Appeal P16-00050

OFFICE OF THE DIRECTOR OF ARBITRATIONS

WAWANESA MUTUAL INSURANCE COMPANY

Appellant

and

BAHRAM ANSSARI

Respondent

BEFORE:	Delegate Jeffrey Rogers
REPRESENTATIVES:	Mr. Paul Barnes, solicitor for Wawanesa Mutual Insurance Company Ms. Melissa Miller, solicitor for Mr. Anssari
HEARING DATE:	By written submissions, completed on October 21, 2016

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990 c. I.8 as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*, and Regulation 664, R.R.O. 1990, as amended, it is ordered that:

1. The appeal is allowed, in part. Paragraph 1 of the Arbitrator's order of June 13, 2016 is rescinded and replaced with the following: Wawanesa is not required to produce the report of Arcon Forensic Engineering.

2. Wawanesa's request for an order removing the Arbitrator on the grounds of a reasonable apprehension of bias is denied.

3. Wawanesa's request for order removing evidence and submissions from the arbitration record is denied.

4. The stay of the arbitration, ordered on July 12, 2016, is lifted.

5. If the parties cannot agree on the legal expenses of this appeal, they may request a determination of the issue within 30 days of this decision.

Jeffrey Rogers
Director's Delegate

November 21, 2016
Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Wawanesa appeals the Arbitrator's decision of June 13, 2016. The Arbitrator ordered Wawanesa to produce a report by Arcon Forensic Engineering over which it claims litigation privilege. Wawanesa seeks to overturn the order.

Wawanesa also alleges that the Arbitrator displayed a reasonable apprehension of bias and admitted hearsay evidence. On those grounds, it seeks an order disqualifying the Arbitrator from continuing the hearing, and an order removing from the arbitration file all of the documentary evidence and submissions which were before the Arbitrator.

For the reasons that follow, I conclude that the Arbitrator erred in ordering production of the report. However, I am not satisfied that the Arbitrator displayed a reasonable apprehension of bias or that the evidence and submissions filed should be removed from the record.

II. BACKGROUND

Mr. Anssari claims that he was injured in a motor vehicle accident on December 20, 2013. He submitted an application for statutory accident benefits to Wawanesa. Wawanesa immediately denied that Mr. Anssari was injured in an "accident" as defined and refused to pay the benefits claimed.

Mr. Anssari applied for mediation and, when mediation failed to resolve the dispute, he applied for arbitration. After Mr. Anssari applied for mediation, but before he applied for arbitration, Wawanesa commissioned a report from Arcon Forensic Engineering for the purpose of getting an expert opinion on whether Mr. Anssari was injured in an "accident". At the pre-hearing discussion, the parties agreed that the issues in dispute included the question of whether Mr. Anssari was injured in an "accident", and the question of production of the Arcon report.

The Arbitrator heard a motion to resolve the question of production of the report and he ordered production. The hearing to resolve the issue of whether Mr. Anssari was injured in an "accident" is scheduled before the same Arbitrator.

Since this is an appeal from a preliminary or interim order, leave was required pursuant to Rule 51.2(c) of the *Dispute Resolution Practice Code (DRPC),* before it could be acknowledged.

By letter dated July 12, 2016, Director's Delegate Evans acknowledged the appeal on the basis of its apparent strength. Delegate Evans also stayed the continuation of the hearing, pending resolution of the appeal.

III. ANALYSIS

The Arbitrator erred in ordering production of the report

Rule 39.3 of the *DRPC* gives an Arbitrator wide jurisdiction to admit evidence at a hearing. There are only two absolute exceptions. They are:

- Evidence that would not be admissible in a court by reason of any privilege under the law of evidence; and

- Evidence that is not admissible under the *Insurance Act*

This appeal involves the first exception. Because of that exception, an Arbitrator lacks jurisdiction to order production of a document which is subject to litigation privilege.

It is well established that litigation privilege attaches to expert reports commissioned after litigation is reasonably anticipated on the issue that is the subject of the report. Therefore, the question that the Arbitrator was required to answer was whether Wawanesa reasonably anticipated litigation of Mr. Anssari's claim that he was injured in an "accident" when it commissioned the Arcon report.

In finding that the report was not subject to privilege, the Arbitrator states as follows:

> In my view, the time frame in which the Insurer requested the Report was in its assessment phase. The balance of probabilities suggests in my view, that the Report was indeed consultative (sic) in nature and relative (sic) to the issues in dispute.
>
> I don't believe that the Report, although received on May 6, 2015, some nine months later, it should be protected by privilege as the commission date was clearly in the assessment stage of the claim. The commission date should bear significant weight when determining if the document is to be protected by privilege, especially when the commissioning time frame also overlaps the expectations time frame when the Insurer is adjusting a file in good faith.
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> Given the positive onus on the Insurer to establish the privilege, I am unable to accept that the "bright line" should be that of the first notice of Mediation in this case. Mediation should have been the beginning of a conversation to adjust the claim in earnest, as the Insurer has made it clear by its actions that more information was required by it.

The Arbitrator correctly noted that, when there is a dispute between an insurer and its insured, the insurer owes the insured person a duty to adjust the claim in good faith, and litigation privilege does not attach during that phase of the claim. The Arbitrator correctly noted that the date the report was commissioned bears "significant weight" in determining litigation privilege. The Arbitrator also correctly noted that the onus is on the insurer to establish privilege. However, the Arbitrator committed several errors in concluding that Wawanesa did not establish privilege.

The leading case on the issue of litigation privilege is the decision of the Court of Appeal in *General Accident Assurance Company v. Chrusz.*[1] On the facts in that case, the Court found that litigation privilege attached when the insurer suspected arson, even though the insurer had no proof of arson and neither party had taken any steps in a process of litigation. The Court fixed the boundary between the insurer's good faith investigation and its anticipation of litigation as follows:

> In my view, an insurance company investigating a policy holder's fire is not, or should not be considered to be, in a state of anticipation of litigation. It may be that negotiations and even litigation will follow as to the extent of the loss but until something arises to give reality to litigation, the company should be seen as

[1] 1999 CanLII 7320(ON CA)

> conducting itself in good faith in the service of the insured. The reality of anticipation of litigation arose in this case when arson was suspected and Eryou was retained. Chrusz was presumably a suspect if this was a case of arson and litigation privilege attached to communications between Bourret and Eryou or from Bourret through General Accident to Eryou so long as such litigation was contemplated.[2]

The Arbitrator referred to *Chrusz* for its statement of the purpose of litigation privilege. However, *Chrusz* is also instructive on where to draw the line when, as in this case, the insurer takes the position that there is no coverage. In my view, *Chrusz* suggests that litigation privilege could arise when an insurer believes that its insured has fabricated an allegation of being involved in an "accident". The Arbitrator did not discuss how his finding accords with the approach in *Chrusz.*

The Arbitrator also did not analyze how this case is different from the long line of cases at the Commission which hold that the date of the insurer's receipt of an application for mediation regarding an issue is the "bright line" for establishing a rebuttable presumption of litigation privilege. This approach is traced to the decision in *Campeau and Liberty Mutual Insurance Company*[3], and it has been followed numerous times. It was approved in the appeal decisions in *Rakosi and State Farm Automobile Insurance Company* - Appeal 2[4], and in *Rama and Allstate Insurance Company of Canada.*[5] The approach is based upon the logic that mediation is a mandatory first step in the arbitration process, therefore mediation will ordinarily trigger the anticipation of litigation.

The Arbitrator was bound to follow the *Campeau* approach. Since Wawanesa commissioned the Arcon report after Mr. Anssari applied for mediation, the *Campeau* approach dictated a finding that Wawanesa had established a *prima facie* right to litigation privilege. Instead, the Arbitrator

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[2]Footnote 1 *supra*

[3](FSCO A00-000522, March 12, 2001)

[4](FSCO P11-00027, May 11, 2012)

[5](FSCO P07-00033, July 16, 2009)

relied on the non-binding, outlier decision in *Jones and Jevco Insurance Company*[6] in which another Arbitrator made the same error.

There was no evidence before the Arbitrator to show that Wawanesa's *prima facie* right had been eroded or waived. The Arbitrator referred to a subsequent mediation, but that was not relevant since Wawanesa's position on whether Mr. Anssari was injured in an "accident" applied equally to all claims. Therefore, had the Arbitrator applied *Campeau,* the only available conclusion would have been that Wawanesa was not required to produce the report.

The above effectively resolves this aspect of the appeal, but the Arbitrator's ruling is flawed in other respects. First, the Arbitrator was influenced by his finding that "the Report was indeed consultative (sic) in nature and relative (sic) to the issues in dispute." It appears that the Arbitrator meant that the report was commissioned with a view to determining whether Mr. Anssari was entitled to benefits and it was relevant to issues in dispute. However, these are irrelevant considerations because expert reports commissioned at any stage in the process will address the subject of entitlement to benefits and will be relevant to issues in dispute.

Second, the Arbitrator concluded that litigation privilege did not attach at the stage of mediation because "the Insurer has made it clear by its actions that more information was required by it." However, an insurer owes its insured a duty to keep an open mind, to continue to adjust the claim, to pursue new information and to act reasonably upon receipt of new information at any stage of the dispute resolution process.[7] Therefore, Wawanesa did what it is required to do at this stage of the process in every case, and what it was required to continue to do, despite anticipation of or even commencement of litigation. So, by the Arbitrator's logic, litigation privilege would never arise.

No apprehension of bias or exclusion of documents

Wawanesa seeks an order that the Arbitrator be disqualified from continuing the hearing on the grounds of a reasonable apprehension of bias. It also seeks an order that the documents and submissions before the Arbitrator be expunged from the record.

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[6](FSCO A11-002794, January 21, 2013)

[7]See *Wawanesa Mutual Insurance Company and Melchiorre* (FSCO P07-00014, April 25, 2008)

In the decision of the Supreme Court of Canada in *Committee for Justice and Liberty v. Energy Board,* de Grandpre J. stated the seminal test for bias as follows:

> ...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly[8]

Applying the test: I am not satisfied that an informed person, viewing this matter realistically and practically, having thought it through, would think it more than likely that the Arbitrator will not decide the remaining issues fairly.

Wawanesa's submission is based upon certain statements in the Arbitrator's decision and the fact that the Arbitrator considered documents that contained hearsay. Wawanesa apparently assumes that hearsay is inadmissible. But, as I earlier noted, Rule 39.3 of the *DRPC* gives an Arbitrator wide jurisdiction to admit evidence, with only two absolute exceptions. Hearsay is not one of them. It follows that the Arbitrator has discretion to consider hearsay. Therefore, it could not have been improper for the Arbitrator to do so. As Rule 39 states, it will be up to the Arbitrator to determine the "relevance" and "materiality" of this evidence.

I am not satisfied that the decision shows that Arbitrator has already determined the outcome, as Wawanesa alleges. The Arbitrator does start the decision by stating that "[T]he Applicant, Mr. Bahram Anssari, was injured in a motor vehicle accident". However, I do not accept that the Arbitrator was stating a conclusion. This statement is part of a preamble that the Commission's decision writing template automatically produces. It appears that the Arbitrator simply overlooked editing it.

In my view, the next statement by the Arbitrator that Wawanesa claims to show bias, in fact contradicts Wawanesa's allegation that the Arbitrator has already decided the issue of whether there was an "accident". The Arbitrator stated as follows:

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[8][1978] 1 S.C.R. 369, at p. 394

> During the Pre-Hearing discussion of February 23, 2016, it was **communicated** that as a result of the December 20, 2013 **incident**, where Mr. Anssari fell from a ladder, he suffered serious injuries. Mr. Anssari, the Applicant, **did not see the vehicle which may have hit the ladder he was on at the time of the incident**. The preliminary issue **which is yet to be heard or decided** is whether or not this **accident** was indeed a **motor vehicle accident** as described under the *Insurance Act*. (emphasis added)

The Arbitrator does not state that a vehicle was involved, as Wawanesa alleges. I find that, in using the terms I have bolded, the Arbitrator demonstrated that the occurrence remains an "**incident**", that there has been no conclusion on the involvement of an unseen vehicle, and that whether or not there was an "**motor vehicle accident**" is "**yet to be heard and decided**".

Wawanesa's requests for removal of the Arbitrator and for expunging material from the record are therefore denied.

IV. EXPENSES

The parties did not make submissions on the issue of expenses of this appeal. If the parties cannot agree, they may request a determination of the issue within 30 days of this decision.

Jeffrey Rogers
Director's Delegate

November 21, 2016
Date