IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, as amended

AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c.17, as amended

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Applicant

- and –

WAWANESA MUTUAL INSURANCE COMPANY

Respondent

DECISION

COUNSEL

Kevin D.H. Mitchell – Samis & Company
Counsel for the Applicant, State Farm Mutual Automobile Insurance Company
(hereinafter referred to as "State Farm")

Katherine Kolnhofer and Brenda Cuneo– Bell, Temple LLP
Counsel for the Respondent, Wawanesa Mutual Insurance Company
(hereinafter referred to as "Wawanesa")

ISSUES – COSTS AND LOSS TRANSFER CALCULATION OF INTEREST

[1] In the context of a loss transfer dispute pursuant to s. 275 of the *Insurance Act,* R.S.O. 1990 c. I.8 and with Wawanesa having accepted loss transfer, the issue before me is the determination of interest and costs.

PROCEEDINGS

[2] The arbitration hearing proceeded on July 19, 2018 in Toronto.

FACTS

[3] The accident benefits claim of Scott Jackson arose as a result of a motor vehicle accident occurring on February 24, 2010 in Toronto. His wife was in the private passenger automobile with him when it came into collision with the heavy commercial vehicle driven by Mr. Galluzzo. Mr. Jackson was taken to hospital by ambulance. Mr. Jackson's Application for Accident Benefits is dated March 14, 2010.

[4] Notification of Loss Transfer was sent to the Respondent on or about July 6, 2011. It claimed the Respondent's insured driver to be 100% at fault for the accident, noting Rule 12(5) of the *Fault Determination Rules* (Regulation 668).

[5] The Applicant's first Request for Indemnification was sent to the Respondent on or about July 6, 2011 and claimed benefits, net of the $2,000.00 deductible, of $24,756.63. It should have been for $24,657.63 due to a transposition error of the numbers 6 and 7. The duration of benefits paid and therefore the indemnity claimed, was from May 4, 2010 to March 28, 2011. 100% liability continued to be maintained. No claim for DAC or IE assessment expenses was made. Various attachments were provided in support of the amounts paid and requested to be indemnified. A legend of the State Farm codes utilized in the Request is attached for reference purposes. A reminder letter was sent to the Respondent, dated September 6, 2011.

[6] The Respondent repaid the Applicant $24,242.47 on or about September 26, 2011 under cover of letter, dated September 23, 2011. The repayment was short by $415.16 and not by $425.16, as claimed by the Wawanesa adjuster. The Applicant attempted to explain in a letter, dated October 24, 2011, the amount claimed in its first Request.

[7] It ought to have been clear at this point in time that liability was not in issue and the sole issue remaining was the amount of indemnity.

[8] The Applicant's second Request for Indemnification was sent to the Respondent on or about November 17, 2011 and claimed benefits of $14,716.24. The duration of benefits paid was from March 28, 2011 to November 3, 2011. No claim to IE assessment expenses was made. Outstanding amounts were noted on page 2 of the form. Various attachments were provided in support of the amounts paid and requested to be indemnified. The Respondent paid the second Request in full on January 25, 2012. A reminder letter was sent to the Respondent, dated April 9, 2012, regarding the short paid first Request.

[9] The Applicant demanded arbitration, as no formal admission of liability had been made, via letter and Notice to Participate and Demand for Arbitration, both dated September 11, 2012.

[10] A second reminder letter, dated September 13, 2012, was sent to the Respondent regarding the short paid amount respecting the first Request.

[11] The Applicant's third Request for Indemnification was sent to the Respondent on or about October 29, 2012 and claimed benefits of $29,602.91. The duration of benefits paid was from November 4, 2011 to February 21, 2012. 100% liability continued to be maintained. No claim to IE assessment expenses was made. Various attachments were provided in support of the amounts paid and requested to be indemnified.

[12] The Applicant's fourth Request for Indemnification was sent to the Respondent on or about April 3, 2013 and claimed benefits of $13,028.92. The duration of benefits paid was from February 22, 2012 to February 15, 2013. 100% liability continued to be maintained. No claim to IE assessment expenses was made. Outstanding amounts were noted on page 2 of the form. Various attachments were provided in support of the amounts paid and requested to be indemnified.

[13] The Applicant hired counsel in or about September 2013 to recover its indemnity. Communication to the Respondent's adjuster was made on September 4, 2013 and arbitral candidates were put forward.

[14] The Applicant's fifth Request for Indemnification was sent to the Respondent on or about July 24, 2014 and claimed benefits of $30,847.50. The duration of benefits paid was from February 16, 2013 to July 14, 2014. 100% liability continued to be maintained. No claim to IE assessment expenses was made. Outstanding amounts were noted on page 2 of the form. Various attachments were provided in support of the amounts paid and requested to be indemnified, including the signed Release and Disclosure Notice. It was confirmed the SABS claim was now settled.

[15] Counsel for the Applicant wrote to the Respondent adjuster on October 17, 2014 reconciling the first Request since there had been some claimed confusion over how the indemnity thereupon was determined. The sum total of the outstanding claim, net of the fifth Request, was then $43,046.18. A related memo, prepared by counsel, was e-mailed to the Respondent adjuster that same day. It provided further reconciliation of the constituent amounts of the first Request.

[16] On November 7, 2014, the Respondent adjuster advised that he would reimburse the Applicant the sum of $33,657.19, made up of four amounts. The Respondent took general exception to the two lump sum settlements contained in Requests #4 and #5. The noted amount was repaid on November 24, 2014.

[17] Via a November 24, 2014 e-mail to the Respondent adjuster, counsel notified the Respondent of the onus upon it to impugn the reasonableness of the payments the Applicant sought as indemnification and invited him to provide a basis for the exception taken to the lump sum payments. Barring that, the appointment of an arbitrator was again recommended.

[18] By a November 24, 2014 e-mail, the Respondent adjuster made it known he wanted various claim file documentation.

[19] On December 1, 2014, counsel advised the Respondent adjuster of the Applicant's policy regarding production of its claim file contents and a process by which to facilitate same. As it turned out, an Order was needed to protect privacy concerns. On December 9, 2014, the adjuster advised he was referring the matter to counsel.

[20] Applicant counsel followed up with Respondent counsel on February 6, 2015 in order to seek the recommended production Order. He did so again on March 20, 2015, but this time regarding an application to appoint an arbitrator. Counsel responded on **March 25, 2015,** proposing arbitrators and the continued **request for a complete copy of the AB file including adjusters log notes.**

[21] On April 2, 2015, counsel for the Applicant proposed the simple process to Ken Bialkowski (the now fully appointed arbitrator). Via **April 5, 2015** e-mail, he rendered an **Order that the Applicant produce its SABS file to the Respondent.**

[22] By letter to Respondent counsel dated April 28, 2015, the Applicant's SABS file was produced, however it appeared to be incomplete and did not include the AB adjuster's log notes.

[23] On May 13, 2015, counsel each broached with the arbitrator the issue of the Applicant requiring a production Order and the Respondent's claim to costs for objecting to same.

[24] By May 13, 2015 letter and e-mail, counsel for the Respondent once again requested the Applicant's log notes. By August 31, 2015 e-mail exchange, counsel for the Applicant advised counsel for the Respondent he was not in possession of the requested log notes but had requested same from the Applicant.

[25] Log notes were produced on April 18, 2016 via letter to Respondent counsel. As it turns out, the log notes were not complete and did not contain the last three years of file handling, which included the time period for the two indemnity requests in dispute.

[26] Applicant counsel requested the Respondent's position upon the remaining indemnity via May 9, 2016 letter. To then, the Respondent had repaid a total of $72,615.90.

[27] On June 6, 2016, Respondent counsel requested to know the amount of the outstanding indemnity claim. On June 21, 2016, Applicant counsel advised that $40,237.30 was outstanding.

[28] On August 2, 2016, the Applicant fully appointed Ken Bialkowski to hear and decide the issues in dispute. On August 3, 2016, counsel requested various documentation and posed various questions in relation to the Applicant's file materials.

[29] The arbitrator accepted the appointment via letter, dated August 26, 2016.

[30] The initial prehearing was set for December 14, 2014. Via October 12, 2016 e-mail, counsel for the Applicant answered various questions posed by the arbitrator. The arbitrator responded on October 13, 2016 requesting he be notified if production issues arose and recommended any EUO of the Applicant be completed before the first prehearing.

[31] By December 13, 2016 letter, various productions were provided to counsel for the Respondent. It was noted that the balance had been requested from the Applicant by its counsel.

[32] Per the December 14, 2016 prehearing, best efforts were confirmed to be undertaken by counsel for the Applicant to secure productions requested by counsel for the Respondent. A January 26, 2017 prehearing was scheduled.

[33] By January 18, 2017 letter, various additional productions were provided to counsel for the Respondent.

[34] The January 26, 2017 prehearing was requested to be adjourned by counsel for the Respondent. By then, an EUO of the Applicant adjuster had still not been proposed by counsel for the Respondent.

[35] Respondent counsel set out ongoing production requests in a March 1, 2017 e-mail said to be relevant to the remaining indemnity claim. **Further log notes were sent to Respondent counsel on March 13, 2017. It should be noted that this was some two years after the production Order was made.**

[36] A March 14, 2017 prehearing went forward. A further prehearing was scheduled for April 26, 2017, at which a deadline to complete the noted EUO would be imposed and a hearing date chosen.

[37] On April 25, 2017, counsel for the Respondent requested the April 26, 2017 prehearing be adjourned on the basis of purported resolution of the dispute.

[38] All that was resolved was payment by the Respondent of the remaining $40,237.30, which was received on May 23, 2017 under cover of letter from counsel, dated May 15, 2017. At this point, the Respondent had paid the benefit indemnity in full amounting to $112,853.20**. It should be noted that payment was made with respect to the two indemnity requests some two months after having received the log notes for the period involving the disputed requests.**

[39] Further to a December 18, 2017 prehearing, the arbitrator noted the remaining issues. A January 30, 2018 prehearing was struck.

[40] Applicant counsel executed on June 26, 2018 the draft Arbitration Agreement, sent to opposing counsel earlier in June 2018, considering no response was received by then. An executed copy was provided to me at the arbitration hearing of July 19, 2018.

ANALYSIS AND FINDINGS

[41] At risk of oversimplification, this was a loss transfer arbitration involving the issue of indemnity only, as liability was really not an issue. It essentially involved the last two of five indemnity requests. These involved lump sum payments. There was about $40,000 in issue. The amount of indemnity owing by Wawanesa to State Farm was resolved prior to the scheduled hearing date with State Farm, recovering essentially all of the payments made to or on behalf of the claimant. The hearing proceeded on the issues of interest, costs and responsibility for the arbitrator's account.

[42] The Respondent Wawanesa took the position that the conduct of the parties and in particular the unreasonable delay of more than two years for the production of the full adjuster's log notes, ought to give rise to a reduction in both State Farm's claim for costs, as well as interest, as the arbitration itself was prolonged by reason of such production delay.

[43] I will firstly deal with the issue of interest. I am satisfied that the *Arbitration Act*, S.O. 1991, c.17, provides me with jurisdiction to award interest in appropriate circumstances and that I should be using the *Courts of Justice Act* as a guideline.

[44] Section 57 of the *Arbitration Act* provides that sections 127 to 130 (regarding pre- and post-judgment interest) of the *Courts of Justice Act* apply to arbitrations with necessary modifications.

[45] Section 128 of the *Courts of Justice Act* states that a person who is entitled to an Order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate, calculated from the date the cause of action arose to the date of the Order.

[46] Section 130 of the *Courts of Justice Act* states as follows:

> 130 (1) The court may, where it considers it just to do so, in respect of the whole or any part of the amount on which interest is payable under section 128 or 129,
>
> (a) disallow interest under either section;
>
> (b) allow interest at a rate higher or lower than that provided in either section;
>
> (c) allow interest for a period other than that provided in either section.

> Same
> (2) For the purpose of subsection (1), the court shall take into account,
>
> (a) changes in market interest rates;
>
> (b) the circumstances of the case;
>
> (c) the fact that an advance payment was made;
>
> (d) the circumstances of medical disclosure by the plaintiff;
>
> (e) the amount claimed and the amount recovered in the proceeding;
>
> (f**) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding**; and
>
> (g) any other relevant consideration. R.S.O. 1990, c. C.43, s. 130.
>
> [emphasis mine]

[47] I find that interest is payable in the case before me given the overall success of State Farm in recovering the payments that had made to or on behalf of the claimant. In *Jevco Insurance Company v. The Dominion of Canada General Insurance Company* (Arbitrator Wesley – November 1, 1996), Arbitrator Wesley stated that the overriding factor in awarding pre-judgment interest is that the secondary insurer has the use of the primary insurer's money, "which it would not have had, had the [secondary insurer] made timely payments to the [primary insurer]."

[48] Section 130 of the Court of Justice Act, as set out above, provides me with considerable discretion in awarding interest, allowing me to consider several factors in my award. I am satisfied on the evidence that there was unusual and unreasonable delay in getting Wawanesa the claims file and more importantly, the log notes required by them to confirm that the payments made by State Farm were reasonable.

[49] In *AXA Insurance (Canada) v. CNA Canada* (Arbitrator Samis - July 22, 2011), counsel for the secondary insurer argued that Arbitrator Samis should reduce the amount of interest recoverable by the primary insurer as a result of its failure to provide the secondary insurer with the complete claim file in a timely manner. While Arbitrator Samis agreed that it might not have been "necessary" for the primary insurer to have delayed production of the file, "the statutory rules for interest are essentially compensatory in nature and are not intended to be used as instruments of behaviour modification." Arbitrator Samis went on to state the following:

> *"The practice of dealing with pre-judgement interest and litigation in Ontario is not to make the award of pre-judgement 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-judgement interest merely because some information*

> *was outstanding at a point in time, there would never be any pre-judgement interest awarded. I do not think that can possibly be the intention of pre-judgement interest rules as presented.*
>
> *The pre-judgement 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-judgement 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-judgement 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-judgement interest payable in this matter."*

[50] Arbitrator Samis ultimately awarded pre-judgment interest to the primary insurer in the full amount as requested. In his subsequent decision in *Primmum Insurance Company v. Royal & Sun Alliance Insurance Company* (Arbitrator Samis - August 11, 2017), he once again allowed interest for the full period from the date of indemnity request to the date of payment, even though there were delays in the collection of information and analyzing the responsibilities for indemnity.

[51] I agree with the approach of Arbitrator Samis and realize that in most cases there will be some delay in obtaining the AB file and log notes and analyzing those records. In the ordinary course, I find such normal delays ought not impact on the Applicant's recovery of interest for the reasons stated by Arbitrator Samis in his two decisions aforesaid. However, in the case before me, the delay in getting Wawanesa the full AB file and log notes was far from ordinary and may well be a factor in determining the period of time interest ought to be paid. In my discretion, I have chosen to allow full interest but take into consideration the unreasonable delay when assessing costs.

[52] The jurisprudence has held that the correct approach to calculation of pre-judgment interest in loss transfer disputes, if it is found that such interest is indeed owed, is from the date that each indemnification request was made to the date that each indemnification request was paid. This approach was clearly articulated by Arbitrator Samis in *Primmum Insurance Company v. Royal & Sun Alliance Insurance Company* (supra) and by Arbitrator Bialkowski in *Wawanesa Mutual Insurance Company v. Markel Insurance Company of Canada* (March 8, 2012).

[53] I find State Farm entitled to interest as follows:

1) Pre-judgment interest of 1.3% (as per second quarter 2013 rates) on $10,000 from April 3, 2013 to May 15, 2017 = (10,000 x 0.013 x 4.1178 years = $617.67.

2) Pre-judgment interest of 1.3% (as per third quarter 2014 rates) on $30,237.30 from July 24, 2014 to May 15, 2017 = (30,237.30 x 0.013 x 2.8109 years = $1,104.92.

[54] I will now deal with the issue of costs.

[55] Sections 54 to 56 of the *Arbitration Act*, 1991, S.O. , c. 17 reads as follows:

Costs
Power to award costs
54. (1) An arbitral tribunal may award the costs of an arbitration. 1991, c.17, s.54 (1).

What constitutes costs
(2) The costs of an arbitration consist of the parties' legal expenses, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration. 1991, c.17, s.54 (2).

Request for award dealing with costs
(3) If the arbitral tribunal does not deal with costs in an award, a party may, within thirty days of receiving the award, request that it make a further award dealing with costs. 1991, c.17, s.54 (3).

Absence of award dealing with costs
(4) In the absence of an award dealing with costs, each party is responsible for the party's own legal expenses and for an equal share of the fees and expenses of the arbitral tribunal and of any other expenses related to the arbitration. 1991, c.17, s.54 (4).

Costs consequences of failure to accept offer to settle
(5) If a party makes an offer to another party to settle the dispute or part of the dispute, the offer is not accepted and the arbitral tribunal's award is no more favourable to the second-named party than was the offer, the arbitral tribunal may take the fact into account in awarding costs in respect of the period from the making of the offer to the making of the award. 1991, c.17, s.54 (5).

Disclosure of offer to arbitral tribunal
(6) The fact that an offer to settle has been made shall not be communicated to the arbitral tribunal until it has made a final determination of all aspects of the dispute other than costs. 1991, c.17, s.54 (6).

Arbitrator's fees and expenses
55. The fees and expenses paid to an arbitrator shall not exceed the fair value of the services performed and the necessary and reasonable expenses actually incurred. 1991, c.17, s.55.

Assessment
Fees and expenses
56. (1) A party to an arbitration may have an arbitrator's account for fees and expenses assessed by an assessment officer in the same manner as a solicitor's bill under the *Solicitors Act*. 1991, c.17, s.56 (1).

Costs
(2) If an arbitral tribunal awards costs and directs that they be assessed, or awards costs without fixing the amount or indicating how it is to be ascertained, a party to the arbitration may have the costs assessed by an assessment officer in the same manner as costs under the rules of court. 1991, c.17, s.56 (2).

Idem

(3) In assessing the part of the costs represented by the fees and expenses of the arbitral tribunal, the assessment officer shall apply the same principles as in the assessment of an account under subsection (1). 1991, c.17, s.56 (3).

Account already paid

(4) Subsection (1) applies even if the account has been paid. 1991, c.17, s.56 (4).

Review by court

(5) On the application of a party to the arbitration, the court may review an assessment of costs or of an arbitrator's account for fees and expenses and may confirm the assessment, vary it, set it aside or remit it to the assessment officer with directions. 1991, c.17, s.56 (5).

Idem

(6) On the application of an arbitrator, the court may review an assessment of his or her account for fees and expenses and may confirm the assessment, vary it, set it aside or remit it to the assessment officer with directions. 1991, c.17, s.56 (6).

Time for application for review

(7) The application for review may not be made after the period specified in the assessment officer's certificate has elapsed or, if no period is specified, more than thirty days after the date of the certificate, unless the court orders otherwise. 1991, c.17, s.56 (7).

[56] Rule 57.01(1) of the *Rules of Civil Procedure*, provides:

1. The principle of indemnity including, where applicable, the experience of the lawyer for the party entitled to the costs, as well as the rates charged and the hours spent by that lawyer;

2. The amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

3. The amount claimed and the amount recovered in the proceeding;

4. The complexity of the proceeding;

5. The importance of the issues;

6. **The conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;**

7. Whether any step in the proceeding was improper, vexatious or unnecessary; and

8. Any other matter relevant to the question of costs.

[emphasis mine]

[57] On the basis of the authority provided to me by the *Arbitration Act* and having considered the factors above set out in the *Rules of Civil Procedure*, I find that State Farm, given its success in recovering indemnity, is entitled to costs on a partial indemnity basis, but

that the usual partial indemnity costs ought to be reduced by reason of the unreasonable delay in producing the full AB file and log notes. Once Wawanesa was in receipt of those documents, payment was made in approximately two months. I find that the proceeding was unnecessarily lengthened and that such conduct should not be condoned. In fact, it ought to be discouraged. In a loss transfer arbitration where reasonableness of payments is an issue in determining indemnity, the non-privileged portions of the AB file and log notes ought to be produced within a reasonable period of time. Failure to do so should result in a reduction of the normal partial indemnity costs which ought to be awarded so as to discourage such conduct.

[58] State Farm has produced a full indemnity Bill of Costs totaling $31,762.61, including HST and disbursements. Ordinarily, partial indemnity costs would be about $19,000. For the reasons aforesaid, I reduce this amount by roughly half in the circumstances and award $9,500, inclusive of HST and disbursements. I am satisfied that had the full AB file and log notes been provided within a reasonable period of time, much of the time spent by the lawyers on this file could have been avoided.

[59] I am also cognizant in awarding costs of proportionality and have considered the following decisions in coming to my award for costs aforesaid:

1. *Toronto (City) v. First Ontario Realty Corp.,* [2002] 59 O.R. (3d), 568 (S.C.);

2. *Boucher v. Public Accountants Council (Ontario),* [2004] 71 O.R. (4d), 291 (C.A.);

3. *Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC,* [2005] 75 O.R. (3d), 638 (C.A.);

4. *Zesta Engineering Ltd. v. Cloutier*, [2002] 21 CCEL (3d), 161 (O.N.C.A.).

[60] Both parties made offers to settle, but the award made herein for interest and costs is higher than that offered by Wawanesa and lower than that proposed by State Farm.

[61] State Farm was overall successful in this arbitration, having recovered essentially all of the indemnity payments that it sought. In the circumstances, Wawanesa is responsible for the Arbitrator's account. As stated by counsel for the Applicant in reference to indemnity challenges of the type before me "you have to pay to play". The delay in producing the AB file and log notes and the resultant lengthening of the proceeding is reflected in the award of costs.

ORDER

[62] On the basis of the findings aforesaid, I hereby order that:

1. Wawanesa pay interest to State Farm in the amount of $1,722.59;

2. Wawanesa pay to State Farm reduced partial indemnity costs in the amount of $9,500, inclusive of HST and disbursements;

3. Wawanesa pay the Arbitrator's account.

DATED at TORONTO this 20th)

day of July, 2018.)

KENNETH J. BIALKOWSKI
Arbitrator