that money to her mother. I do not accept the claimant was paying her mother $300.00 per week in the 14 months prior to the accident. She simply did not have the funds to do so.

I do accept that that the claimant paid for her own phone bill when she was working and that her mother paid for it when she was not working. I also accept that by and large that the claimant

likely paid for her own clothing. She also paid for some life insurance through the Scotia Bank at $98.95 per month. She also had an OSAP loan and she made some contribution to that every 6 months but her mother would assist when she was not working.

The claimant's mother was gainfully employed at the time of the accident. On her EUO the claimant was unable to provide any information with respect to what her brothers may have contributed to the family expenses.

In a statement given by the claimant to Wawanesa in April 2018 she herself stated that she was not financially dependent on her mother. However, I note that it is not what the claimant believes in terms of dependency that is the issue before me but whether based on legal principles to be applied to facts of the case whether there is a principal financial dependency.

Submissions of the Applicant:

The Applicant submits that whether you examine the family's income vs needs, apply the Low-Income Cut-Off government statistics (LICO) or apply the Statistics Canada Market Basket Measure (MBM) that in each case it will found that the claimant was principally dependent for financial support on her mother.

Wawanesa submits that the claimant lived in Brampton, which is a metropolitan area with a population over 500,000 people. In 2017 the LICO before tax for that metropolitan area was $25,338.00. If one translates the claimants expenses over 14 months into an average annual income it comes to $5,166.84. Clearly on that analysis the claimant was not capable of supporting herself based on her earnings.

Wawanesa submits that with respect to the same analysis using the MBM for 2017 which is $20,968.74 the claimant would still not be able to be self supporting.

The Applicant submits that the mathematical approach suggests that if you accept that the claimant actually paid $300.00 per month to her mother that when you add that to the other expenses she would have expenses of $15,600.00 and she would still not be able to contribute to anywhere near 51% of that based on her average annual income and her sporadic employment.

Finding and analysis:

The Statutory Accident Benefit Schedule provides a definition of a dependent as someone who is "principally dependent for financial support or care on the other person, or the other person's spouse or same-sex partner".

In order for someone to be "principally dependent for financial support" the case law indicates that they must chiefly or for the most part derive their support from the other person. Over the

course of the years the common test that has been established and used in determining principal dependency is the 50% + 1 test. This means that if a person is 51% dependent upon another person for financial support then they are principally dependent on that individual. This formula has been supported by the Court of Appeal in *Federated Insurance Company of Canada and Liberty Mutual Insurance Company* (Justice Labrosse for the Ontario Court of Appeal April 10, 2000).

In addition, case law over the last nearly 20 years has supported the Application of an older decision of the Court of Appeal *Miller v Safeco,* 1994 CarswellOnt 679 upheld on Appeal *Miller v Safeco Insurance Company of America,* 1985 CarswellOnt 787 in determining dependency in priority disputes. The court directs a trier of fact to look at the following in determining dependency:

1. Amount of dependency
2. Duration of dependency
3. Financial or other needs of the alleged dependent
4. The ability of the alleged dependent to be self-supporting.

In making my decision in this matter, I considered all four of those issues.

As to the amount of dependency, I note that the claimant has been living with her mother for 5 years. She has only recently graduated from school with a diploma she has been unable to use for the purposes of employment. She has been sporadically employed over the 14 months prior to the accident working through three different staffing agencies. Her earnings were quite minimal.

As to the duration of the dependency I find in this case that the appropriate time period to look at this issue is the 14 months prior to the motor vehicle accident. That time period runs from when the claimant finished school and allows a very broad spectrum of analysis with respect to her ability to earn up until the time of the accident.

With respect to the ability of the claimant to be self-supporting in providing for a time frame for 14 months after graduation is sufficient to provide a picture of how the claimant was able to secure employment and her earning capacity over those 14 months. Clearly the claimant tried to secure employment working though three staffing agencies. As noted she was minimally employed over that time and there is no evidence to suggest that it was not for lack of trying or that she had any disability. I find that her earnings over that 14 month period of $6,594.73 reflected no further capacity for her to become more independent and to be able to support herself.

With respect to her financial needs while there is not a great deal of information about that we do know that she lived in a home with her mother and her brothers. While she may have contributed something to the family expenses, I find that it was likely only to be when she was

earning money. When she was not earning money her mother was assisting her. There is little question in my mind but for living with her mother and her mother providing the level of financial support she did the claimant would not have been able to live on her own.

In this particular case I do find that using either the LICO or the MBM method is more reliable. I have already indicted that I have some questions with respect the evidence of the claimant relating to the $300.00 a week she says she gave to her mother. I agree with Arbitrator Samis in his decision of *Wawanesa Mutual Insurance Company and State Farm Insurance Company,* 2018 CarswellOnt 16484. Arbitrator Samis indicates in that case that he finds the statistical approach particularly the Market Basket Measure to be more reliable than the evidence of the witnesses. He also finds that the components of the Market Basket Measure are more focused on the costs of meeting needs rather than simply putting together an inventory of each and every expenditure. The Market Basket Measure data provides information about modest needs for different family sizes in different communities such as cost for food, clothing, footwear, transportation.

Therefore, in this case I elect to use the Market Basket Measure as the most reliable way of attempting to determine principal financial dependency. On the information provided to me the MBM for 2017 was $20,968.74 and with an average yearly income of $5,166.84, clearly the claimant was not able to provide for herself. I do also note as pointed out by counsel for Wawanesa that even if I use the LICO method the result would be the same and I so find. Whichever method used, the claimant's income is less than 50% of the 2017 LICO and the 2017 MBM and accordingly I find she is principally dependent for financial support on her mother who is insured by Pembridge.

Accordingly, I find that Pembridge is the priority insurer.

Order:

In accordance with my findings above Pembridge is found to be the priority insurer with respect to Statutory Accident Benefits payable to the claimant arising out of the motor vehicle accident of February 22, 2018.

There was no information before me with respect to the amounts that have been paid to the claimant. However, I find that Pembridge is required to reimburse Wawanesa with respect to the monies that they have paid to the claimant for her Statutory Accident Benefits. If there is any dispute with respect to that quantum I can be contacted and we can schedule further pre-hearings to deal with the issue of quantum.

Costs:

Section 54(1) of the *Arbitration Act* provides that an Arbitrator has jurisdiction to Award "Costs of the Arbitration". This includes the parties' legal expenses, the fees and expenses of the Arbitrator Tribunal and other expenses relating to the Arbitration.

Considering that Pembridge has ignored every step taken by Wawanesa to establish its rights and in accordance with Regulation 283/95 and Section 268 of the *Insurance Act,* I am prepared to Award Costs on a full indemnity basis to Wawanesa. I was not provided with any documents or any submissions with respect to Costs. If Wawanesa and Pembridge cannot agree on Costs then I will scheduled a Costs hearing.

Pembridge is also responsible for paying the Arbitration fees. However, I will direct my account to Wawanesa and they can add those Costs to the amount the Pembridge is obliged to pay.

DATED THIS 24th day of March, 2021 at Toronto.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP