

**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990,
c. I. 8, SECTION 268 and *REGULATION 283/95***

**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 -

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
AS REPRESENTED BY THE MINISTER OF FINANCE
(MOTOR VEHICLE ACCIDENT CLAIMS FUND)**

Respondent

DECISION

COUNSEL:

J. Claude Blouin for the Applicant

Todd M. Wasserman for the Respondent

ISSUES:

1. Is Motors entitled to recover its legal fees incurred in pursuing the priority dispute from the Fund ?
2. Is Motors entitled to recover the cost of the court reporter and interpreter used at Ms. Yavorska's examination under oath, conducted pursuant to section 33 of the *Statutory Accident Benefits Schedule*?

RESULT:

1. Motors is not entitled to recover its legal fees incurred in pursuing the priority dispute.
2. Motors is not entitled to recover the disbursements incurred related to the section 33 examination conducted.

BACKGROUND:

Nadiya Yavorska was injured when she was struck by a vehicle while she was walking through a parking lot on July 17, 2008. The driver of the vehicle left the scene of the accident and the vehicle has never been identified. Ms. Yavorska was not a named insured or listed driver on any automobile policy of insurance, but Motors Insurance ("Motors") insures a vehicle owned by her son-in-law. Ms. Yavorska applied to and received accident benefits from Motors. In the course of its investigation of the matter, counsel retained by Motors conducted an examination of Ms. Yavorska pursuant to section 33 of the *Statutory Accident Benefits Schedule* ("SABS"), and determined that she was neither financially dependent on her daughter and son-in-law nor dependent upon them for care.

As a result, Motors provided notice of its intention to dispute its obligation to pay benefits to Ms. Yavorska to the Motor Vehicle Accident Claims Fund (“the Fund”) on September 25, 2008. The Fund responded that it was not prepared to accept priority of the claim, and an arbitration was initiated by Motors on January 9, 2009. On November 25, 2009, prior to my convening the first pre-hearing teleconference call, the Fund advised Motors that it would accept priority of the claim and agreed to reimburse Motors for the benefits it had paid out to that point.

Motors contends that it is also entitled to be reimbursed for the legal fees it has incurred on the file, as well as some expenses associated with the section 33 examination that its counsel conducted. The Fund disputes that those amounts are recoverable. Counsel could not resolve the issue and the matter was then discussed with me at the pre-hearing teleconference that had been scheduled. The parties agreed to file written submissions on the point and have me issue a decision on the matter.

PARTIES’ SUBMISSIONS:

Counsel for Motors advised that his client incurred approximately \$500 in expenses related to the section 33 examination conducted, consisting of the cost of the court reporter and the interpreter who assisted Ms. Yavorska. He also submitted dockets detailing the time spent on the file from the date the assignment was received until the telephone pre-hearing I conducted on December 4, 2010. Counsel contended that as the Fund has agreed to accept priority of Ms. Yavorska’s claim largely due to his efforts, Motors should be able to recover the costs associated with that.

Counsel noted that over one year had passed between Motors providing its notice to the Fund and their confirmation that they would accept priority of the claim. He also submitted that if he had not conducted the section 33 examination, counsel for the Fund would have required Ms. Yavorska to be examined under oath in the arbitration proceeding and that costs for the time spent on that would have been payable.

Counsel for the Fund takes the position that Motors is not entitled to be reimbursed for the legal fees they incurred in the course of their priority investigation. He noted that Motors made the decision to conduct examinations of the Claimant and her daughter to explore the dependency issue, and that the Fund was not invited to participate. He stated that it was speculative to suggest that examinations would have been required in the arbitration proceeding, as Ms. Yavorska's counsel had provided the information that the Fund had requested and that an examination may therefore not have been necessary.

Counsel explained that the delay in the Fund accepting priority of Ms. Yavorska's claim resulted from the fact that the records he had requested relating to her pre-accident condition took a long time to appear. He noted that once they were received, the Fund advised that it would accept priority a few days later.

Counsel for the Fund submitted that expenses incurred by an insurer in investigating priority are not expressly reimbursable under *Regulation 283/95*, and that costs should only be payable in circumstances in which an arbitration proceeds beyond the pre-hearing stage. He contended that even in those instances, cost awards should be limited to reimbursing insurers for time spent by counsel during the course of the arbitration proceeding itself, such as participation in pre-hearings and examinations under oath, preparation of factums, and attendance at hearings.

REASONS/ ANALYSIS:

I find that the Fund is not required to reimburse Motors for the legal costs and expenses incurred in relation to the section 33 examinations in this matter.

I acknowledge the argument made by counsel for Motors that costs will generally be awarded to the successful party, especially in circumstances in which counsel's diligent efforts result in the priority insurer (the Fund in this case) agreeing to take over the claim from the first insurer who received the application, without having to proceed through to

arbitration. However, I do not believe that the priority scheme set out in *Regulation 283/95* contemplates that outcome.

In *Zurich Insurance v. Co-operators'* (unreported decision of Arbitrator Jones, January 2007), Arbitrator Jones determined that arbitrators who conduct hearings pursuant to *Regulation 283/95* have the equitable jurisdiction to order legal costs incurred to be repaid, but that this jurisdiction should only be “used in the most extreme of cases.” He stated that the intention behind the regulation was to create a quick and efficient scheme for resolving priority disputes and that if legal costs incurred were routinely recoverable, much time would be spent examining accounts and arguing about their reasonableness. The legal costs sought in the *Zurich v. Co-operators'* case related to counsel for Zurich’s efforts in defending the first party claim, including attendances at FSCO mediations as well as an arbitration hearing that took a few days.

This decision was upheld on appeal by Justice Wilson (unreported decision dated May 1, 2008, court file 07-CV-326827 PD1). She stated that the decision to either award or decline an insurer’s request for reimbursement of legal fees is an exercise of discretion based on the particular facts of each case. As I stated in *MVACF v. Kingsway and Royal and SunAlliance (Carr)* (unreported decision, dated January 28, 2010), I take these comments to mean that there will be cases in which arbitrators will conclude that equity favours the repayment of costs incurred by the first insurer.

An insurer that receives an application for benefits is required to conduct reasonable investigations if priority for the claim is unclear. If notice is provided to another insurer under the regulation, that insurer is required to investigate the issue without delay, and decide whether to accept priority of the claim. In the normal course, each insurer should bear its own costs of those investigations. If the issue cannot be resolved and arbitration is initiated, section 54(1) of the *Arbitration Act* provides an arbitrator with the jurisdiction to award “costs of the arbitration”. Subsection 54(2) specifies that the costs of an arbitration consist of “the parties’ legal expenses, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration”.

I agree with Mr. Wasserman's submission that costs awards in this context should be restricted to time spent by counsel on large steps inherent in the process, as opposed to the few hours (or less) that may be required to prepare and participate in the initial pre-hearings that characterize the early stages of most arbitrations under the regulation.

Clearly, there must be checks and balances on the system, as the potential exists for abuse. An insurer presented with a notice pursuant to section 3 of the Regulation may choose to ignore the matter and deny its obligations, causing the first insurer to receive the application to incur significant costs and expenses. If the evidence suggests that the refusal to accept priority was motivated by the desire to avoid expense as opposed to any rational basis, the arbitrator ultimately charged with determining the matter may exercise his or her equitable jurisdiction and order that the costs incurred be repaid.

I am satisfied that that did not occur in this case, and I therefore decline to order the Fund to reimburse Motors for the legal fees it has incurred. For the same reasons, I decline to order the Fund to repay Motors for the expenses it incurred for the examination conducted pursuant to section 33 of the Schedule.

DATED at TORONTO, ONTARIO this _____ DAY OF FEBRUARY, 2010.

Shari L. Novick

Arbitrator