

**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c.I.8
section 275 and O.Reg. 664/90**

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

- and -

ING INSURANCE COMPANY

Matthew Duffy
Counsel for Applicant

Douglas Wallace
Counsel for Respondent

AWARD

Introduction

This arbitration arises out of a motor vehicle accident which occurred on July 22, 1999 in the City of London, between a motor cycle owned and operated by Devon Scanlan and a car owned by Metro Park Services Ltd. The motor cycle was insured by the applicant and the car was insured by the respondent. For the purposes of this arbitration, it is accepted by the parties that the driver of the car was entirely at fault.

As a result of the accident Ms Scanlan sustained injuries. The applicant paid her accident benefits. It also paid for independent medical examinations (\$4,072.50) and for the cost of a medical/rehabilitation Designated Assessment Centre report (\$2,050.00).

The applicant sought and received indemnification from the respondent for amounts paid as benefits to Ms Scanlan. However, the respondent disputes the applicant's claim for indemnification in respect of amounts paid for the independent medical examinations and the Designated Assessment Centre report. That dispute is the subject of this arbitration.

Analysis

The right to indemnification is governed by statute and regulation. Central to this case is section 275 of the *Insurance Act*. Subsections (1), (2) and (3) provide:

(1)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.

(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.

(3) No indemnity is available under subsection (2) in respect of the first \$2000 of statutory accident benefits paid in respect of a person described in that subsection.

As indicated, it is accepted for the purposes of this arbitration that the respondent's insured is 100% at fault in this case. Given that the applicant's policy insured a motorcycle, it is also accepted that, for such payments as may be subject to indemnification, the applicant is entitled to be indemnified by the respondent under the terms of section 9 of Ontario Regulation 664.

The issue then, is whether payments of fees for independent medical examinations or Designated Assessment Centre (DAC) reports are subject to indemnification. Section 275 provides for indemnification "in relation to such *benefits* paid by it" (emphasis added). Therefore the question is: can such payments be considered "benefits" for the purpose of section 275?

For the applicant, Mr. Duffy argued that the payments in issue here should be construed as benefits for this purpose. He relied on the fact that an insurer's responsibility to pay for independent medical examinations and DAC reports is prescribed in the *Statutory Accident Benefits Schedule* (emphasis added). The general obligation to pay for the cost of examinations is contained in section 24. Sections 38, 42 and 43 provide specifically for the types of examinations and assessments at issue in this case. This distinguishes such payments from other expenses such as overhead and surveillance which may be associated with the administration of a claim but which are not mentioned in the *Schedule*. Support for this argument is found in the arbitration decision, *Allstate Ins. Co. v. AXA Boreal Inc.* (1999) where the arbitrator stated:

I find that the intent of the legislation was that all payments made by the first party insurer should be reimbursed by the second party insurer, except where it involves direct overhead, office overhead and such items as surveillance. (P.15)

Mr. Duffy also relied (as, to some extent did the arbitrator in the *Allstate v. AXA* case) on OIC Bulletin No. 11/94 in which the Commission advised that, under what was then a new *Schedule*, indemnification was "now" available for, *inter alia*, "the cost of any assessment conducted under the *Schedule*" and "all expenses covered by the *Schedule*". At least in part, the stated rationale was that a second party insurer would be more willing to pay requests for indemnification if certain that the first party insurer is employing "loss control measures".

For the respondent, Mr. Wallace argued that payments for all loss control measures including medical examinations and DAC assessments, even if provided for in the *Benefits Schedule*, are not themselves "benefits" for the purpose of section 275. He cited the decision of Mandel J. in the Ontario Court (General Division) in *Jevco Ins. Co. v. Prudential Ins. Co.* (1995), O.R. (3d) 779. In reference to section 275, it was held in that case that the cost of loss control efforts was "never intended by the legislature to be indemnified" because they are not payment of benefits but efforts to limit the payment of benefits. Medical assessments were held to be loss control measures. The Court rejected the argument that the words "in relation to" in section 275

extended the entitlement to indemnification beyond reimbursement of actual benefits to associated administrative costs such as expenses associated with medical assessments. In support of its view about the legislative intent, the court pointed to subsection 275(3) which applies a deductible of \$2000 to “statutory accident benefits paid”, considering it absurd to have a deductible applicable to benefits but not medical assessment costs.

To the extent that it is applicable to the facts of the case before me, the *Jevco* case is binding on me subject to any subsequent changes to the legislation or regulations.

First, is the reasoning in that case applicable to the facts of this case? *Jevco* concerned medical assessments provided for under the regulations in force prior to 1993. The relevant regulation (O.Reg. 672, s.23(2) provided:

....the insurer may, on reasonable notice, require an examination of the insured person by a qualified medical practitioner...as often as it reasonably requires...

This was characterised by the Court as a loss control measure because it allowed an insurer to verify the authenticity of a claim before making payment.

The case before me is governed by O.Reg. 403/96 as it was before it was amended in 2003. The relevant sections of that regulation also allow insurers to verify medical aspects of claims by requiring examinations and/or assessments. Section 42, for example, begins with the words: “For the purpose of determining whether an insured person is entitled to a benefit....” Section 38(12), dealing with medical and rehabilitation benefits, specifically allows insurers to refuse to pay claims pending a DAC assessment. These are clearly loss control measures as that term is used in *Jevco*. It follows that the *ratio decidendi* 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 regulations themselves, of an intention to reverse the effect of *Jevco* which is not to treat payment of these expenses as “benefit” payments for the purpose of section 275.

This conclusion is clearly inconsistent with OIC Bulletin 11/94, issued after *Jevco*, which asserts that the change in regimes in 1993 provided for indemnification of assessment costs and other expenses covered by the *Schedule*. OIC Bulletins, issued as they are by the Commission charged with the administration of the regulations, are to be given considerable weight. Indeed, it is perhaps ironic, but in *Jevco*, Mandel J. relied in part on a previous case which had cited with approval a predecessor bulletin which had stated, in 1992, that indemnification was to be made only for actual benefits paid. But OIC bulletins are not law and cannot change the law. For

Bulletin 11/94 to be an accurate statement of the law, there would have to be some basis for that in the regulations or the caselaw.

As I have indicated, I cannot find any such basis in the regulations applicable to this case. Counsel could find only one case on point since the change in regulations. That is *Allstate v. AXA*, an arbitration decision referred to above, in which the arbitrator held that the cost of independent medical examinations was subject to indemnification. The arbitrator placed some reliance on OIC Bulletin 11/94 but there is no reference to the *Jevco* case.

With respect I disagree with the arbitrator in the *Allstate* case, and indeed the OIC Bulletin, on this point. 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 governed in 1995. While there might be good policy reasons for a different approach, the applicable regulations do not achieve that in the face of the *Jevco* decision.

There is a suggestion in the *Allstate* arbitration decision that some expenses related to examinations and assessments might not be strictly characterised as loss control measures and be more properly attributable to ongoing treatment and therefore more readily regarded as “benefits” which are subject to indemnification. On this point I agree with both counsel who submitted in argument that this distinction is unworkable in practice. In any event, it seems clear that the approach taken in *Jevco* would not accommodate such a distinction.

Moreover, I see no distinction for these purposes between independent medical examinations and DAC assessments, the two categories of expenses at issue in this case.

Conclusion

Accordingly, I find that the respondent is not required to indemnify the applicant for the expenses in dispute.

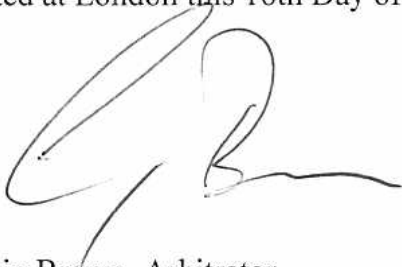
Addendum

Counsel requested that I address, in what would amount to *obiter dicta*, whether the outcome would differ under the amended regulations relating to independent medical examinations and DAC assessments which came into effect in 2003. As I read the amended regulations they do not change the characterisation of medical examinations and assessments as loss control measures as that phrase is understood in *Jevco*. Accordingly, until the section 275 is changed or the regulations are changed again, to manifest an intention to include expenses for these measures in the indemnification entitlement, the decision in *Jevco* will continue to govern.

Costs

Under the terms of the Arbitration Agreement, the costs of this arbitration are to be borne by the applicant, as the unsuccessful party. I remain seized of the matter against the possibility of disagreement as to the amount of costs.

Dated at London this 16th Day of February, 2005

A handwritten signature in black ink, appearing to be 'CB', written in a cursive style.

Craig Brown, Arbitrator