IN THE MATTER OF SECTION 268 OF THE ***INSURANCE ACT,*** R.S.O. 1990 S. I.8

AND IN THE MATTER OF THE ***ARBITRATION ACT, 1991.*** S.O. 1991, C. 17

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE WAWANESA MUTUAL INSURANCE COMPANY

Applicant

- and –

AXA INSURANCE (CANADA)

Respondent

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THE WAWANESA MUTUAL INSURANCE COMPANY

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Respondent

AWARD

Introduction:

These matters come before me as an arbitration pursuant to the Arbitrations Act, 1991 and pursuant to Section 275 of the Insurance Act and its Regulations 664, 668 and 403/96. The parties have selected me as their Arbitrator on consent and these matters proceeded to a half day arbitration in Toronto on August 11th, 2010.

The Applicant and Respondent with respect to both matters are automobile insurers and a dispute has arisen between them with respect to amounts that are recoverable under loss transfer as a result of two accidents: August 21, 2006 (accident involving Kazimierz Konopka) and October 6, 2005 (accident involving Terrence, Rosa, Samantha and Michael Flynn).

Counsel:

The Wawanesa Mutual Insurance Company – Kevin Mitchell

Axa Insurance (Canada) – Linda Matthews

Record:

The record in this matter consisted of two exhibits:

Exhibit 1 – Arbitration Agreement dated April 2010
Exhibit 2 – Applicant's Arbitration Record (Tabs 1 – 30)

No oral evidence was called and the parties did not file an Agreed Statement of Facts.

The Issue:
Pursuant to the Arbitration Agreement of April 2010, the issue for determination at this hearing was identified as follows:

> *Are insurer assessment expenses recoverable in loss transfer, particularly in light of the March 1, 2006 legislative changes?*

The Arbitration Agreement identified other issues relating to quantum and interest. These issues are deferred pending my conclusions on the primary issue.

Background Information: Facts

1. The Flynn Accident

On October 6, 2005 Terrance Flynn was operating a 2005 Dodge Minivan which was insured by Wawanesa under Policy No. 7657563. Mr. Marco Campoli was operating a 1986 Mack truck which was insured by Axa under Policy No. RAA5704548. Axa concedes that the Campoli truck was 100% at fault for the accident, pursuant to the Fault Determination Rules, R.R.O. 1990, Regulation 668, Section 6. It is further conceded pursuant to Regulation 664 that the Campoli truck was a heavy commercial vehicle.

Axa has reimbursed Wawanesa for part of the Statutory Accident Benefits incurred as a result of this accident but has refused to pay for various Section 42 Assessments.

Wawanesa claims that it has paid the following amounts in Section 42 examinations (Insurer Assessments), in order to determine each claimant's entitlement to various benefits:

a) Terrence Flynn $35,405.12

b) Rosa Flynn $1,312.50

These amounts were properly submitted pursuant to a Loss Transfer Request for Indemnification by Wawanesa to Axa. Axa has declined to pay the cost of the Section 42 Assessments taking the position they are not covered under the loss transfer legislation and regulation as interpreted by the case law to date.

2. The Konopka Accident

On August 21, 2006 Kazimierz Konopka was operating a 1992 Dodge Spirit Sedan insured by Wawanesa under Policy No. 7602924. Mr. Dale Johnstone was operating a 1998 Ford L8501 truck which was insured by Axa pursuant to Policy No. 32-R4001140. Axa concedes that the Johnstone truck was a heavy commercial vehicle as defined by the Automobile Insurance Regulations, Ontario Regulation 664, subsection 9(1) and also concedes that the Johnstone truck was 100% at fault pursuant to Section 12 of the Fault Determination Rules (FDR, R.R.O. 1990, Regulation 668).

In the course of handling the Konopka claim, Wawanesa paid $12,702.91 with respect to Section 42 Examinations that were required in order to determine entitlement of Mr. Kazimierz Konopka to various Statutory Accident Benefits.

Wawanesa forwarded appropriate loss transfer requests for indemnification with respect to the Section 42 assessments to Axa. Axa refused to pay the assessment costs on the same basis as it declined to pay them with respect to the Flynn accident.

Relevant Statutes:

In determining entitlement to loss transfer, one must have reference initially to Section 275(1) of the *Insurance Act* which provides a scheme for loss transfer indemnity where the insurer responsible for payment of accident benefits may be entitled to indemnity or repayment by another insurer. Section 275 is reproduced below.

> **Indemnification in certain cases**
>
> 275. (1) The insurer responsible under subsection 268(2) for the payment of statutory accident benfits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose. R.S.O. 1990, c. I.8, s. 275(1); 1993, c. 10, s. 1.
>
> **Idem**
>
> (2) Indemnification under subsection (1) shall be made according to the respective degree of fault of each insurer's insured as determined under the fault determination rules. R.S.O. 1990, c. I. 8, s. 275(2).
>
> **Deductible**

(3) No indemnity is available under subsection (2) in respect of the first $2,000 of statutory accident benefits paid in respect of a person described in that subsection. R.S.O. 1990, c. I.8, s. 275(3); 1993, c. 10, s. 1.

Arbitration

(4) If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the *Arbitrations Act*. R.S.O. 1990, c. I.8, s. 275(4).

Stay of arbitration

(5) No arbitration hearing shall be held with respect to indemnification under this section if, in respect of the incident for which indemnification is sought, any of the insurers, and an insured are parties to a mediation under section 280, an arbitration under section 282, an appeal under section 283 or a proceeding in a court in respect of statutory accident benefits. 1993, c. 10, s. 31.

Also of relevance in consideration of this issue are two bulletins issued by what was then known as the Ontario Insurance Commission to provide some assistance to insurers making use of the loss transfer process. The first Bulletin is No. 9/92 issued on July 6, 1992. The Bulletin confirms that the purpose of the loss transfer provisions is to balance the cost of no fault benefits between different classes of vehicles. Under a question and answer provision, we see the following:

> "*Does the second – party insurer reimburse the first – party insurer for cost of adjustment expenses and other claims – related expenses incurred by the first – party insurer? Answer: No, reimbursement is only made for the actual benefits paid.*

This Bulletin was issued at a time when the prevailing legislation was what is commonly known as "The Ontario Motorist Protection Plan/OMPP".

The second Bulletin of relevance was issued June 6, 1994 when the Statutory Accident Benefits Schedule had been extensively amended to what is commonly known as "Bill 164". This marked the advent of the Designated Assessment Centre system. In that Bulletin (No. 11/94) reference is made to the Ontario Insurance Commission having heard from various industry representatives that since observing the loss transfer process in operation, that there were a number of recommendations made to help clarify and improve how the loss transfer system was supposed to work. This Bulletin was much longer and far more detailed than the previous Bulletin. On the issue of what monies could be recovered by way of indemnification, the Bulletin advises as follows:

> *Question – Which Statutory Accident Benefits may be the subject of a loss transfer indemnification request.*
>
> *Answer – First party insurers are entitled to be reimbursed for all accident benefit payments made under the Statutory Accident Benefits Schedule subject to the $2,000 deductible discussed below. Now that the new Schedule is in effect, loss transfer is now available for the following kinds of benefits:*

- *the cost of any assessment conducted under the Schedule;*
- *the cost of services provided by a case manager related to the co-ordination of medical, rehabilitation and attendant care services;*
- *all expenses covered by the Schedule.*

While I am not bound by either of these Bulletins, the prevailing law is that I should give them considerable weight.

Finally, I was also referred to subsection 9(3) of Ontario Regulation 664/90 pursuant to the Insurance Act which sets out the process and procedure relating to, inter alia, loss transfer claims. Subsection 3 is reproduced below:

> *A second party insurer under a policy insuring a heavy commercial vehicle is obligated under Section 275 of the Act to indemnify a first party insurer unless the person receiving Statutory Accident Benefits from the first party insurer is claiming them under a policy insuring a heavy commercial vehicle.*

Arguments:

Wawanesa's main argument that the cost of Section 42 Assessments should be indemnified under the Loss Transfer Provisions, is based on the change in wording to the Statutory Accident Benefits Schedule and indeed a change in the overall approach of that Schedule that came into effect in March 2006. Wawanesa outlined that prior to March 2006 when one reviewed the various provisions relating to insurer assessments (Section 23(2) under OMPP and Section 65(1) under Bill 164 and the predecessor Section 42 under the pre March 2006 Schedule) that in each and every case, the right to conduct an insurer's exam was a voluntary process. Under Section 23 (2) of the OMPP, the insurer could only have an insurer's exam with respect to weekly benefits and had no right to assess entitlement to any other benefits. This Section clearly provides an optional process for the insurer.

Similarly under Section 65(1) and the pre March 2006 Section 42, while the benefits that an insurer could assess under this Section were expanded, the right to do so remained optional. In fact under Bill 164 and under the Bill 59 pre March 2006 legislative scheme, Designated Assessment Centres formed a large part of the entitlement scheme and assessment process for Statutory Accident Benefits. The "DACs" as they are known were intended to be a neutral assessment facility that would benefit both the insured and the insurer in providing direction and opinions on various benefit entitlement.

In March 2006 significant changes were made to the Statutory Accident Benefit Assessment/Entitlement Process. First the Designated Assessment Centres were eliminated. In their place the government instituted a scheme of mandatory insurer assessments that had to take place before an insurer could deny entitlement to a benefit. This mandatory assessment process applied to each and every benefit to which an insured may be entitled: attendant care, medical and rehabilitation benefits, specified benefits and even whether an insured was entitled to have an assessment conducted and/or paid for under Section 24. This new process also brought in the right

of the insured to have a "rebuttal exam" in the event that the insured did not agree with the insurer's assessor.

Wawanesa argues that with the elimination of the DACs and the mandatory requirement that insurer assessments be conducted prior to the termination of a benefit, that the nature of these assessments changed. Wawanesa argues that they are no longer "expenses relating to loss control" but rather part of a comprehensive scheme dealing with benefit entitlement. Wawanesa argues that as such these expenses under Section 42 would now be recoverable in loss transfer as they are "in relation to such benefits paid by it". (see Section 275(1) of the *Insurance Act).*

Wawanesa further submits that when Section 42 benefits became mandatory in March 2006 that they become a different class of expenses and ones that can no longer be characterized as administrative costs, overhead costs or costs similar to those incurred in surveillance or investigation.

I find this to be a compelling argument and one that would appear on its face to be consistent with the Bulletin from the Ontario Insurance Commission in 1994. I do note no subsequent bulletins have been issued despite numerous regulatory changes to the Statutory Accident Benefits Schedule since 1994.

Axa's argument to put it succinctly, is that I am bound by the decision of Justice Mandel in the case of *Jevco Insurance Company v. Prudential Insurance Company* (1995), 22 O.R. (3d) 779: April 3, 1995. Axa argues that this case is still good law and I am bound to follow it unless and until Section 275 of the *Insurance Act* and/or its regulation is amended. Axa points to the decision of *State Farm Mutual Automobile Insurance Company v. ING Insurance Company* (February 16, 2005: Decision of Arbitrator Craig Brown) and the decision of *Motors Insurance Corp. v. State Farm Mutual Insurance Company* (October 2007 decision of Arbitrator Ken Bialkowski) where both Arbitrators concluded that although considering different Statutory Accident Benefits schemes that had been considered by Justice Mandel that absent an amendment to Section 275 of the *Insurance Act*, the Arbitrators were bound by Justice Mandel's conclusions. Reluctantly I find myself forced to agree with Arbitrators Brown and Bialkowski.

Analysis:

The key to my conclusion that Section 42 Expenses for the cost of the assessments by an insurer are not recoverable under loss transfer is an analysis of the decision of Justice Mandel in *Jevco v. Prudential* (supra).

The case of *Jevco v. Prudential* was decided after the 1994 O.I.C. Bulletin was released. Somewhat confusingly Justice Mandel notes that the claim for assessment costs is made both under Section 23(2) of the Statutory Accident Benefits Schedule (which would refer to OMPP) and under Section 65 of the Statutory Accident Benefits Schedule which must refer to Bill 164. There is no reference in the decision to the date of the accidents but I do note that only one accident is described by Justice Mandel. The medical assessments that were in dispute are not specifically described but clearly they were an insurer directed assessment under either Section 23(2) or Section 65. The cost was $3,754.70.

The issue had proceeded before a private Arbitrator who had concluded that the cost of assessment was not recoverable and this was upheld by Justice Mandel.

The following are the relevant conclusions of Justice Mandel from this decision:

1. Administration costs include costs of medical assessments. They are similar to and in the nature of loss control efforts such as surveillance and investigation;

2. The insured has no choice in who will assess him when an assessment is arranged pursuant to Section 65. If he refuses to be examined by that individual then the insurer is not required to pay the expense. When one considers such a process and when one considers that an insurer will choose to deny or accept a claim to a benefit as a result of such an assessment then it would not appear to be a "benefit" to the insured. In fact, such costs are not directed to the payment of no fault benefits but are directed in part, if not entirely to limiting such payments.

3. The cost of such loss control efforts was never intended by the Legislature to be indemnified and transferred to the automobile insurer under loss transfer. Justice Mandel notes in reference to the OIC Bulletins that he is not bound by such Bulletin but that he would give it considerable weight.

4. Justice Mandel does not accept that the words "in relation to" as found in Section 275(1) can be interpreted as allowing indemnification for administrative costs such as costs of assessments. He notes there is no connection between administrative costs, limiting benefits and the benefits paid.

Justice Mandel therefore clearly finds that medical assessment costs are not covered under Section 275 of the Insurance Act. His decision does not appear to allow for any argument that costs that are mandatory as opposed to optional in relationship to assessments could be covered. Whether the assessment costs are mandatory or optional the character and nature of those costs still remain the same as found by Justice Mandel, administrative or loss control measures.

In my view, the change to the Statutory Accident Benefits Schedule in March 2006 makes a substantial change to the nature of Insurer's Exams. In my view they do become part of an overall scheme of entitlement to benefits. However absent a concurrent change to Section 275 of the *Insurance Act*, which did not occur, I do not see any way around Justice Mandel's decision and I feel I remain bound by it.

Similar conclusions were reached by Arbitrators Brown and Bialkowski in their decisions of *State Farm and Ing* (supra) and *Motors Insurance and State Farm* (supra). In *State Farm and Ing*, Arbitrator Brown was dealing with a claim for indemnification for Designated Assessment Centres as well as independent medical examinations. The accident occurred under the Statutory Accident Benefits Schedule in place effective November 1996 generally referred to as Bill 59. Arbitrator Brown held that the assessments under Section 42 were clearly loss control measures as found in the Jevco and Prudential decision. He states:

> *It follows that the ratio decided of the Jevco case is applicable to this case unless the law has been changed by legislation or regulation.*

> *Section 275 remains unchanged, as does Section 9 of Ontario Regulation 664. It is true that Jevco was decided under a different automobile insurance regime than that which was in place at the time of Ms. Scanlan's accident and that the later regulations contain more detailed treatment of medical examinations and assessments. However, the new provisions do not change their character as measures for verifying claims. There is no indication, in the Regulation themselves of an intention to reverse the effect of Jevco which is not to treat payment of these expenses as "benefit" payments for the purposes of Section 275…*
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> *In my view the Jevco case, being a decision of what is now the Superior Court of Justice, remains the law. Its reasoning is no less applicable to the regulations governing this case than to those that govern in 1995. While there may be good policy reasons for a different approach, the applicable regulations do not achieve that in the face of the Jevco decision.*

Similarly in Arbitrator Bialkowski's decision in Motors and State Farm, he concluded that he too was bound by Justice Mandel's decision. Arbitrator Bialkowski was dealing with a case that involved an accident that occurred on April 20, 2005. The expenses he was asked to consider included the cost of DAC assessments and the cost of Insurer's Exams. In concluding that State Farm was not responsible to indemnify Motors for either costs, Arbitrator Bialkowski states:

> *Motors further argues that the change in legislation and the elimination of DACs effective March 1, 2006, is relevant to the issues in dispute. I cannot agree. As long as the wording of Section 275 of the Insurance Act remains as it is only those benefits paid to the insured are recoverable by way of loss transfer.*
>
> *I am of the view that if the legislature had intended to allow further recovery of the costs of insurer's exams and DACs, Section 275 of the Insurance Act, could have easily been amended to allow for "indemnification for such benefits paid to the insured and the costs incurred by the insurer for medical examinations and DACs", the legislature did not….*
>
> *I am fully satisfied that the wording of Section 275 of the Insurance Act is such that it restricts loss transfer indemnification to benefits actually paid to the insured and not cost control expenditures such as insurer exams and DACs.*

While I do not agree with Arbitrator Bialkowski that the amendments made in March 2006 are not relevant to the question of loss transfer and what may be recoverable, I do agree with Arbitrator Bialkowski that absent any change to Section 275 of the *Insurance Act* that my hands are tied and I am bound to follow Justice Mandel.

Conclusion:

The question posed to me for determination was: "are insurer assessment expenses recoverable in loss transfer, particularly in the light of the March 1, 2006 legislative changes", the answer to this question is no.

Costs:

The Arbitration Agreement provided that costs related to the Arbitration shall be awarded at the discretion of the Arbitrator. Despite the very able argument of counsel, on behalf of Wawanesa the award was not in their favour. I see nothing in this case that would justify any order other than costs following the usual course. Accordingly, I award costs of the Arbitration to Axa Insurance

(Canada). I do congratulate both counsel on their succinct and well organized written and oral argument.

Order:

It is ordered that the Wawanesa Mutual Insurance Company is not entitled to recover the Section 42 expenses relating to payments of Terrence and Rosa Flynn and Kazimierz Konopka from Axa Insurance (Canada).

DATED THIS day of October 2010 at Toronto.

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Arbitrator Philippa G. Samworth
DUTTON BROCK LLP