IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, s. 275, and Regulation 664 and 668 thereunder;

AND IN THE MATTER OF the *Arbitration Act*, S.O. 1991, c.17

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

AXA INSURANCE (CANADA)

Applicant

- and -

CNA CANADA

Respondent

AWARD

Counsel Appearing

Linda Matthews for the Applicant

Mark K. Donaldson for the Respondent

Introduction

The parties to this matter have been involved in a loss transfer dispute arising out of an accident which occurred on March 12, 2008. The claimant, Shawn W.[1], was seriously injured, sustaining catastrophic impairment, at the time of that accident. A claim for accident benefits was made to the Applicant, AXA Insurance Company, who has been administering the statutory accident benefits claim.

In the circumstances of the accident, AXA has asserted a claim for loss transfer in accordance with section 275 of the *Insurance Act* against CNA Insurance Company.

Background of Proceedings

The matter proceeded as an arbitration before me pursuant to the Order of Justice Sproat made March 4, 2010 appointing me as an arbitrator in this matter. The parties executed an Arbitration Agreement in April and May of 2011 with respect to this proceeding as well.

[1] In recognition of the privacy interests of non parties I have deleted references to surnames from these reasons.

During the course of this matter, to the extent that I have been involved, there have been numerous pre-hearing conferences dealing with various issues between the parties. It appears that we have had 11 pre-hearing conferences culminating in our hearing on May 17, 2011.

It is clear that this matter has progressed through pre-hearings over a year and the position of the parties has been informed by the process. At the outset, liability was in question and quantum of reimbursement was very much in question as well. Very quickly the liability issue was resolved for purposes of loss transfer and the parties turned their minds to quantum and reimbursement issues.

AXA had submitted loss transfer indemnity requests to CNA. There were 5 of those requests and the parties have agreed that those 5 requests and spreadsheets annexed form part of the record of this arbitration. These loss transfer requests indicate transmission of claims for indemnity made by AXA to CNA's representative on March 17, 2009, June 9, 2009, November 4, 2009, March 17, 2010, and November 9, 2010.

According to materials provided to me, the aggregate amount of SABS paid by AXA in this matter is $1,389,446.90.

The claims are substantial and the paper associated with the claims is voluminous, consuming 3 banker's boxes as far as the Applicant's counsel is concerned.

As is often the case with loss transfer matters, there is concurrent tort litigation that involves the claimant and, one expects, the insured under the Respondent's policy.

That concurrent tort litigation proceeded to a private mediation in late 2010. At that time the parties to this loss transfer arbitration attended at the mediation and many of the issues between the parties were ultimately resolved at the same time as a settlement of the claims of Shawn W. was achieved.

Notwithstanding the various loss transfer indemnity requests made by AXA over the last 2 years, there has been some difficulty in obtaining fulsome production of AXA's statutory accident benefits claims file. Counsel for CNA reports request being made for this information well before my involvement in this matter. Certainly when this matter first came before me, the production of the AXA claims file continued to be an issue. Ultimately, a copy of most of the file was provided by AXA to CNA's counsel at the end of July 2010. Thereafter, there remained a few items that were ultimately identified as missing from the file and required for resolution of the case. Some items were delivered by AXA to CNA's counsel immediately prior to the arbitration hearing.

Part of the delay in obtaining the AXA file is attributable to AXA's concern about having appropriate authorization from Shawn W. to release the file to CNA. While I doubt the requirement for this authorization in view of the recitals that are present in the accident benefits claims form, it is understandable that an insurer needs to be sensitive to the privacy interest of its insured in cases of this nature. Nonetheless, CNA is able to rightly state that it has had only the most superficial information about the claims until it was provided with more fulsome production in the summer of 2010.

So on one side of this lingering dispute there has been CNA's desire to have fulsome production of the claims file for its review, and its inability to obtain that full production at an early date.

On the other hand, AXA notes that it has provided repeated loss transfer indemnity requests showing the amounts of the claims as extremely substantial. AXA challenges CNA for failing to advance any amount on account in this loss transfer claim until December 14, 2010, at which time CNA advanced $1.2 million, on account.

The arbitration proceeded before me as a hearing to determine what residual amounts are payable in this matter with respect to recoverable loss transfer amounts, interest, and costs.

Reimbursement Issues

With respect to the reimbursement for benefits, there seem to be a couple of distinct issues. Firstly, it appears clear that AXA paid out more than the statutory limit of $1 million for medical and rehabilitation benefits. Having paid out amounts that were not covered as benefits, AXA cannot now recover that money under loss transfer principles.

Secondly, certain items are advanced as being assessment costs under section 24 of the regulation then applicable. If these various items are not captured by the language of section 24, they are not recoverable in loss transfer.

Thirdly, there is the question of loss transfer indemnity for income replacement benefits when the claimant became entitled to Canada Pension Plan benefits. Essentially it is asserted that there has been an overpayment made by AXA.

With respect to the claims as presented, I have made the following findings.

The aggregate amount of benefits possibly subject to loss transfer is $1,389,446.90. CNA has paid on account $1,200,000.00. This leaves $189,446.90 as the outstanding principal amount with respect to loss transfer claims. Of that outstanding principal, it is agreed that $31,791.90 is not recoverable as being med/rehab expenses in excess of the $1 million limit. Furthermore, there is an account from Elements in the sum of $24,351.50 which is also not recoverable for the same reason. There is a claim from Excel Care in the amount of $50.00 which was withdrawn. There is a claim from Serviwrap in the amount of $58.62 which is determined to be a section 42 expense and not recoverable. There is an account from Strategic Treatment in the amount of $2,626.10 which has been determined to be a section 42 expense and not recoverable. There is an account from Accessible Solutions in the amount of $6,263.26 which is a section 42 expense and determined not be recoverable. Therefore, the parties have identified $65,141.38 of expenses that are not recoverable reducing the outstanding principal down to $124,305.52.

From this amount we have to deal with 4 further issues:

a) Recoverability;
b) CPP Adjustment;
c) Pre-judgment Interest; and
d) Costs.

a) Recoverability

The first issue is a dispute with respect to recoverability of 4 items.

(1) The Adaptable Design account in the amount of $7,239.59 is disputed. I have reviewed the documentation for this dispute. It is clearly the invoice for preparation of an assessment report for renovation claims. I have reviewed the invoice and the accompanying letter. This matter clearly represents a recoverable expense in the amount of $7,239.59.

(2) There is an expense claim from Janice Woynarski in the amount of $550.00 which appears to be a capacity assessment associated with determining the legal capacity of the claimant. An argument was made that this was somehow connected with determining attendant care but this person's catastrophic status and entitlement to attendant care is not determined by this and the item itself is not an attendant care item. This $550.00 is not recoverable in loss transfer.

(3) There is a claim for S.L. Hunter & Associates in the amount of $4,219.72. Counsel for CNA has pointed out that this is a double entry and that this amount is already included in a previous tally of recoverable expenses and should not be included for a second time. I agree.

(4) There is a further report from Adaptable Design in the amount of $2,625.00. For the reasons mentioned for the August 14th payment of Adaptable Design, this amount is also recoverable.

Therefore, having looked at each of those components of the loss transfer claim, I conclude that the net outstanding principal amount needs to be adjusted by the amount I found to be not recoverable and that reduces the outstanding principal to a new net number of $119,535.80.

b) CPP Adjustment

The next issue is the question of the CPP adjustment to the income replacement benefits. Essentially the argument is that AXA overpaid the income replacement benefits because it was entitled to take a credit for Canada Pension Plan benefits to which the claimant became entitled. It failed to take that credit and therefore the amount involved is not fully recoverable from CNA in a loss transfer proceeding.

This issue raises some evidentiary issues that counsel discussed between themselves. At this time I am not making any ruling with respect to this item.

c) Pre-judgment Interest

The question of pre-judgment interest is complex. In its materials, AXA has presented a claim for pre-judgment interest at various rates for various time intervals. I gather that the time intervals applied by AXA start with the delivery of the request for indemnity and span the period of time during which the items went unpaid.

Counsel for CNA agrees in principle with the calculations in terms of the rates, the stop date, and the application of the *Courts of Justice Act*. Counsel submits, however, that the amount of principal needs to be adjusted to reflect the outstanding amounts, and that is correct. Counsel for CNA submits that the recovery of interest in this matter should be reduced as a result of AXA's failure to provide the complete claim file in a timely manner. Counsel appropriately points out that the responding insurer must exercise due diligence about the nature of the claim presented to it for reimbursement. Necessarily, this involves having access to information and

undergoing some kind of evaluative process to determine what amounts are appropriately recoverable in a loss transfer proceeding. To the extent that the insurer is not provided with information that allows that evaluation, the insurer should not be criticized for failure to make reimbursement.

On the other hand, AXA clearly identifies the fact that this claim was known to be extremely large and the quantum of the claim, while not precisely known, was identified to be of high magnitude very early in the process. AXA criticizes CNA for not making payments "on account" of the pending loss transfer.

There is merit to both positions. I do not think either insurer can be criticized for attempting to conduct its business in a prudent and businesslike manner by taking the steps which they have taken in this case. While it, strictly speaking, might not have been necessary for AXA to have delayed production of the file, equally it might have been reasonable for CNA to make an advance payment on account in the matter. But these are not acts of egregious bad faith. These are business decisions made in the ordinary course of business. It seems to me that the statutory rules for interest are essentially compensatory in nature and are not intended to be used as instruments of behaviour modification. Were I to apply them in that fashion, I might penalize AXA for its failure to release the file at an earlier point, and I might also penalize CNA for failure to make an advance payment on account at an earlier point. I note section 130 of the *Courts of Justice Act* would permit me to award interest at a higher or lower rate. If I thought it were deserving in the circumstances, I could award AXA interest on the loss transfer amounts at a rate greater than that prescribed by the *Courts of Justice Act*. Indeed I might be tempted to do so if I found that CNA had capriciously delayed payment while enjoying the profitability of investment returns substantially greater than the pre-judgment interest rate. But I do not find that to be the case.

The practice of dealing with pre-judgment interest and litigation in Ontario is not to make the award of pre-judgment interest contingent on any particular notification or degree of disclosure. All litigation proceeds as an exchange of information, and if we were to preclude recovery of pre-judgment interest merely because some information was outstanding at a point in time, there would never be any pre-judgment interest awarded. I do not think that can possibly be the intention of pre-judgment interest rules as presented.

The pre-judgment interest allowed is at a simple rate and is therefore more modest than the true cost of money for the litigants. Given that the pre-judgment interest rates are moderate, and represent less than a fulsome recovery, I do not think it is appropriate to further reduce the entitlement to pre-judgment interest on the theory that there has been some delay in disclosure of information through the dispute resolution process. I therefore decline to exercise any discretion to either increase or reduce the amount of pre-judgment interest payable in this matter.

Pre-judgment interest is awarded in accordance with the methodology proposed by AXA in its submissions.

d) Costs

AXA request its costs of these proceedings. In accordance with the Arbitration Agreement costs should follow the event. In accordance with the practice in these arbitrations, costs are awarded in favour of the successful party subject to the discretion of an arbitrator.

In this matter, AXA indicates it has solicitor and client costs of more than $17,000.00 and is asking for an award of costs of $8,000.00

There is no hard and fast rule of costs quantification based on solicitor and client issues.

In this matter I note that we have had 11 pre-hearings. Prior to any pre-hearing there was a court ordered appointment of me as an arbitrator which presumably required the usual legal work to obtain that order. In addition, there was a mediation prepared for and attended to by the legal counsel.

The case is substantial. The documentation involved is extremely voluminous. Some of the issues in the loss transfer dispute are difficult issues. Counsel have had to wade through considerable documentation and have had to participate in 11 pre-hearing conferences and the hearing before me on May 17, 2011.

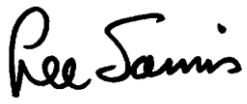
The May 17, 2011 hearing took half a day. Most of the pre-hearings were brief.

In the end, it seems to me that success in this matter has been somewhat divided. Truly AXA has succeeded on liability but that has not been an issue through most of this process. There has been no participation in an Examination for Discovery. There has been no Examination Under Oath.

Success on the hearing has been partially divided. With respect to the benefits issues where AXA has prevailed on the identified remaining controversies, it has been as a result of a very recent production of documentation to support its case. Nonetheless, taking into account the voluminous documentation associated with the case, I think it is appropriate for AXA to recover the sum of $5,000.00 with respect to costs.

In accordance with the Arbitration Agreement, CNA will be responsible for the costs of the arbitration.

Dated at Toronto this 22nd day of July, 2011.



LEE SAMIS
Arbitrator