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

AND IN THE MATTER OF THE ARBITRATION ACT, S.O. 1991, c. 17, as amended;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

AVIVA INSURANCE COMPANY OF CANADA

Applicant

- and -

ROYAL AND SUN ALLIANCE INSURANCE COMPANY OF CANADA

Respondent

DECISION

COUNSEL:

J. C. Rioux and Kate Naugler for the Applicant

Calogero Rumeo for the Respondent

BACKGROUND:

1. George Mitskopoulos was injured when his Chevrolet Explorer collided with a tractor trailer insured by Royal and SunAlliance Insurance Company ("RSA") on August 10, 2005. He was traveling northbound on Brock Road, near its intersection with Highway 407. While some of the facts surrounding the accident are in dispute, the parties agree that the tractor trailer was traveling southbound on Brock Road, and was in the course of making a left turn when the collision occurred. The intersection was governed by traffic lights.

2. Mr. Mitskopoulos submitted an application for payment of benefits under the *SABS* to his insurer, Aviva Insurance Company of Canada ("Aviva"), a few weeks after the accident. Aviva made various payments to him, and his claim was settled on a full and final basis at a mediation held in July 2010.

3. Aviva claims that the driver of the RSA insured truck was 100% at fault for the accident under either Rule 12(5) or Rule 15(2) of the *Fault Determination Rules.* It seeks repayment of the benefits it has paid to the Claimant from RSA, pursuant to the Loss Transfer provisions in section 275 of the *Insurance Act*.

4. RSA concedes that the vehicle it insured was a "heavy commercial vehicle" as defined in *Regulation 664* to the *Ac*t, and that the Loss Transfer provisions apply. It denies, however, that its driver was 100% at fault for the accident. It contends that Rule 15(3) or alternatively, Rule 12(2) of the *Fault Determination Rules* applies, and that each driver should bear 50% fault for the accident.

5. RSA also argues that regardless of which of the above Rules is found to apply, Aviva is not entitled to full re-imbursement for the benefits it paid to the Claimant, as its adjusting of Mr. Mitskopoulos' claim was grossly mismanaged.

ISSUES:

1. Which of the *Fault Determination Rules* in *Regulation 668* apply, and what is the effect of that finding?

2. What amounts are owing from RSA to Aviva as reimbursement for the benefits paid?

THE EVIDENCE:

6. Three witnesses testified at the hearing – the police officer who investigated the accident, the Claimant, and Ann Hurl, a representative from Aviva who was involved in adjusting Mr. Mitskopolous' claim in the later stages. Many documents were also filed and relied on by the parties, including the Police MVA Report, and a Statutory Declaration and signed statement provided by the Claimant.

7. Counsel for RSA had requested all relevant documents supporting the payments made by Aviva at the pre-hearing stage. Some documents were provided. Counsel for Aviva and Ms. Hurl then appeared on the first day of hearing with two large boxes of documents, some of which were claims notes and medical reports that had been requested earlier. Counsel for RSA objected to the production of these documents at this late stage.

8. It was ultimately determined that we would hear the evidence on liability for the accident on the first day of hearing, and would then adjourn for a few weeks in order to allow counsel for RSA to review the new material presented. Ms. Hurl testified about Aviva's handling of the claim on the second day of hearing, followed by counsels' submissions on both issues.

9. I will summarise the salient parts of the evidence on tendered below:

Police Constable Frech

10. Police Constable Ryan Frech was the investigating officer called to the scene of the accident on August 10, 2005. He did not witness the accident. He testified that he completed the Police MVA Report based on his observations at the scene, and on what both drivers had told him about the incident. Mr. Frech had no independent recollection of the accident. This is not surprising, given that that the accident occurred in August 2005, and the hearing took place in July 2017, approximately twelve years later.

11. The MVA Report completed by Mr. Frech contains the usual diagram depicting the scene of the accident, along with a description of what occurred. The description states - "*V1 (Claimant) n/b on R1 (Brock Road) approaching the intersection. V2 (truck) turning e/b on R2 (407 ramp) from R1. V1 not able to stop. V1 turning w/b onto (407) R2. Both vehicles collide in intersection*."

12. The accompanying diagram indicates that the tractor trailer is turning left through the intersection, from a southbound direction on Brock Road to an eastbound direction. Mr. Mitskopoulos' vehicle is depicted as coming from the opposite direction (northbound), pointing straight ahead, in what seems to be the second of two westbound left turning lanes. It is shown as being part way into the intersection, heading straight.

13. A copy of Constable Frech's notes of what each driver told him that day was also filed. Mr. Mitskopoulos is noted as reporting that he was going northbound on Brock Rd. at its intersection with Highway 407. He then stated – "the light was green. I saw something turning. I tried to stop, I put on my brakes and hit the truck".

14. Interestingly, Daniel Carpentier, the driver of the truck, reported – "I was going down Brock Road. There was an accident in front of me, so I went on the other side of them to turn onto Hwy #7. I was trying to get the speed to turn and the other guy (van) ran right into me". This is the only reference in the evidence to another accident having occurred in the vicinity. I note that there is also no reference to Mr. Mitskopoulos' vehicle turning left through the intersection in this statement.

15. There were no independent witnesses to the accident. No charges were laid under the *Highway Traffic Act* against either party.

16. Constable Frech was also asked about some of the notations he made in the small boxes that appear along both sides of the main text on the MVA Report. One set of boxes contains the code indicating that D2 (the truck driver) was "driving properly", while Mr. Mitskopoulos was driving "too fast for conditions". Another set of boxes is coded to indicate that both vehicles were "turning left".

17. Constable Frech was cross-examined about the source of the information for the notations above. He testified that he completed the report based on what both drivers told him. I note, however, that neither the diagram nor the description of how the accident happened refer to Mr. Carpentier's statement that he drove around some other vehicles that had collided before making his turn. Notably, the diagram also does not show Mr. Mitskopoulos' vehicle being in the course of making a left turn.

George Mitskopoulos

18. Mr. Mitskopoulos testified that he was traveling north on Brock Road, intending to proceed straight through its intersection with the Highway 407 ramp, when he saw the tractor trailer turn left in front of him. He recalled applying his brakes, but was unable to stop and collided with the truck. He stated that he may have angled his vehicle slightly to the left in order to avoid hitting the truck straight on, but denied that he was turning left or that he had planned to turn left through the intersection.

19. The Claimant also denied that he was traveling too fast for the conditions, as noted in the Police Report. He advised that he was taken to the hospital after the accident. He recalled speaking to the police officer while he was in hospital, but did not remember what he had told him. When asked in cross-examination whether his memory of the accident might be affected by the fact that he hit his head on the windshield, he acknowledged that it could have.

20. Mr. Mitskopoulos provided both a Statutory Declaration and a signed statement to Aviva in the course of the adjustment of his claim. The Statutory Declaration is dated September 28, 2005, and contains the statement – *I was travelling northbound on Brock Road. A truck travelling southbound suddenly made a left turn in front of my vehicle causing a collision.* His statement dated January 16, 2006 provides – *I was proceeding north on Brock St. through a green light at 407/7 when a large transport truck with a trailer proceeded to make a left turn in front of me, from the right most southbound lane. I struck the trailer. No other vehicles were involved in the accident.*

RELEVANT PROVISIONS:

The following provisions are relevant to my determination of this matter:

Insurance Act – Section 275

> *(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.*

Regulation 668 – Fault Determination Rules

> ***12.*** *(1) This section applies when automobile "A" collides with automobile "B", and the automobiles are travelling in opposite directions and in adjacent lanes.*
>
> *(2) If neither automobile "A" nor automobile "B" changes lanes and both automobiles are on or over the centre lane when the incident (a "sideswipe") occurs, the driver of each automobile is 50 per cent at fault for the incident.*

(5) If automobile "B" turns left into the path of automobile "A", the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.

15. *(1) This section applies with respect to an incident that occurs at an intersection with traffic signals.*

(2) If the driver of automobile "B" fails to obey a traffic signal, the driver of automobile "A" is not at fault and the driver of automobile "B" is 100 per cent at fault for the incident.

(3) If it cannot be established whether the driver of either automobile failed to obey a traffic signal, the driver of each automobile shall be deemed to be 50 per cent at fault for the incident.

ARGUMENTS & ANALYSIS - LIABILITY:

21. I will address the parties' arguments on liability and the appropriate quantum of indemnification separately.

Liability for the accident

22. Aviva contends that either Rule 12(5) or Rule 15(2) of the *Fault Determination Rules* apply, each of which would lead to the conclusion that the RSA insured was 100% at fault for the accident. RSA takes the position that Rule 15(3) applies, or alternatively, Rule 12(2). The application of either of these rules would lead to a 50/50 split in liability between the two drivers. The rules are set out above.

23. I begin the analysis with a restatement of the purpose of the Loss Transfer scheme, and the general principles to be applied when considering who is at fault for an accident. The Court of Appeal stated in *Jevco Insurance Co. v. York Fire & Casualty Co.* (1996) 27 O.R. (3d) 483 that the purpose of the scheme is to provide a summary method of spreading the cost of statutory accident benefits among insurers, "in a gross and somewhat arbitrary fashion, favouring expediency and economy over finite exactitude". This principle was restated by the Court of Appeal almost twenty years later in *State Farm Mutual Automobile Insurance v. Aviva Canada* (2015) O.R. (3d) 321 (at para. 56). This approach has often been referred to as the application of "rough justice" (see

Wawanesa Mutual Insurance Company v. TD Home and Auto Insurance, unreported decision, December 5, 2016).

24. As I have stated in other decisions, (see *State Farm v. Economical (Dave), March 31, 2017)* the clear message from the courts is that the analysis of fault in the Loss Transfer context is to be undertaken in a relatively 'mechanical' manner. Rather than delving into a detailed analysis of every aspect of the evidence, the focus should be on whether the key requirements or preconditions of a particular rule have been met.

25. With this in mind, I turn to the facts of this case. The evidence before me consists of the Police MVA Report, and Constable Frech's *viva voce* evidence at the hearing, approximately twelve years after that accident. I also have a signed statement and a Statutory Declaration authored by Mr. Mitskopoulos, as well as his oral testimony at the hearing.

26. There is no direct evidence before me from Daniel Carpentier, the driver of the RSA insured truck. Counsel for RSA suggested that it was up to counsel for Aviva to request a Summons compelling his attendance at the hearing. Mr. Rioux disagreed, stating that a party who asserts a fact must present evidence to support that assertion, barring a legal rule to the contrary. He contended that if RSA contends that Mr. Mitskopoulos was turning left through the intersection, and knows that Mr. Mitskopoulos disputes this contention, RSA bears the onus of calling a witness to support this assertion. I agree with counsel for Aviva's position on this point.

27. Mr. Mitskopoulos claims that he was proceeding straight through the intersection, when his vehicle collided with the left-turning truck. He denies that he was turning left, or that he intended to do so. His evidence has been consistent on this point, as reflected in his statement, the Statutory Declaration provided and his testimony at the hearing. He did acknowledge under cross-examination that the impact caused him to hit his head on the windshield of his vehicle, and that that might have affected his memory of the events.

28. Mr. Mitskopoulos' evidence is inconsistent with parts of the Police Report. The description in the report provides that both vehicles were turning left, from opposite directions. The accompanying diagram clearly depicts the truck in the middle of the intersection, making a left turn, but shows the Claimant's vehicle pointing straight ahead at the time of impact. As noted above, the investigating officer did not have any independent recollection of the events in question, and could not explain this discrepancy.

29. Mr. Frech testified that he would have completed the report based on what both drivers had told him at the time. That is difficult to reconcile with the fact that neither the description, nor the diagram described above reflect what he noted the drivers told him at the time. Nothing in Mr. Mitskopoulos' statement suggests that he was making a left turn. Mr. Carpentier is noted as saying that he came upon an accident as he approached the intersection, and drove "on the other side of them to turn onto Highway #7". Nothing in the diagram or description in the report reflects any of this. I also note that there is no mention in Mr. Carpentier's statement that Mr. Mitskopoulos' vehicle was turning left through the intersection.

30. These inconsistencies cause me to question the accuracy of the information provided in the Police Report. Given that Mr. Carpentier was not called to testify, the only evidence before me supporting the assertion that Mr. Mitskopoulos was turning left through the intersection is the description part of the Police Report, and the notations in boxes 46 and 47. As this is a central point in dispute between the parties, a reliance on this hearsay evidence would be procedurally unfair. I therefore accept Mr. Mitskopoulos' evidence that he was proceeding straight through the intersection, being the only direct evidence before me on this point.

31. The parties did not file any documents or photographs showing the property damage sustained by the vehicles. I note that boxes 62 and 64 on the Police Report indicate that the Claimant's vehicle sustained damage to its "front centre", while the truck's damage is to the "right rear". While there was no direct evidence on this point, I note that these indications are more consistent with Mr. Mitskopoulos' evidence that he

attempted to drive straight through the intersection, rather than the contention that both vehicles were making left turns through the intersection at the time of the collision.

32. I turn now to the Rules cited by the parties. It is common ground that the vehicles involved were travelling in opposite directions, and in adjacent lanes. For the reasons outlined above, I find that the truck insured by RSA turned left into the path of the Claimant's vehicle. The elements of Rule 12(5) of the *Fault Determination Rules* have therefore been made out, and I find that this Rule applies in these circumstances.

33. RSA contended that Rule 15(3) should be applied. That rule provides that if it cannot be established whether the driver of either vehicle failed to obey a traffic signal, each driver is deemed to be 50% at fault. I do not accept this argument. While the incident did occur at an intersection with traffic signals, the drivers were heading in opposite directions. They would therefore have been facing the same signal, whether it was a green light or some other colour.

34. RSA argued alternatively that Rule 12(2) should be applied. It refers to both vehicles being on or over the centre lane and a "sideswipe" occurring. I find that the evidence outlined above does not support that the collision occurred in this manner.

35. My determination that Rule 12(5) applies results in a finding that the RSA driver is 100% at fault for the accident. I now turn to the question of the appropriate level of reimbursement owing to Aviva for the benefits paid out.

QUANTUM OF INDEMNIFICATION :

Ann Hurl

36. Ann Hurl is a senior litigation specialist with Aviva Insurance. She confirmed that Aviva paid out a total of approximately $136,000 in benefits on the file. Included in that amount is a lump sum settlement of $43,500 negotiated at a global mediation held in July 2010. The above amount is comprised of payments of approximately $65,000 for past and future medical/rehabilitation benefits, approximately $37,000 for income

replacement benefits, housekeeping benefits of $10,400 and approximately $20,000 in assessment costs (that do not include Insurer Examinations).

37. Ms. Hurl's stated that the information provided indicates that the Claimant had worked as a carpet installer prior to the accident, and that he had the equivalent of a Grade 6 education. She referred to a multi-disciplinary assessment conducted at Aviva's request in October 2007 that concluded that he would have serious problems returning to "any kind of employment in the future". I note, however, that this is excerpted from a psychologist's "paper review" of earlier assessments, and also provided the opinion that the Treatment Plan submitted for further psychological treatment should be denied. The witness also noted that a preliminary CAT file review arranged by counsel for the Claimant in April 2009 concluded that Mr. Mitskopoulos would likely achieve a Catastrophic rating under the *SABS,* if the ratings for his physical and mental impairments were combined. No such determination was ultimately made in this case.

38. Ms. Hurl's direct involvement in adjusting the file began in 2009, four years after the claim was submitted. She accordingly had no first-hand knowledge of the adjusting decisions made before that time. The evidence regarding the benefits paid and the steps taken (or not taken) by Aviva were established through the documents filed, although some of the key documents appeared to be missing. I will summarise the relevant information contained in the documents filed below.

39. The OCF 1 Application for Accident benefits form was received by Aviva on September 6, 2005. A question on that form asks whether the claimant is covered by any other benefit plan. The box next to "yes" is ticked off, and the Benefit Payor is listed as the United Brotherhood of Carpenters & Joiners, Local 127. Under "type of coverage", the words "to obtain" is filled in. Despite this clear reference to collateral benefits being available to Mr. Mitskopoulos, it appears that no one at Aviva pursued any further information on this point.

40. Mr. Mitskopoulos was self-employed prior to the accident, and conducted his business dealings through an entity known as "George's Carpet". Aviva retained accountants to calculate the quantum of Income Replacement Benefits that he was entitled to receive. A report dated July 26, 2006 concluded that 80% of Mr. Mitskopoulos' weekly net income amounted to $220. It was determined that an amount of $38.83 should be added for post-accident losses suffered, yielding a total weekly amount payable of $259.12. The evidence suggests that this amount was eventually paid to the Claimant, retroactive to one week following the accident, as required by the SABS.

41. The evidence indicates that Aviva received a letter from counsel for the Claimant in October 2006 advising that Mr. Mitskopoulos was receiving STD benefits of $1,500 per month. The letter enclosed an OCF 13 form (Declaration of Post-Accident Income and Benefits). Despite receiving this notice, Aviva continued to pay the weekly amount of $259 to Mr. Mitskopoulos for a further year, until October 11, 2007. No one at Aviva advised the accountants that collateral benefits were being received by Mr. Mitskopoulos, or requested further calculations to be made.

42. Aviva received a package of medical information from Manulife Financial on October 18, 2007. It is clear from these documents that Mr. Mitskopoulos had an ongoing LTD claim with Manulife. He had also been approved for CPP Disability payments, although the date that he qualified for these benefits is unclear.

43. Aviva subsequently retained Price Waterhouse Coopers in November 2007 to calculate the quantum of IRBs to be paid to the Claimant in light of this information. They were also asked to calculate the amount that would be owed back to Aviva as a result of the overpayments made, given the collateral benefits received. The report refers to Mr. Mitskopoulos having received STD payments of $1,500 per month from early September 2005 to early September 2006. It also refers to his receipt of LTD benefits from Manulife from December 9, 2005 to the date of the report in the amount of $1,000 per month.

44. The report concludes that there was a net IRB overpayment of approximately $25,235 for the period from September 10, 2005 (the date STD payments commenced) to November 21, 2007 (the end of the week in which the report was provided). Ms. Hurl acknowledged that Aviva paid the full entitlement of $259 per week to the Claimant from early September 2005 through to October 11, 2007, a period of more than two years, when it would have been entitled to deduct the STD and LTD payments that Mr. Mitskopoulos received during that period.

45. It appears that Aviva gave notice to the Claimant in October 2007 that an overpayment had occurred, and that it was requesting repayment of the amounts paid in error. In accordance with section 47(3) of the SABS, it was only permitted to seek repayment of the IRBs paid as of October 17, 2006, twelve months prior to the notice provided, at the rate of 20%. Mr. Mitskopoulos' weekly payments were then reduced to $20 per week as of October 11, 2007. I note that this reduction in benefits and notice of repayment was provided approximately one year following the date that Aviva first received confirmation that collateral benefits were being received.

46. Ms. Hurl also confirmed that approximately $24,500 of the IRB overpayment remained owing by the time the parties attended a global mediation in July 2010. While it is not clear why, less than $1,000 had been "clawed back" over the course of the almost three years from the notice of repayment having been issued to the date of the mediation.

47. Counsel for RSA also referred the witness to the Mediation Memorandum prepared by counsel for Aviva who attended the mediation. It provides that given the deductions for the CPP Disability and LTD benefits being received, the present value of the Claimant's lifetime entitlement to IRBs would have only been $12,900 in July 2010. This amount was equivalent to about half of the outstanding IRB overpayment at that date. Regardless of this fact, Aviva agreed to pay an additional $6,000 toward IRBs at the mediation, and agreed to forgive the balance of the repayment.

48. Ms. Hurl acknowledged that when the almost $25,000 that had not been repaid (and was forgiven) is added to the $6,000 in additional IRBs paid out, Aviva's payments to Mr. Mitskopoulos for IRBs far exceeded the Claimant's maximum lifetime IRB entitlement. She confirmed that no Application for Determination of catastrophic impairment (OCF 19) was submitted on behalf of Mr. Mitskopoulos.

ARGUMENTS & ANALYSIS – QUANTUM OF INDEMNIFICATION:

49. The evidence suggests that Aviva paid a total of approximately $136,000 in benefits to Mr. Mitskopoulos or on his behalf. Various Request for Indemnification forms were sent to RSA over the course of the claim, and filed at the hearing. Counsel for RSA submitted that the figures on these forms did not match the amounts set out in a letter from the Aviva adjuster to her counsel confirming the amounts that had been claimed from RSA. Counsel for Aviva acknowledged the confusion and advised that in light of this, his client would reduce its claim to $127,000, plus interest.

50. Both parties cited earlier arbitral decisions that provide that that an insurer who resists full repayment of eligible benefits paid to a claimant by a first insurer bears a heavy onus to establish that the payments made were not reasonable. Arbitrator Malach stated in *Dominion of Canada v. Royal & SunAlliance Insurance* (unreported decision, August 20, 2001) that a second party insurer who resists full re-imbursement of benefits "must prove that any settlement entered into is clearly and grossly unreasonable or that there was gross mismanagement or gross negligence in the handling of the claim" (at p. 27). In upholding my decision in *Jevco Insurance v. Gore Mutual Insurance* (2014) ONSC 3741, Justice Stewart confirmed this test, stating that "the onus is a strict one, and the second party insurer must demonstrate that the first insurer either acted in bad faith or grossly mishandled the claim such that the amounts paid out that it is seeking to recover are grossly unreasonable."

51. It is clear from the above authorities that while a second party insurer may disagree with steps taken or decisions made in the adjusting of a claim, they are not

permitted to resist repayment simply because they feel that with the benefit of hindsight, they would have managed a claim differently. That said, if significant mistakes are made that result in benefits being paid at a higher level than they would have been if the claims handler had acted in a reasonable fashion, the test for ordering less than full reimbursement can be met.

52. In this case, Mr. Rioux conceded that the availability of collateral benefits was referenced in the OCF 1, and that Aviva could have paid less than they did for the first two years, had they been aware that Mr. Mitskopoulos was receiving STD and LTD benefits. He acknowledged that Aviva received a Declaration of Post-Accident Income form from the Claimant attesting to these payments, but that the quantum of IRBs paid was not reduced for about one year, leading to an overpayment of $25,000 in benefits. Aviva also conceded that by the time the parties attended the global mediation in 2010, the present value of Mr. Mitskopoulos' lifetime entitlement to IRBs was less than the amount that he owed back to them, as a result of the overpayment made.

53. Counsel for Aviva argued, however, that while mistakes were clearly made in the adjusting of this part of the claim, his client's actions do not constitute bad faith, or amount to gross negligence. Counsel for RSA disagreed. He contended that given the serious errors outlined above, Aviva's actions (or inaction) with respect to adjusting the weekly benefits paid amounted to gross negligence or gross mismanagement of the claim. He noted that despite requesting production of documents in Aviva's file supporting the six-figure payout on this claim, he received almost nothing until the first day of hearing, when two boxes of relevant material appeared unexpectedly. He suggested that this casual approach characterised the handling of the claim throughout.

54. Mr. Rumeo pointed also pointed out that Aviva's delay in seeking a repayment of IRBs once the overpayment came to their attention resulted in only $500 of the overpayment of approximately $25,000 being recovered. He

suggested that in light of these significant errors, no IRBs, or at best a very modest amount, should be repayable.

55. I agree with counsel for RSA's contention that Aviva's approach to the payment of IRBs to Mr. Mitskopoulos crossed over the line from acceptable claims handling to 'gross mismanagement'. And while alone not conclusive, the fact that documents that shed light on the history of the IRB payments made were only produced on the first day of hearing, seven years after the AB claim settled, reflects the less than diligent approach taken by Aviva with this claim. While some records may still be missing, the documents that were produced reveal that long gaps occurred between steps taken to adjust the claim, and many things were missed as a result.

56. The first glaring error was Aviva's failure to note that Mr. Mitskopoulos or his representative provided on the OCF 1 form submitted in early September 2005 that collateral benefits were available to him through his Union. This failure is significant. Arbitrator Bialkowski stated in the case of *Jevco Insurance v. Royal & SunAlliance Insurance* (June 28, 2012, 2012 CarswellOnt 11342) that if the respondent in that case was able to demonstrate that (at para.16),

> *…short-term disability benefits, long-term disability benefits, CPP disability benefits or health benefits were available to the claimant for a benefit paid by Jevco without offset, I would have no hesitation …in finding that there was gross mismanagement or gross negligence in the handling of this claim.*

57. It turned out that these benefits were not available to the claimant in that case, once further information was received that revealed that he had been laid off before the date of the accident. In this case, however, it is agreed that collateral benefits were available to Mr. Mitskopoulos from the outset of his claim, and Aviva concedes that its adjuster neglected to make any inquiries about these benefits.

58. As it turned out, that mistake may have been able to be rectified, with minimal consequence. A Declaration of Post-Accident Income form (OCF 13) was sent to Aviva

by the Claimant's counsel in October 2006. While that form had not been located at the time of the hearing, the accountants' report filed refers to it, and that it sets out that Mr. Mitskopoulos received STD benefits of $1500 per month from September 2005 to September 2006. He also received LTD benefits of $1,000 per month from December 9, 2005, which were ongoing in November 2007 when the report was authored. If a notice had been sent to the Claimant in October 2006 when this form was received advising that an overpayment had been made in error, any benefits paid from October 2005 – two months after the IRBS payments began – could have been recovered, subject to the restrictions in the *Schedule.* .

59. This did not happen. Instead, for reasons that could not be explained, a repayment notice was not sent until October 2007, one year later. The effect of that delay was that IRBs paid up to October 2006, with no deduction for collateral benefits received, could not be touched. The initial calculation of Mr. Mitskopoulos' IRB entitlement was $259 per week, which amounts to just under $13,500 per year. In addition to this amount, he also received an additional $28,000 from collateral sources from September 2005 through October 2006. The evidence suggested that only a small fraction of that overpayment was clawed back by Aviva.

60. The parties attended a global mediation approximately three years later, in July 2010. Again, for reasons that were not explained, only $500 of the significant overpayment had been clawed back as of that date. Aviva agreed at the mediation to forgive the $25,000 that remained owing to them from the Claimant, and to pay an additional $6,000 in IRBs to settle the claim. As noted above, counsel for Aviva's mediation brief noted that the present value of Mr. Mitskopoulos' remaining lifetime entitlement to IRBs, given the offsets, was just under $13,000. This amount was noted as being approximately half of the overpayment outstanding at that point.

61. I find that these actions outlined above constitute gross mismanagement of the claims handling surrounding payment of Mr. Mitskopoulos' IRB claim. In *Commercial Union Assurance Company v. Boreal Property & Casualty* (interim decision, December

21, 1998) Arbitrator Samworth specified that in assessing the reasonableness of payments made in a Loss Transfer proceeding,

> *the indemnifying insurer should be limited to confirming that the primary insurer did not – (1) act in bad faith, (2) make payments that were not covered under the SABS in existence at the time of loss…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.*
>
> *(at page 6)*

62. I find that Aviva's actions in this case fit within the third example provided above. The question then becomes what amount, if any, should be repaid by RSA on account of the IRBs paid ? I have concluded that $5,000 would be an appropriate figure. Once Aviva requested the accountants to include the collateral benefits being received, they calculated that a weekly benefit of approximately $20 was owing. That amounts to approximately $1,000 per year. And while the calculation provided in Aviva's Mediation Brief indicated that the present value of the Claimant's lifetime entitlement to IRBs was less than the overpayment still outstanding at the time of the mediation, the reality is that insurers may be required to offer benefits that exceed the exposure that they have calculated, in order to secure a full and final settlement at a mediation. Without the evidence to engage in a detailed calculation, I find that the above figure of $5,000 constitutes a reasonable figure that reflects the exposure for IRBs.

63. RSA did not take issue with the $10,400 paid by Aviva for housekeeping expenses or for the approximately $20,000 for the cost of assessments. These amounts should be repaid in full.

64. The question of whether the full amount of $65,000 paid for med/rehab expenses should be reimbursed to Aviva remains. Counsel for Aviva noted that the *Schedule* in effect at the time provided for a maximum potential entitlement of $100,000 for medical / rehabilitation benefits (for claimants not deemed to be catastrophically impaired). He contended that the $65,000 paid out by Aviva, given the nature of the claims presented, was reasonable. He noted that Mr. Mitskopoulos had qualified for both CPP Disability

benefits and continued LTD benefits at the time of the settlement reached at mediation. He also noted that RSA had paid a significant amount to settle the tort claim, all of which suggested that the Claimant had sustained serious injuries that required ongoing care and treatment.

65. Counsel for RSA disputed that the $65,000 paid for medical/rehabilitation benefits was reasonable. He suggested that the Claimant may well have had coverage available to him through Manulife for much of the treatment funded by Aviva, given his entitlement to generous STD and LTD benefits through his Union. Counsel contended that Aviva's failure to inquire into the availability of collateral benefits for these items constituted gross mismanagement of the claim. He did not dispute that the amounts paid for housekeeping benefits or for the cost of assessments were reasonable.

66. Again, I find that Aviva fell short of the required standard on this point. Inquiries ought to have been made upon receiving the OCF 1 form whether med/rehab benefits were available through the Claimant's Union's extended health plan. Once he or she received notice that STD and LTD benefits were being collected, the claims handler at that time should have awoken to the idea that treatment expenses may have been covered as well. There was no evidence filed at the hearing to indicate whether these benefits were in fact available, but I find that it is likely that they were, and that a reasonable claims handler would have pursued this avenue of inquiry. As none of the details of the potential coverage is known, I will reduce the $65,000 claimed for this item by 20%, to $52,000.

67. Finally, counsel for RSA noted that the breakdown provided for the $43,500 paid at the mediation in exchange for a full and final settlement of the Claimant's AB claim did not attribute any amounts for legal costs or disbursements. Counsel did not really dispute that some amount would have been allotted for these items in the lump sum negotiated. Given that the accident benefit claim was litigated in the context of a civil action, I find it reasonable to assume that the 'usual' 15% would be claimed and paid for

costs, being $6,525. This is not a "benefit" and is therefore not recoverable through the Loss Transfer process. It should be deducted from the amounts claimed.

68. The result of my findings above is that RSA must indemnify Aviva for the benefits it paid out on this claim in the total amount of $80,875. I arrive at this figure by adding $5,000 for IRBs, $52,000 for med/rehab expenses, $10,400 for housekeeping, $20,000 for cost of assessments (not IEs) to arrive at a subtotal of $87,400, from which I deduct the above costs figure of $6,525.

Interest

69. Aviva seeks interest on the amounts owing for six years, at the rate of .5% per year, given that the date of the last Request for Indemnification form was sent to RSA in early 2011. Counsel for RSA suggested that interest should only begin to run from July 4, 2017, as it was only at the first date of hearing that the accounting reports explaining the IRB payments made and other material regarding the benefits paid were provided. I agree. While RSA would have known from the outset of the arbitration that it would likely be required to reimburse Aviva for some amount (given its best case on the liability issue was 50/50), it was not clear until the documents were provided on the first day of the hearing what precise amount was being claimed, or what documents might exist to support that claim.

ORDER:

In accordance with my findings above, it is hereby ordered that RSA shall:

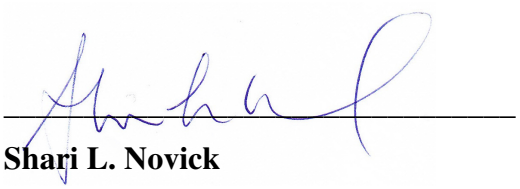
1. Indemnify Aviva for benefits paid to George Mitskopoulos pursuant to section 275 of the Insurance Act in the amount of $80,875; and

2. pay interest on the above amount from July 4, 2017 to the date of payment at the rate of .5% per year.

Given the mixed nature of the result achieved, I find that each side should bear their own costs, and that the arbitration fees should be split equally. I will render my account to the parties shortly.

On a final note, I extend my thanks to counsel involved for approaching the challenging issues faced in this case in a collegial and professional manner.

DATED at TORONTO, ONTARIO this __21st___DAY OF FEBRUARY, 2018.



Shari L. Novick
Arbitrator