

**IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990, c. I. 8 AND REGULATION 664 AS AMENDED**

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

MOTORS INSURANCE CORPORATION

Applicant

- and -

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent

AWARD

COUNSEL

George Kanellakos
Counsel for the Applicant, Motors Insurance Corporation

Michael Smith
Counsel for the Respondent, State Farm Mutual Automobile Insurance Company

ISSUE

The issue in dispute between the parties is whether Motors Insurance Corporation ("Motors") is entitled to indemnification from State Farm Mutual Automobile Insurance Company ("State Farm") for the cost of the DAC assessments and the cost of the insurer examinations incurred by Motors with respect to the statutory accident benefits claim of Innocent James, arising out of a motor vehicle accident which occurred on April 20, 2005.

FACTS

As a result of injuries sustained in the April 20, 2005 motor vehicle accident, Innocent James presented accident benefit claims to Motors. These claims were paid by Motors. During the course of the claims handling, Motors incurred expenses for insurer examinations and DACs. Motors then requested loss transfer indemnification from State Farm pursuant to Section 275 (1) of the Insurance Act, R.S.O. 1990 c.I.8, as amended. State Farm accepted that it was liable to reimburse Motors for the benefits actually paid to the insured, Innocent James. They refused to reimburse Motors for the costs of DAC assessments and insurer examinations totalling \$14,140.72. Therefore, in dispute are the costs of the DAC assessments totalling \$11,336.50 and the costs of the insurer examinations, totalling \$2,804.22.

APPLICABLE LEGISLATION

The legislation governing indemnification between insurers with respect to the payment of statutory accident benefits is found in Section 275 (1) of the Insurance Act, R.S.O. 1990, c.1.8. This section provides as follows:

“Section 275. (1) Indemnification in certain cases – The insurer responsible under subsection 268 (2) for the payment of statutory accident benefits 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.”

FINANCIAL SERVICES COMMISSION OF ONTARIO BULLETINS

Relevant excerpts from Bulletin No.: A-9/92, dated July 6, 1992:

- **What is loss transfer?**

“Loss transfer is a mechanism by which, under certain circumstances, automobile insurers who pay no fault benefits (the first party insurer) may be reimbursed by another insurer (the second party insurer) for all or part of a claim.

Loss transfer only operates between insurers of different classes of vehicles (see attached chart for summary) and only applies when the policyholder of the second party insurer was at least partly at fault in an accident. The purpose of loss transfer is to balance the cost of no fault benefits between different classes of vehicles...”

- **Does the second party insurer reimburse the first-party insurer for loss adjustment expenses and other claims-related expenses incurred by the first party insurer?**

“No. Reimbursement is only made for actual benefits paid.”

Relevant excerpts from Bulletin No.: A-11/94, dated July 6, 1994:

- **What is loss transfer?**

“Loss transfer permits insurers that pay accident benefits (the “first party insurer”) to be indemnified by another insurer (the “second party insurer”) for all or part of the accident benefits paid to an insured person, under the circumstances.”

- **Which statutory accident benefits may be the subject of a loss transfer indemnification request?**

“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; and*
- *All expenses covered by the Schedule.*

APPLICANT'S SUBMISSIONS

Motors takes the position that it is entitled to recover the costs that it has incurred in respect of DAC assessments and insurer examinations. Motors takes the position that the loss transfer provisions under Section 275 of the Insurance Act properly apply to such payments. Motors relies on OIC Bulletin No. A-11/94, which it claims entitles it to reimbursement for “the cost of any assessment conducted under the Statutory Accident Benefits Schedule and all expenses covered by the Statutory Accident Benefits Schedule” which would include insurer examinations and DACs. Motors relies on the decision of Arbitrator Jones in *Liberty Mutual Insurance Company v. Zurich Insurance Company*, dated August 23, 2005, where it was concluded that the costs of DAC assessments were properly recoverable under the loss transfer scheme. Motors further relies on the decisions of Arbitrator Robinson in *Allstate Insurance Company of Canada v. AXA Boreal Insurance Inc.*, where it was held that insurer examinations were recoverable. Motors states that expenses relating to the insurer's chiropractic examination dated April 21, 2006, after the elimination of DACs, was recoverable as Sections 35 and 42 of the Amended Statutory Accident Benefits Schedule allowed an insurer to conduct medical examinations to determine entitlement.

RESPONDENT'S SUBMISSIONS

State Farm takes the position that Motors is not entitled to recover the costs incurred in respect of DAC assessments and insurer examinations as applicable legislation, namely Section 275 of the Ontario Insurance Act restricts indemnity to statutory accident benefits paid to insureds and not to other expenses paid to third parties in the course of handling of the claim for accident benefits. State Farm takes the position that OIC Bulletin No. A-11/94 does not alter the applicable legislation and only relates to benefits paid to an insured which had not been available under the previous OMPP legislation. State Farm submits that unless and until there is a change in the legislation, indemnity to an insurer under loss transfer is restricted to the statutory accident benefits paid to its insured. State Farm relies upon the appeal decision of Mr. Justice Mandel in *Jevco Insurance Company v. Prudential Insurance Company* (1995) 3 O.R. 779, which concluded that medical assessments are part of the insurer's loss control efforts and that such loss control efforts were never intended by the legislature to be indemnified. State Farm further relies on the decision of Arbitrator Brown in

State Farm Mutual Automobile Insurance Company v. ING Insurance Company, wherein he found that he was bound by the legislation and Mr. Justice Mandel's decision in the *Jevco* decision aforesaid. State Farm also relies on two Arbitration decisions of Arbitrator Malach in *Progressive Casualty Insurance Company v. Markel Insurance Company of Canada* and *Certas Direct Insurance Company v. Allstate Insurance Company*, in which he concluded that recovery by way of loss transfer was restricted to benefits actually paid to the insured.

ANALYSIS AND FINDINGS

I find that recovery by way of loss transfer is restricted to benefits "actually paid to the insured" and would not extend to the cost of insurer examinations or DACs. The enabling legislation reads as follows:

"Section 275. (1) Indemnification in certain cases – The insurer responsible under subsection 268 (2) for the payment of statutory accident benefits 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."

I find that this enabling legislation essentially states that where loss transfer is applicable, the "insurer responsible for payment of statutory accident benefits to its insured is entitled to indemnification in relation to such benefits paid to its insured". The payments for DACs and insurer examinations go to third party medical assessors and not the insured.

There appears to be ongoing debate and conflicting judicial/arbitral decisions with respect to an insurer's entitlement for indemnification of the costs of DACs and insurer examinations in a loss transfer situation. In my view, there ought not be. A historical review of the numerous legislative regimes dealing with accident benefits over the last two decades assists in distinguishing those Arbitration decisions which suggest otherwise.

The first "threshold – no fault" system came into existence effective June 22, 1990. It was known as Bill 68 or OMPP legislation. This system expanded available no fault benefits to insureds and restricted their tort recovery by way of a verbal threshold. It was at that time that the Fault Determination Rules and Loss Transfer came into existence. It is important to note that first party benefits at that time were extremely limited compared to those available today.

With the passage of time, some confusion arose as to the type of benefit or expense to be indemnified in a loss transfer situation. The Financial Services Commission of Ontario issued Bulletin No. A-9/92 on July 6, 1992, which provided in part that:

Relevant excerpts from Bulletin No.: A-9/92, dated July 6, 1992:

- **What is loss transfer?**

"Loss transfer is a mechanism by which, under certain circumstances, automobile insurers who pay no fault benefits (the first party insurer)

may be reimbursed by another insurer (the second party insurer) for all or part of a claim.

Loss transfer only operates between insurers of different classes of vehicles (see attached chart for summary) and only applies when the policyholder of the second party insurer was at least partly at fault in an accident. The purpose of loss transfer is to balance the cost of no fault benefits between different classes of vehicles..."

- **Does the second party insurer reimburse the first-party insurer for loss adjustment expenses and other claims-related expenses incurred by the first party insurer?**

"No. Reimbursement is only made for actual benefits paid."

A radical overhaul of the insurance scheme took place effective January 1, 1994, with the introduction of Bill 164 legislation. This regime significantly restricted tort recovery to non-pecuniary general damages only and vastly expanded available no fault benefits. Ontario Regulation 776/93 established a Statutory Accident Benefits Schedule. Embedded in this Schedule in Section 57 was funding to the insured for the fees charged by medical professionals conducting examinations or assessments in order to establish entitlement to benefits and the expenses incurred by the insured in attending such examinations.

Section 57 (1) of the Statutory Accident Benefits Schedule read as follows:

"The insurer shall pay for all reasonable expenses incurred by or on behalf of an insured person in obtaining and attending an examination or assessment for the purpose of this Regulation or in obtaining a certificate or report for the purpose of this Regulation, including:

- a) fees charged by a person who conducts an examination or assessment or provides a certificate or report; and*
- b) transportation expenses incurred in attending an examination, including transportation expenses for an aide or attendant."*

Motors relies heavily in support of its position, on Financial Services Commission of Ontario Bulletin No. A-11/94 which includes the following:

- **What is loss transfer?**

"Loss transfer permits insurers that pay accident benefits (the "first party insurer") to be indemnified by another insurer (the "second party insurer") for all or part of the accident benefits paid to an insured person, under the circumstances."

- **Which statutory accident benefits may be the subject of a loss transfer indemnification request?**

“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; and*
- *All expenses covered by the Schedule.”*

I am of the view that the costs of assessments and expenses referred to in such Bulletin refer to reimbursement to the insured for the costs of assessments and expenses contemplated by Section 57 of the newly introduced Statutory Accident Benefits Schedule. The Bulletin, in my view, still restricts indemnification to “accident benefits paid to an insured”.

Support for my finding is found in the appeal decision of Mr. Justice Mandel in *Jevco Insurance Company v. Prudential Insurance Company* (1995) 3 O.R. 779 and the Arbitration decision that Mr. Justice Mandel refers to, that being the Arbitration decision of Mr. Justice Holland in *Jevco Insurance Company v. Guarantee Company of North America*. Mr. Justice Holland determined that administrative expenses, such as adjuster’s fees, investigation expenses and surveillance expenses may not be subject of loss transfer, pursuant to Section 275. Mr. Justice Holland found that Section 275 was intended to restrict the right of indemnity to the **no fault payments actually made** and was not intended to expand the right of indemnity to the recovery of the first party insurer’s administration costs, including the costs of their own medical assessments of the insured person. It should be noted that the decision of Mr. Justice Holland was appealed to the Ontario Court (General Division) and by Order made July 29, 1994, Mr. Justice Moldaver dismissed the appeal.

The appeal decision of Mr. Justice Mandel in *Jevco Insurance Company v. Prudential Insurance Company* (1995) 3 O.R. 779 arises from an Arbitration decision of Arbitrator Ayers in which he allowed recovery by way of loss transfer of the cost of DACs. On appeal, Mr. Justice Mandel found that such examinations were akin to loss control efforts and never intended by the legislators to be indemnified under loss transfer. Mr. Justice Mandel noted that such costs were not directed to the payment of no fault benefits, but rather they were directed to limiting such payments. Mr. Justice Mandel reiterated that a clear reading of Section 275 is that an insurer is only to be reimbursed for statutory accident benefits paid to the insured. He states, “*if the legislature intended that the medical assessment cost to be indemnified under Section 275 (1), then the wording of Section 275 (3) would so indicate and the wording would cover not only the no fault benefits, but also such costs*”.

Further support for my finding is found in the Arbitration decision in *State Farm Mutual Automobile Insurance Company v. ING Insurance Company* dated February 16, 2005. Arbitrator Brown addressed a loss transfer dispute arising out of an accident which occurred on June 22, 1999. The issue was whether the cost of insurer examinations and a med/rehab DAC assessment was recoverable under loss transfer. Arbitrator Brown believed that the decision in *Jevco Insurance Company v. Prudential Insurance Company* (1995) 3 O.R. 779 was binding upon him, subject to any subsequent changes to the legislation or regulations. Arbitrator Brown noted that Bulletin A-11/94 was not law and could not change the law. Arbitrator Brown noted that the Insurance Act had not been modified in any way following either Bulletin No. A-11/94 or the *Jevco Insurance Company v. Prudential Insurance Company* (1995) 3 O.R. 779 and therefore, there could have been no intent to change the original legislative purpose of limiting indemnity to statutory accident benefits. Arbitrator Brown was requested to opine as to whether the outcome would be different under the amended regulations relating to the insurer examinations and DAC assessments which came into effect in 2003. For the same reasons, Arbitrator Brown did not believe that the outcome would change as he states, "until Section 275 is changed or the regulations are changed again to manifest an intention to include expenses for these measures and the indemnification entitlement, the decision in Jevco will continue to govern".

This approach, that indemnity is limited to the statutory accident benefits paid to insureds, has also been adopted by Arbitrator Malach in two separate decisions.

Arbitrator Malach's decision in *Progressive Casualty Insurance Company v. Markel Insurance Company of Canada* was a loss transfer matter which dealt with the issue of recovery of case management services and occupational therapy services from an accident which occurred on January 14, 1992. Arbitrator Malach confirmed that the indemnification was related only to the statutory accident benefits paid the insured, making reference to the *Jevco Insurance Company v. Prudential Insurance Company* and the *Jevco Insurance Company v. Guarantee Company of North America* decisions that I have referred to aforesaid.

In *Certas Direct Insurance Company v. Allstate Insurance Company*, Arbitrator Malach was dealing with a priority dispute with respect to a motor vehicle accident which took place on February 1, 2003. Arbitrator Malach dealt with the issue of recoverability of the cost of the FSCO mediation and arbitration fees paid by the insurer. Arbitrator Malach found that recovery was limited to the statutory accident benefits. Arbitrator Malach further noted that an insurer handling a claim for benefits will incur expenses for insurance examinations, assessments imposed by FSCO, surveillance, salaries, adjusting expenses, etc., but the legislation does not provide for recovery of such expenses.

Motors argues that Financial Services Commission of Ontario Bulletin No. A-11/94 broadens the scope of that recoverable under loss transfer. I am of the view that the purpose of Bulletin No. A-11/94 was never to broaden the scope of that recoverable under loss transfer, other than in relation to certain new statutory accident benefits which an insurer may have had to pay to an insured pursuant to Section 57 of the expanded Statutory Accident Benefits Schedule of Bill 164.

Motors relies on Arbitration Robinson's decision in *Allstate Insurance Company of Canada v. AXA Boreal Insurance Inc.* The expenses in dispute in that Arbitration related to insurer examinations. Arbitrator Robinson concluded that the purpose of an insurer examination was for the purposes of treating the insured and assist him in his future care. Arbitrator Robinson

found that the cost of insurer examinations were recoverable. Arbitrator Robinson concluded that the purpose of an insurer examination was for the purposes of treating the insured and assist him in his future care. I am of the view that Arbitrator Robinson clearly misapprehended the purpose of an insurer examination. The doctor completing such assessment is not the treating doctor nor is the insured a patient of that doctor. I believe that Arbitrator Robinson not only has mischaracterized the purpose of an insurer examination, but failed to see the restrictive nature of Section 275, limiting recovery to benefits paid to the insured.

Motors also relies on the decision of Arbitration Jones in *Liberty Mutual Insurance Company v. Zurich Insurance Company*. In that decision, Arbitrator Jones used "policy reasons" for allowing the recovery of DAC expenses by way of loss transfer. In my view, there may well be policy reasons why the costs associated with containing accident benefit claims ought be subject to loss transfer indemnification, but unfortunately the enabling legislation remains restrictive to amounts paid to the insureds.

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 examinations 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 therefore support the views as ably expressed by Mr. Justice Holland, Mr. Justice Moldaver, Mr. Justice Mandel and Arbitrator Malach in the decisions referred to in the body of this Award. 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 examinations and DACs.

CONCLUSION

I conclude that State Farm is not responsible to indemnify Motors for the costs of insurer examinations or DAC expenses totalling \$14,140.72.

COSTS

I order that Motors pay to State Farm their costs of this Arbitration on a partial indemnity basis. If the parties are unable to agree on an amount, I would be happy to hear submissions.

DATED at TORONTO this)
day of October, 2007.)

KENNETH J. BIALKOWSKI
Arbitrator