

IN THE MATTER OF THE ARBITRATIONS ACT, S.O. 1991;
AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

JEVCO INSURANCE COMPANY

Applicant

- and -

PRUDENTIAL INSURANCE COMPANY

Respondent

John S. McNeil, Q.C.
Counsel for Applicant

Stephen M. Malach, Q.C.
Counsel for Respondent

A W A R D

Facts

Jevco Insurance Company ("Jevco") insured a motorcycle owned by its insured, Kenneth Meloche ("Meloche"), under the provisions of a standard automobile policy. On December 3, 1990, Meloche was involved in a motor vehicle accident with a vehicle insured by Prudential Insurance Company ("Prudential"). It does not appear that Meloche's motorcycle was involved in the accident.

Meloche made application to Jevco for no-fault benefits, and between the early part of 1991 and late 1992, Jevco paid Meloche weekly indemnity payments and rehabilitation expenses totalling approximately \$50,000.00. Throughout that period of time and again in

the fall of 1993, Jevco made arrangements to have Meloche medically examined. It appears that as a result of a three-day multi-disciplinary assessment of Meloche by staff at the Orthopaedic & Arthritic Hospital in Toronto in the fall of 1992, Meloche's benefits were terminated.

On December 2, 1992 Jevco wrote to Prudential and demanded reimbursement of the no-fault benefits that had been paid to Meloche as of that time pursuant to the loss transfer provisions of Section 239 (now Section 275) of the *Insurance Act*. It is not in dispute that with its letter dated December 2, 1992, Jevco enclosed a loss breakdown and copies of all of the invoices and cheques to support the loss breakdown. Jevco did not receive a reply from Prudential, and on March 23, 1993 a letter demanding a reply was sent by Jevco to Prudential. On July 26, 1993 Prudential requested certain further particulars from Jevco which particulars were given in a letter from Jevco to Prudential dated September 9, 1993.

This arbitration took place on December 12, 1994. It was initially to have taken place one week earlier but had to be rescheduled to December 12, and just prior to the original date scheduled for the arbitration, Prudential reimbursed Jevco for all of the no-fault weekly benefits and rehabilitation expenses, etc. that Jevco had paid with respect to Meloche.

Counsel for Prudential candidly conceded that until he was retained on behalf of Prudential, Prudential was of the view that it was not legally obligated to reimburse Jevco as Jevco had demanded.

Issues

Because of the payment made by Prudential to Jevco just before the original date scheduled for the arbitration as set out above, the only matters that remained in issue to be determined on this arbitration were Jevco's claims for reimbursement of the amounts it had paid out to various doctors and institutions that it had retained to medically examine Meloche, certain travel, transportation and accommodation expenses it had paid to Meloche in connection with his three-day assessment by the Orthopaedic & Arthritic Hospital in Toronto, and the interest to which Jevco was entitled on the various sums of money for which it was seeking reimbursement from Prudential.

Submissions on behalf of Jevco

Section 275(1) of the *Insurance Act*, R.S.O. 1990, c. I.8 reads in part as follows:

"The insurer responsible ... for the payment of no-fault 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 no-fault benefits arose."

A motorcycle is one of those classes of automobiles. The position of Jevco is that the words "in relation to" in Section 275 are broad enough to include medical assessment costs incurred by the insurer in administering the no-fault benefits claims and that if the legislature had intended to restrict the right to indemnification to the actual benefits paid

to or on behalf of the insured, then it should have substituted the word "for" for the words "in relation to." Logically, that interpretation of the section has considerable merit.

However, counsel for Jevco referred to the earlier arbitration award of the Honourable R. E. Holland, Q.C. in the case of Jevco Insurance Company and the Guarantee Company of North America ("the Krusic case") in which the arbitrator, having placed heavy reliance on Bulletin No. 9/92 of the Ontario Insurance Commission, found that the section in question 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. The relevant part of that bulletin stated as follows:

"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 the actual benefits paid."

That decision of the arbitrator, the Honourable R. E. Holland, Q.C. was appealed to the Ontario Court (General Division) and by Order made the 29th day of July, 1994, Mr. Justice Moldaver dismissed the appeal.

It is the position of Jevco that the decisions of the Honourable R. E. Holland and Mr. Justice Moldaver were based on the interpretation of Section 275(1) given by the Ontario Insurance Commission in its aforesaid Bulletin No. 9/92. Jevco takes the position that the matter must now be revisited because of the statements made in the more recent

Bulletin No. 11/94 of the Ontario Insurance Commission which bulletin appears to have been released on June 6, 1994. That bulletin only deals with issues concerning loss transfer, and on page 4 of the bulletin, the following is stated:

"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 \$2,000.00 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 coordination of medical, rehabilitation and attendant care services, and;
- all expenses covered by the Schedule.

It was agreed that the Schedule referred to in Bulletin No. 11/94 is Ontario Regulation 776/93 made under the *Insurance Act* and entitled "Statutory Accident Benefits Schedule - Accidents On Or After January 1, 1994." That Schedule became effective on January 1, 1994 when the *Insurance Statute Law Amendment Act*, S.O. 1993, c. 10 (Bill 164) was proclaimed into force.

Counsel for Jevco argued that the Schedule referred to by the Ontario Insurance Commission in Bulletin No. 11/94 did not alter the basic no-fault benefits to which insureds were entitled under the predecessor legislation and that the Ontario Insurance

Commission had simply changed its position with respect to whether the first-party insurer's medical assessment costs were recoverable from the second-party insurer.

With respect to the matter of interest, Jevco's position is that it is entitled to be paid interest commencing from December 2, 1992 when it gave written notice to Prudential demanding payment. Jevco relies on an arbitration award of H. B. Campbell, Q.C. in the case of Jevco Insurance Company vs Royal Insurance Company in support of its argument.

Submissions on behalf of Prudential

Counsel for Prudential argued that I am bound by the decision of Mr. Justice Moldaver in the Krusic case referred to above. Contrary to Jevco's position, counsel for Prudential argued that the Statutory Accident Benefits Schedule which became effective on January 1, 1994 introduced some very major changes to the no-fault system which preceded Bill 164. Specifically, he argued that "the cost of any assessment conducted under the Schedule" referred to on page 4 of Bulletin No. 11/94 issued by the Ontario Insurance Commission only dealt with assessments conducted at Designated Assessment Centres which were to be set up around the province pursuant to that very Schedule. Prudential took the position that assessments at Designated Assessment Centres are intended to be totally independent assessments unlike medical examinations of the insured by a health practitioner of the insurer's choice as contemplated by Section 64(5)(a) of the Schedule.

With respect to the matter of interest, Prudential concedes that it is obligated to pay interest from September 9, 1993 when it received the particulars of the claim from Jevco that it had requested in July, 1993.

As set out above, counsel for Prudential conceded that Prudential initially was of the view that it was not obligated under the *Insurance Act* to reimburse Jevco because of the particular circumstances of this claim.

Conclusion

In my view, I am bound to follow the decision of Mr. Justice Moldaver in the Krusic case. The Schedule referred to in Bulletin No. 11/94 of the Ontario Insurance Commission only applies to accidents that occur on or after January 1, 1994. The concept of assessments is dealt with in virtually every part of the Schedule. As noted above, Designated Assessment Centres are to be set up around the province. However, assessments need not be conducted in those Designated Assessment Centres if the insured and the first-party insurer can agree on the name of the person or persons to conduct the assessment.

Section 50 of the Schedule dealing with assessments in the case of attendant care costs is a typical example of the assessment schemes contemplated by the Schedule. The relevant provisions of Section 50 are as follows:

- (1) The insured person may, by written notice to the insurer, elect to be assessed under this section.
- (2) The insurer may give the insured person notice requiring the insured person to be assessed under this section.
- (3) If more than two years have elapsed since the date of the accident, an insured person shall not be assessed under this section within twelve months of the last assessment under this section.
- (4) If the insured person gives a notice under subsection (1) or the insurer gives a notice under subsection (2), the insurer

and the insured person shall endeavour to agree on one or more people to conduct the assessment.

(5) If the insurer and the insured person cannot agree on who shall conduct the assessment within fourteen days after the insurer or insured person received notice under subsection (1) or (2), the assessment shall be conducted by the designated assessment centre nearest to the insured person that is authorized to assess impairments of the type sustained by the insured person.

(6) If the assessment is required to be conducted by a designated assessment centre,

- (a) the insurer shall, within fifteen days, notify the designated assessment centre; and
- (b) the centre shall promptly notify the insured person and arrange for the assessment.

Unlike Section 64(5)(a) of the Schedule which contemplates an examination of the insured by a health practitioner of the insurer's choice, the assessments contemplated by the *Act* are to be totally independent of both the insurer and the insured and, presumably, of benefit to both. The insurer and the insured may agree on the name of the person or persons to conduct the assessment and, failing such an agreement, either may require that the assessment take place at a Designated Assessment Centre.

It appears to me that the medical examinations for which costs Jevco is seeking reimbursement from Prudential were of the type contemplated by Section 64(5)(a) of the Schedule which, itself, did not become effective until January 1, 1994 and only applied to accidents occurring on or before that date.

Unlike independent medical examinations of insureds arranged by their insurers as part of the insurer's loss control efforts and usually of little or no benefit to the insured, the assessments contemplated by the Schedule that came into effect on January 1, 1994 are intended to be of benefit to both the insurer and the insured. As the cost of these assessments to the insurer may be triggered at the request of the insured as well as the insurer, it is understandable that the cost thereof now should be the subject of loss transfer. I accordingly find that Jevco is not entitled to be reimbursed for its costs incurred in having Meloche medically examined or for the travel and transportation costs incurred in having Meloche attend the three-day examination at the Orthopaedic & Arthritic Hospital in Toronto.

Jevco demanded reimbursement from Prudential on December 2, 1992 and at that time provided considerable documentation to Prudential to establish the payments that Jevco had made. It does not appear that Prudential responded to Jevco's demand at all until July, 1993. It does not appear that any payment was made until early December, 1994.

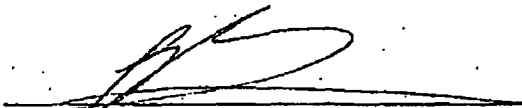
On that basis, I can see no reason why Jevco should not be paid interest on the principal sum that was finally paid in early December, 1994. Insurers must take a business-like approach to loss transfer payments. In this case, Prudential would have had no way of knowing of its exposure to pay loss transfer payments until demand was made by Jevco. I believe that Prudential should have been given a reasonable period of time within which to evaluate and pay the claim before interest began to accrue. On that basis, Jevco should be paid interest from January 15, 1993 through until the date upon which payment was

made in early December, 1994. The amount of interest should be calculated in accordance with the provisions of the *Courts of Justice Act*. If the parties cannot agree on the rate of interest to be charged or the method by which it is to be calculated, then I will hear further submissions and make a supplemental award.

Costs

The Order submitting this matter to arbitration was made on the 10th day of June, 1994 based on a submission to arbitration consented to by the parties on April 15, 1993. Prudential's delay in making payment until early December, 1994 necessitated much more legal expense for Jevco than would have been necessary had reimbursement for the weekly benefits and rehabilitation expenses been made earlier by Prudential.

Accordingly, Jevco shall have all of its costs up to the date of payment by Prudential. Thereafter, there was divided success and each party shall bear its own costs of the arbitration itself. The expense of the arbitration shall be paid equally by both parties.


E. A. Ayers, Q.C.
Arbitrator

Dated at Toronto this 23rd day of January, 1995.