

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990, c.I.8, s.275(4)

AND IN THE MATTER OF AN ARBITRATION
PURSUANT TO THE ARBITRATION ACT, S.O. 1991

BETWEEN:

COMMERCIAL UNION ASSURANCE COMPANY OF CANADA

Applicant

and

BOREAL PROPERTY & CASUALTY COMPANY

Respondent

Counsel

Brian C. Atherton
Counsel for Commercial Union Assurance Company of Canada

Lori Visconti
Counsel for Boreal Property & Casualty Company

INTERIM AWARD

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ISSUE

The issue that I am being asked to decide today is the extent of production required between two insurers in a lost transfer matter pursuant to s. 275 of *The Insurance Act*. Ultimately, I will be asked to decide on the appropriate quantum for loss transfer, but to date this case has been lost in the mire of documentary production.

FACTS

Mr. Ansari was involved in a motor vehicle accident on February 24, 1994. He is insured through the applicant, Commercial Union Assurance Company of Canada. In accordance with s. 275 of *The Insurance Act*, as the at fault vehicle insured by Boreal Property & Casualty Company was a heavy commercial vehicle as defined under Regulation 275/90, Commercial Union is entitled to indemnification with respect to the no fault benefits paid to Mr. Ansari. There is no issue as to liability. The only issue between the parties is as to quantum.

Mr. Ansari was paid weekly income benefits together with medical and rehabilitation expenses. All of which are being claimed pursuant to the lost transfer provisions. His claim was settled at some point by way of a lump sum of \$26,500.00. There is an executed full and final release that has been produced.

I have been provided with copies of various correspondence between Boreal Property & Casualty Company and Commercial Union Assurance Company. On July 27, 1994, a letter was sent to Boreal from Commercial Union providing the notification of lost transfer together with various documents identified in the aforesaid letter.

Boreal responded to this letter on December 14, 1994, regretting that they could not at that point reconcile the documentation provided in support of the amount being claimed. A request was made for copies of all cheque payments and supporting invoices.

On March 22, 1995, Commercial Union wrote back to Boreal attaching all cheque payments and supporting invoices. That letter also enclosed further documents with respect to additional expenses that had been incurred since July 27, 1994.

Boreal wrote back on May 11, 1995 advising that the file had been reassigned to a new claims handler. Commercial Union wrote again on July 4, 1995 making reference to a apparent telephone call and advising that the total surrogated interest at that point came to a total of \$55,418.12. I have not been provided with copies of any further correspondence dealing with the exchange of information or the request for lost transfer. In or about

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September, 1997, it was agreed between the parties, this matter would proceed to private arbitration.

The first pre-arbitration hearing took place on September 9, 1998. The only issue argued before me at that time was productions. I made an interim order at that time which provided:

1. That Mr. Atherton on behalf of Commercial Union Assurance Company of Canada was to produce within 30 days of September 9, 1998 all those portions of the Commercial Union file which Mr. Atherton deemed to be relevant and producible in the context of this arbitration.
2. It was further ordered that Ms. Visconti, counsel for Boreal within 30 days of the receipt of the productions from Mr. Atherton was to advise Commercial Union as to whether she was satisfied with the extent of the production provided and if not to specify which further documents she required.

The parties complied with the terms of the order but no agreement could be reached on production and accordingly a further pre-hearing took place by way of conference call on November 16, 1998. In accordance with the discussions held at the pre-hearing I have received brief written submission from each party and copies of caselaw and bulletins that the parties rely upon.

In reviewing all the correspondence between the parties and the submissions made to me both orally and in writing, I satisfied that the following documents have been produced by Commercial Union to Boreal to date.

- 1) All medical documentation in their file.
- 2) All rehabilitation reports.
- 3) All investigative reports excluding the accompanying video tapes.
- 4) A statement from Mr. Ansari.
- 5) A statement from the employer of Mr. Ansari.
- 6) A bundle of documents which have been described as "the employer's file".
- 7) A complete copy of the application for accident benefits.
- 8) A copy of the mediator's report from the Ontario Insurance Commission.
- 9) Copies of the explanations of assessments provided by Commercial Union to Mr. Ansari.
- 10) Copies of all correspondence between Commercial Union and Third Parties.
- 11) The full and final release signed by Mr. Ansari.
- 12) A written explanation completed by Mr. Atherton as to how the settlement of \$26,500.00 in return for the full and final release was reached; in this regard

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I note that Mr. Atherton represented Commercial Union at the mediation and negotiate the settlement himself. A claim for solicitor and client privilege has been advanced by Mr. Atherton for notes surrounding this event. Ms. Visconti has conceded solicitor and client privilege and is not requesting this specific portion of the file.

In reviewing this list there is one document that has clearly been excluded and that is the video tapes that have been generated by the investigator whose reports have already been provided.

I requested counsel for Boreal Property and Casualty to specify for me which documents over and above those listed she required to be produced. In her submissions, she requests an order for the complete Commercial Union file save and accept for any claim for solicitor/client privilege that may be asserted."

The issue therefore, in my mind, is whether it is appropriate in the circumstances of the production to date, as noted above, to require Commercial Union to produce its complete file".

THE LAW

I have reviewed all the cases provided by counsel and I attach to this decision a list of the cases and materials that I reviewed in reaching my conclusion.

Before making any order as to production, one should, in my view, look first to the law regarding lost transfer principles and then look to the issue that have been identified within the context of these principles.

The Honourable Robert S. Montgomery in his arbitral decision in Jeyco Insurance Company vs Loyalist Insurance Company (June 30, 1997) stated the following with respect to lost transfer with which I concur:

"The entire process under this remedial legislation is to place no fault benefits in the hands of the injured driver, passenger or pedestrian in a timely fashion. Resort to infinite retrospective analysis of reports by adverse insurers is not the purpose of this legislation.

The only thing that the adverse insurer can contest is the reasonableness of payments."

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This statement has been adopted in many decisions including Jevco Insurance Company vs Prudential of America Insurance Company, Arbitrator Edward Ayers dated January 31, 1997. In that decision, Mr. Ayers stated:

"Accordingly, in my view, the test is whether Jevco acted reasonably and responsibly in all the circumstances and not, simply, whether Cecile was overpaid."

I have reviewed the OIC Bulletin No. 11/94 which was the second bulletin (prior bulletin issued July 6, 1992 by Donald C. Scott, Commissioner) directed at standardizing the forms and procedures for loss transfer. That bulletin provided:

"The second party insurer is not entitled to dispute the accident benefits claim made by the first party insurer to its insurer. The second party insurer is entitled to dispute the reasonableness of a payment and that it should not have to reimburse the first party insurer for that payment. The first party insurer is expected to act responsibly in administering an accident benefits claim where benefit payments will be substantially reimbursed by a second party insurer through loss transfer."

I agree with Arbitrator Ayers that while this bulletin does not have the force of law it should be given substantial weight.

I have also reviewed the decision of Arbitrator, The Honourable Robert S. Montgomery, Q.C. in his decision dated July 17, 1996: Jevco Insurance Company and Coachman Insurance Company in which he concluded:

"It is easy to second guess anyone after the fact. Indeed, a decision in the course of handling a file may be wrong in retrospect, but that is not the test. Did Scott act reasonably in light of all the circumstances in particular after being alerted to a false claim for income, a pre-accident back complaint, surveillance and return to work part-time."

On this point, I also read with interest the decision of Arbitrator Stephen Malach dated May 13, 1997 in Progressive Casualty Insurance Company and Market Insurance Company of Canada. In that case, Arbitrator Malach was asked to rule on the appropriateness of various payments in a Loss Transfer situation including case management services and occupational therapy services. I agree wholeheartedly with Arbitrator Malach where he states:

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"I conclude that, unless it is established that the primary insurer acted in bad faith or grossly mishandled the processing of claims for benefits under the SABS, the insurer responsible to indemnify the primary insurer must indemnify the primary insurer for benefits paid to an insured person."

I therefore conclude that in terms of Loss Transfer principles that there is a limited right of the insurer responsible for the indemnification to question the appropriateness of the payments made by the primary insurer. There is no doubt that the indemnifying insurer is entitled to look at the "reasonableness of the payments" but in my view that inquiry is limited to confirming that the primary insurer did not:

- (1) act in bad faith
- (2) make payments that were not covered under the Statutory Accident Benefits Schedule in existence at the time of the loss, ie. pay for a weekly benefit when there were no such entitlement, or
- (3) in general, so negligently handle the claim that payments were made greatly in excess of that which the insured would have been entitled had the file been managed by a reasonable claims handler

It is with this background in mind that I now look at the question of production.

Firstly, I was asked by Mr. Atherton to consider the fact that Commercial Union at an early stage (July 27, 1994) put Boreal on notice of their Loss Transfer claim and provided them with documentation and information from time to time. I note in that context that from the beginning Boreal took the position that they had insufficient information and it would appear that initially they were provided with some limited medical documentation, copies of cheques and supporting invoices only. Mr. Atherton goes further and suggest that the early notification by Commercial Union gave Boreal and opportunity to raise at an early stage any concerns they may have had with respect to the nature of the payments being made. I agree in general with Mr. Atherton's submissions that the second party or indemnifying insurer can again, to a limited extent participate in the claim at an early stage through such a dialogue. Indeed, this was raised in the bulletin from Commissioner D. Blair Tully, No. 11/94 dated June 6, 1994 in which it was stated:

"Once the first party insurer notifies the second party insurer, the insurers should discuss how the loss transfer process should operate with respect to that claim. For example, the insurers should agree on the frequency of the indemnification request... whether the second party is prepared to reimburse the first party insurer for specific claims control expenses, and timing of payments, payment terms, etc... if insurers engage in a regular dialogue,

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there is a greater likelihood that the loss transfer process will operate smoothly.

I read this portion of the bulletin as allowing more for the smooth process of payments to be indemnify as opposed to the right of the second party insurer to intervene or actively prevent the payment of certain benefits. It is, however, an opportunity for a second party insurer at an early stage to put the first party insurer on notice that it may have concerns with respect to certain expenses that are being paid and these expenses may later be contested.

However, that did not occur in this case and in reviewing the materials provided, without hearing any oral evidence on the subject, I am not satisfied that Boreal had sufficient information available to it between July 1994 and July 1995 to determine reasonableness of the payments being made. I do note, however, that at no time until this procedure was commenced, did there appear to be any requests for the "complete Commercial Union file". All that was requested were "cheque payments and all the supporting invoices." These appear to have been provided. While this correspondence and any further evidence on this point may go to the question of interest payable once quantum is determined, I do not find it helpful with respect to the issue of production before me at this time.

Neither of the parties were able to provide me with any decision on production that provided any detailed analysis of this issue. I was provided with the decision in Jevco Insurance Company of North America (Arbitrator Honourable Richard E. Holland, Q.C. June 4, 1993 in which he stated:

"It is unreasonable to suppose that any such dispute can be resolved simply by proof of payment by the first party insurer (Jevco). If Jevco wishes to seek indemnity from Guarantee then it has an obligation to establish that no fault payment were properly made. In order to do so it has an obligation to produce its file (emphasis mine) including the medical reports received."

While I agree with Arbitrator Holland that Commercial Union must establish its payments were reasonably made and made within the context of the requirements of the Statutory Accident Benefits Schedule, I do not agree with Arbitrator Holland that:

"Commercial Union has an obligation to produce its file".

I do note in that particular decision, Jevco had not been able to release any medical information which it had secured with respect to its insured in the course of handling and managing its no fault claim. Apparently, the solicitors for the insured had refused to give permission to Jevco to release the file. Guarantee was requiring "all medical and other

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documentation relevant to the payment of no fault disability benefits" in order to assess the quantum. Assuming those were the correct facts before Arbitrator Holland, it appears that his order was more specifically related to the medical reports and other relevant documentation as opposed to the "complete file".

I also am cognizant of the fact that Arbitrator Holland's decision was rendered prior to the issuance of the Ontario Insurance Commission (now Fisco) Bulletin No. 11/94. If one extract from the Decision of Arbitrator Holland that he is ordering the production of the complete file (which is not clear to me) then the Bulletin would, in my view, raise some serious doubts as to the appropriateness of that order. In particular, the Bulletin states under the following heading.

Should Second Party Insurers have Access to Claim Information?

"The second party insurer should be entitled to receive a summary of accident benefits paid in respect of a request for indemnification as well as basic information about the condition of the person receiving accident benefits. The information furnished by the first party insurer should verify that amounts claimed by the first party insurer were amounts actually paid to its insured. The information contained in the Request for Indemnification form should be sufficient in most cases. It was not anticipated that the second party insurer would be entitled to receive a complete copy of the accident benefits file, detailed medical and other personal information about the insured person. (emphasis mine)."

The Ontario Insurance Commission is established under the Insurance Act. It is the duty of the Commissioner to administer and enforce the Act and to supervise it generally. As a matter of statutory interpretation, while I am not bound by this bulletin issued by the Commission, I believe that I should give the views of the Commission considerable weight and I do so.

CONCLUSION

I find that it is not appropriate in a loss transfer file for the indemnifying insurer to simply make a request for the "entire accident benefits file". In this particular case, I am satisfied that Commercial Union has provided Boreal with more than sufficient information upon which it should be able to determine whether the payments made by Commercial Union were reasonably made within the context of the SABS. In the absence of Boreal being able to direct me to any specific portion of the file which they feel they require in order to reasonably assess quantum, I am not prepared to make an order which in my view appears

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to be a fishing expedition. I am, however, satisfied that Commercial Union having produced the investigative reports should produce the accompanying video tapes.

Accordingly, I am ordering Commercial Union to produce to Boreal within 30 days of the date of this Order, the video tapes that accompanied the surveillance and investigation reports that have been produced to date.

COSTS

The costs of the pre-hearings to date with respect to the issues of production are reserved to be spoken to at the conclusion of the arbitration on the main issue.

DATED at Toronto this 21st day of December, 1998.


PHILIPPA G. SAMWORTH

SCHEDULE "A"

Jevco Insurance Company and The Guarantee Company of North America
Arbitrator E.A. Ayers
September 30, 1996

Jevco Insurance Company and Loyalist Insurance Company
Arbitrator Hon. Robert S. Montgomery
June 30, 1995

Jevco Insurance Company and Prudential of American Insurance Company
Arbitrator Edward A. Ayers
January 31, 1997

Progressive Casualty Insurance Company and Markel Insurance Company of Canada
Arbitrator Steven M. Malach
May 13, 1997

Jevco Insurance Company and Dominion of Canada General Insurance Company
Arbitrator J.R. Wesley
November 1, 1996

Jevco Insurance Company and The Guarantee Company of North America
Arbitrator Hon. Richard E. Holland
November 26, 1993

Jevco Insurance Company and Coachman Insurance Company
Arbitrator The Hon. Robert S. Montgomery
July 17, 1996

Jevco Insurance Company and Dominion of Canada Insurance Company
Arbitrator The Hon. Richard E. Holland
August 24, 1995

Jevco Insurance Company and The Guarantee Company of North America
Arbitrator, The Hon. Richard E. Holland
June 4, 1993

Ontario Insurance Bulletin No. 9/92 issued July 6, 1992 by Donald C. Scott and
Ontario Insurance Commission Bulletin No. 11/94 issued by Commissioner D. Blair Tully,
June 6, 1994