IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990,
s.275, and REGULATION 664,

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

AND IN THE MATTER OF AN ARBITRATION;

BETWEEN:

PRIMMUM INSURANCE COMPANY

Applicant

- and -

AVIVA CANADA INC.

Respondent

DECISION

COUNSEL:

Derek Greenside for the Applicant

Marianne Davies for the Respondent

ISSUES:

1. Is Primmum entitled to be compensated by Aviva pursuant to the loss transfer provisions of the Insurance Act and if so, in what amount?

ORDER:

1. Aviva is to pay Primmum $364, 969.31 for loss transfer, plus applicable interest. If the parties are unable to agree with regard to the amount of interest owing, I may be spoken to.

HEARING:

This matter proceeded by way of filed documents and oral argument, and was heard in the city of Toronto on February 15, 2008.

FACTS & ANALYSIS:

This arbitration arises out of two motor vehicle accidents involving Mr. Michael Mauro, which occurred on April 29, 2000 and May 15, 2002. The first accident occurred in circumstances that the parties agree would require Aviva to indemnify Primmum for Statutory Accident Benefits paid to or on behalf of Mr. Mauro pursuant to the loss transfer provisions (s.275) of the Insurance Act. The second accident occurred under such circumstances that Mr. Mauro would be found at fault and there would be no loss transfer.

Mr. Mauro applied for and received Statutory Accident Benefits from his insurer, the applicant, Primmum, for both motor vehicle accidents. Primmum submitted loss transfer requests to Aviva regarding payments arising from the first accident, which Aviva paid. It is only after the second accident occurred that difficulties arose as to the payment of loss transfer regarding certain issues. These may be put into two main categories, being: income replacement benefits in the amount of $352,400.00 and other, primarily medical rehabilitation benefits in the amount of $46,712.64. Primmum also claims interest on the amounts found owing,

In order to determine what amounts are properly owing, it is first necessary to review Mr. Mauro's pre accident medical history as well as the injuries suffered in both the first and second accidents.

At the time of the first accident, Michael Mauro was approximately 36 years of age. He had a slight leg length discrepancy which led to low back problems and which subsequently effected his recovery from the motor vehicle accidents. In addition, prior to the accidents, Mr. Mauro had been addicted to pain medication secondary to post surgical complications from an abscess in his left hip in 1992 and 1993. He had been on methadone for approximately 3 and a half years prior to the first accident. At the time of that accident he had been a kitchen cabinet installer, a job

that also included sales and design of kitchen cabinets. The physical demands of that work are considered heavy when compared to DOT standards.

In the first accident, Mr. Mauro was operating his motorcycle when he was hit by a motor vehicle that pulled out in front of him from a private driveway. Mr. Mauro slid on the roadway and suffered headaches, as well as injuries to his neck, left arm, back and left knee. He did not return to work prior to the second accident, although he did make some progress in some areas, which I will discuss later.

The second accident also involved Mr. Mauro driving his motorcycle and being struck by another motor vehicle. His injuries in this accident were significantly more severe than the first accident and included an unstable pelvic fractured, right proximal femur fracture, right tibia and right radius fracture with an open wound to the right ankle. There is also some suggestion that Mr. Mauro suffered a closed head injury. He also suffered an aggravation of the soft tissue injuries that he suffered in the first accident.

Aviva concedes that Mr. Mauro was not working at the time of the second accident and may still not have been able to work for a period of time there after even without the second accident. However, it takes issue with the $52,400 paid out by way of income replacement benefits from November 9, 2002 to July 13, 2005. It also takes issue with "lump some" pay out of Mr. Mauro's entitlement to future income replacement benefits in the sum of $300,000, pointing out that the present value of his entire future income replacement benefit was only $336,000. Accordingly, Primmum paid roughly 90% of the full future present value of Mr. Mauro's income replacement benefits and it's claiming this from Aviva despite the fact that Mr. Mauro was declared catastrophic only after the second accident.

The real issue with regard to the income replacement benefits dispute is whether Mr. Mauro would have ever gone back to work after the first accident. There is no doubt that the onus of establishing that a first party insurer (Primmum) has made an unreasonable payment rests upon the second party insurer (Aviva) (See: Jevco Insurance Company vs. Guardian Insurance

Company), (unreported decision of Arbitrator Mallach, dated August 28, 2000; upheld on appeal by Mr. Justice Jennings, unreported, dated November 20, 2000). As Mr. Justice Jennings stated:

> Is its not for the second party insurer's to second guess payments made by first parties insurer's. The latter is presumed to be acting reasonably. It may well be better practice for a first party insurer, contemplating a lump some settlement with its insured, to seek input from the second party insurer, if the circumstances permit….It does not, however, shift the onus of proving reasonableness. It is for the party from whom indemnification is sought to show the payment was unreasonably made.

Indeed, not only does the onus lie with the second party insurer but the test they must meet is a very high one. As Arbitrator Mallach stated in Progressive Casualty Insurance Company vs. Markel Insurance Company of Canada (unreported decision dated May 13, 1997):

> Unless it is established that the primary insurer acted in bad faith or grossly mishandled the processing of the claims for benefits under the Statutory Accident Benefits schedule, the insurer responsible to indemnify the primary insurer must indemnify the primary insurer for benefits paid to an insured person.

Arbitrator Mallach expanded on this in Dominion of Canada Insurer vs. Royal & Sun Alliance (unreported decision released August 20, 2001) stating:

> …The second party insurer must prove that any settlement entered into is clearly and grossly unreasonable or that there was gross mismanagement or gross negligence in the handling of the claim.

Before dealing with the facts of this case in detail, I will deal first with one further legal issue that arose between the parties. Because of the over lapping nature of injuries that arose from the two accidents, counsel for Primmum submitted that the "material contribution" test, as set out by

the Supreme Court of Canada in Athey vs. Leonarti [1966] 3 S.C.R. 458, should apply. Counsel for Aviva submitted that the "but for" test as stated by the Supreme Court of Canada in Hank vs. Resurface, [2007] 1S.C.R. 333 should apply. Despite able argument by counsel for Primmum, I am of the view that the "but for" test as set out in the Resurface case should apply. As chief Justice McLaughlin stated in that case:

> …First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.
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> This fundamental rule has never been displaced and remains the primary test for causation in negligence actions. As stated in Athey vs. Leonarti, at paragraph 14, per Major J., "the general, but not conclusive test, for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant". Similarly, as I noted in Black Water vs. Plint at paragraph 78 "the rules of causation consider generally whether "but for" the defendant's act, the plaintiff's damages would have been incurred on a balance of probabilities".
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> The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and the defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone" Snell vs. Farrell at page 327, per Sopinka J.
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> However, in special circumstances, the law has recognized exceptions to the basic "but for" test, and applied a "material contribution" test. Broadly speaking, the cases in which the "material

> contribution" test is properly applied involve two requirements.
>
> First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, there by exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the "but for" test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a "but for" approach.

In our particular case, I am satisfied that the test in Resurface can be met and there is no need to apply the test as set out in Athey.

Having decided the above, it now remains to be determined if it was reasonable for Primmum to have continued the income replacement benefits as they did and lumped out the remaining income replacement benefits and then claim it from Aviva. This involves looking at the medical evidence that was available to Primmum when it made the decisions regarding the weekly payments as well as the lump some payment that were made in October 2005.

As mentioned above, Mr. Mauro suffered what might be termed "soft tissue" injuries in his first accident. Is it clear, however, from very shortly after the first accident, that Mr. Mauro was suffering from very severe psychological and psychiatric problems arising from the accident. In August 2001, Dr. Makos and Sharon Mills, an occupational therapist, conducted a multi-task disciplinary disability DAC wherein they found him substantially physically disabled and did not have the functional ability to perform his pre accident job.

Doctor N.E. Morris also wrote a report for the disability DAC and concluded that Mr. Mauro was suffering from sever depression and suffered from a post traumatic stress disorder. He felt that Mr. Mauro's pre-existing problems compounded the problem. He was of the view that Mr. Mauro was substantially disabled from performing his old job.

Dr. Goodfield, a psychologist, interviewed and tested Mr. Mauro in March and April of 2002, just prior to May 2002 second accident. Dr. Goodfield noted that Mr. Mauro was unable to complete all the psychometric testing even over 2 days due to his pain, anxiety and depression. He was of the view that psychologically he was unlikely to be competitively employable in any capacity.

Mr. Mauro's treating psychologist was Dr. David Clair, who saw him from June 19, 2000 up to and after the second accident. Before the second accident, Dr. Clair diagnosed Mr. Mauro as suffering from a major depressive disorder, as well post traumatic stress disorder. He was unable to perform his old job and was having difficulty managing anger and made it un likely that he would work in any job where he would interact with the public. He also had major attention and concentration issues. Dr. Clair, in his report dated April 9, 2002, or roughly a month prior to the second accident, wrote a report to his family physician stating:

> Over the past few weeks Mr. Mauro has appeared to be extremely unwell physically, including tremendous pain, significant weight loss and lack of sleep. He reports that he is vomiting with regularity and often goes several days without leaving his bed. From a physical point of view he appears to be particularly compromised.
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> In addition to being physical unwell Mr. Mauro has been presenting an significantly impaired from a mental status perspective. He has frequently made references to self-harm ideation and non specific thoughts of harming others… Mr. Mauro showed me cuts that he had inflicted on is legs over the previous weeks…I see Mr. Mauro as continuing to be at risk of significant acting out and having on several occasions suggested that he consider for an emergency psychiatric consultation or even

> hospitalization…I am not convinced a hospitalization, either on an acute basis (ie: emergency admission) or a more on going basis (eg: Homewood) is not indicated at this time…I am not confident that physiological interventions are effective at this point.

Dr. Clair later commented on Mr. Mauro's condition leading up to the second accident, stating:

> The prognosis for change, however, remained guarded given the chronicity of his state, the reoccurrence of his altered perspective and the continued severity of his symptoms and dysfunction…He continued to be disabled from returning to his pre accident employment and was expected to remain so for indeterminate time period.

Mr. Mauro was the subject of an attendant care assessment by the West Park Healthcare Centre in March 2003. In their report they reported that Mr. Mauro had developed an atypical reaction as a result of accident number one physically and physiologically. They were of the view that even before accident number two Mr. Mauro was incapable of work.

Dr. David Young conducted a neuro-psychological assessment on behalf of the insurer (Primmum) in May and June of 2003. Dr. Young concluded:

> Mr. Mauro requires on going psychotropic medication, and it is my opinion that this is being handled very well and expertly. I am impressed with the recent addition of lithium. Continued counselling is also worthwhile to address on going issues of addiction, characterlogical problems, anxiety, depression and grief and posttraumatic stress disorder-symtomalogy… I would note that Mr. Mauro's psychological difficulties are multi factorial with many of them pre-existing. He may require several years of counselling, but this by no means is strictly related to the subject motor vehicle accident.

> The expected outcome over the next four or five months would be reduce anxiety and depression with a focus re-employment…

Primmum also conducted a "Catastrophic Impairment Review" conducted by Dr. William Gnaam, a phyciatrist, in November 2004. This amounted to a file review and did not include an interview with Mr. Mauro. Dr. Gnaam concluded that:

> In my opinion, overall, there is consistent and persuasive evidence that Mr. Mauro developed post traumatic stress disorder (PTSD) as a result of the accident in 2000. The documentation also suggests that Mr. Mauro developed a persistently depressed mood, suicide ideation, sleep disturbance, impaired concentration, ankedonia, and that he met the criteria for the diagnosis of major depressive order…cross-sectional clinical studies have demonstrated that major depressive disorders co-occur frequently with PTSD, and that the co existing disorders generally have a worse prognosis comparable to PTSD alone.

While attributing significant parts of his problems to accident number one, Dr. Gnaam suggested that accident two played a role. Dr. Gnaam concluded that both accidents one and two contributed to his becoming catastrophically impaired. Dr. Gnaam did not, however, comment on whether Mr. Mauro would have returned to work but for accident number two.

Counsel for Aviva submits that "but for" accident number two, Mr. Mauro might well have returned to some form of employment, and that it was unreasonable for Primmum to pay out essentially 90% of the present value of Mr. Mauro's future income replacement benefits without having had a follow up neuro psychiatric report for more then two years prior to the lump out settlement. Aviva further submits that the second accident was clearly far more serious than the first and taking all factors into account it was unreasonable to pay all the income replacement benefits up to the time of the settlement and 90% of the remaining income replacement benefits.

While I have some sympathy for Aviva's position, which was put forward forcefully by its counsel, I do not think that Aviva has met the very stringent test that it must meet. With the

benefit of hindsight, I believe that Primmum could have obtained updated medical reports prior to settling out the claim. Indeed, it would have been a wise thing for it to have done, and this controversy might well have been avoided. I cannot, however, say that the settlement was clearly and grossly unreasonable or that there was gross mismanagement or gross mishandling of the claim. This is not to say that the handling of the file was perfect, and my reasons should not be taken to excuse conduct of a first party insurer. They do have a duty to act reasonably, and if they fail in this regard, they do so at their peril.

For the reasons given, Aviva shall refund Primmum $352,400.00 for income replacement benefits.

OTHER BENEFITS:

Primmum is also claiming $46, 712.64 for various medical rehabilitation benefits incurred after the second accident, but which it has attributed to the first accident. This covers the period from July 15, 2003 to August 25, 2005. Primmum takes the position that in the two months prior to the second accident, Mr. Mauro was spending approximately $3,500.00 per month on medical rehabilitation and associated expenses. It concedes that this rate might well have decreased over time and that a lot of the post second accident care was reasonably related to the second accident.

Counsel for Aviva submits that when one examines the loss transfer forms submitted by Primmum, there are costs that should not be attributed to the first accident. For example, there is a claim for $29,509.38 for taxi services for transportation. Prior to the second accident, as I understand it, there was no claim for taxi services, and indeed this is not surprising as Mr. Mauro was driving is own motorcycle at the time of the second accident. It was in the second accident that Mr. Mauro suffered his severe orthopaedic injuries. Counsel for Primmum argues that even if Mr. Mauro took public transit or drove himself he would be subject to some transportation expenses, subject to the statutory deductible. Without knowing how far Mr. Mauro was required to travel for care resulting from his first accident, it is somewhat difficult to put an accurate amount to what would have been appropriate, however, but for the second accident he clearly would have had to travel for medical care on his own. I will allow $2,500.00 of the $29, 509.38 claimed.

With regard to the loss transfer claim covering June 15 to December 12, 2003 $26, 857.88 of this is for taxis and accounted for in the $29,509.38 dealt with above. As $33,645.15 was claimed, $26,857.88 is deducted and therefore $6,787.31 of that loss transfer claim is recoverable.

With regard to the loss transfer claim covering March 24 to April 23, 2005, Aviva states that there is a total $10,316.11 being claimed primarily arising out of Mr. Mauro's being declared catastrophic. When the appropriate deductions for those items not properly claimable are removed. One is left with the amount of $2,782.00 rather then the $10,316.11 claimed.

Turning to the July 13 to December 12, 2003 loss transfer request $2,002.00 of this is for ADAPT Ontario. This involves therapy at York Region Therapy. A review of the injuries being treated at the time (see exhibit 3, tab 10) suggests that the vast majority of treatment was for injuries suffered in the second accident. I would allow $500 for loss transfer from this account.

In summary, with regard to the claims for medical rehabilitation issues, I would allow $12,569.31. With regard to the income replacement benefits and lump sum settlement, I would allow $352,400.00. Thus the final total is $364,969.31.

While the parties supplied me with calculations regarding interest owing, I have, of course, changed the amount of the claim which would attract interest. I will therefore leave it to the parties to work out the interest owing, however, if they are unable to agree in this regard, I may be spoken to.

In the event that the parties are unable to agree with the regard to the issue of costs, I may be spoken to.

Dated at Toronto, this _____ day March 2008.

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M. Guy Jones

Arbitrator