S.M. v. Unica Insurance Inc. – A Welcomed Clarification On Special Awards

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Earlier this year, I wrote an article entitled "Surprising Special Award Against Insurer" based on the case of *Malitskiy v. Unica Insurance*.[1] Among other things, that case found that an insurer cannot simply rely on the opinion of an assessor when determining a claimant's needs.

Instead, the adjudicator held that the insurer should have considered all relevant medical evidence and should have followed-up with the assessors for clarification of the claimant's needs.

The failure to do so resulted in a finding that the partial denial of benefits by the insurer to be "imprudent, inflexible, and immoderate" and the Licence Appeal Tribunal ordered a special award in the amount of 25%.

At the time, I noted that the adjudicator was certainly entitled to reject the opinions of the insurer's assessors, but it was highly questionable as to whether the insurer "unreasonably withheld or delayed payments" to warrant a special award.

Indeed, insurers are not medical experts and should be able to rely on the expertise of assessors who conduct benefit-specific assessments, including occupational therapists that complete a detailed Form 1.

The insurer sought reconsideration of the Tribunal's decision and, in the welcomed reconsideration decision of *S.M. v. Unica Insurance Inc.*,[2] the adjudicator set aside the special award in a lengthy, detailed and well-reasoned decision.

[1] 2020 CanLII 12718 (ON LAT).
[2] 2020 CanLII 61460 (ON LAT).

The Underlying Decision

The claim involves an ice fishing accident that occurred on March 16, 2014. The vehicle in which the claimant was travelling hit a pressure crack on the lake and slipped over, ejecting the passengers in the process.

The impact caused the claimant to suffer a brain injury and multiple fractures, including to his cervical spine and wrist. It was later discovered that the accident caused nerve damage in the claimant's shoulder as well as cognitive and emotional impairments. Unica deemed the claimant to be catastrophically impaired as a result of the accident.

After a seven day in person hearing, the Tribunal found the claimant entitled to almost all the benefits claimed, including attendant care and the home modification expense.

While the Tribunal found that Unica paid for "most of the disputed benefits in part" and that the decisions were based on the assessments it completed, the Tribunal held, among other things, that on receipt of the Form-1, Unica's assessors "should have investigated whether [the claimant] needed cuing, emotional support, and nighttime supervision".

Furthermore, the Tribunal found that it was unreasonable for Unica to focus on its own OT reports when Unica's assessors found the claimant to be catastrophically impaired and the evidence confirmed that the claimant required significant assistance.

The Tribunal found the Unica's approach to be "imprudent, inflexible, and immoderate" and ordered a special award of 25% under s.10 of Reg. 664 totalling approximately $70,000.

Unica requested reconsideration on the basis that the Tribunal acted outside of its jurisdiction or violated the rules of natural justice or procedural fairness and/or that the Tribunal made an error of law or fact such that the Tribunal would likely have reached a different result had the error not been made.

Reconsideration Decision

On reconsideration, the adjudicator relied on the language and reasoning in the FSCO decision of *Plowright v. Wellington Insurance Co.,*[3] as to the conduct that should attract a special award.

The adjudicator outlined that in *Plowright* the actions of the insurer demonstrated a pattern of bad faith decision making on the part of the adjuster, "who ignored the opinion of a treating family doctor, ignored the commentary of an [insurer examination] assessor and terminated income benefits without providing a basis to the insured."

[3] 1993 OIC File No.: A-003985 (FSCO).

This conduct was found to be an "immoderate, imprudent, inflexible, and excessive" approach. The arbitrator in *Plowright* ultimately awarded less than 10% of the total benefits as part of the special award.

The adjudicator clarified that is well-settled that a special award should not be ordered simply because it is determined that the insurer made an incorrect decision. Instead, he highlighted that in order to attract a s. 10 award, "the insurer's conduct must rise to the level described in *Plowright*—it must be excessive, imprudent, stubborn, inflexible, unyielding or immoderate."

The adjudicator noted that he struggled to understand how Unica's adjusting decisions "bear any resemblance to those in *Plowright* or how its decisions would justify a 25% award under s. 10" considering the claimant was already deemed to be catastrophically impaired and the benefits in dispute were partially approved.

In particular, the adjudicator found that it was not imprudent, inflexible or immoderate for the insurer to question certain aspects of the home modifications. He also found that Unica was entitled to rely on reports that were prepared by experienced professionals that made recommendations in good faith and that were reasonably supported by the bulk of the medical evidence.

Accordingly, the adjudicator found that the Tribunal erred wherein it found that it was unreasonable for the insurer to focus on its own OT reports and that the Tribunal "conflated the fact that the claimant sustained a catastrophic impairment with the notion of entitlement to benefits, which is an error of law."

The adjudicator went on to clarify that, "while a catastrophic claim warrants greater scrutiny when adjusting a file, it does not mean that the insured is exempt from having to demonstrate that the goods and services they seek are reasonable and necessary, that an insurer cannot rely on its own reports or that an award should be imposed when recommendations in reports differ." The adjudicator rightly noted that this occurs on a smaller scale in almost every case.

Most importantly, the adjudicator was particularly critical of the Tribunal's finding that the adjuster ought to have asked assessors to investigate the claimant's need for supervision. The adjudicator held that this unfairly placed the adjuster in the role of a medical professional and that it was not unreasonable to rely on the observations of a qualified occupational therapist.

The adjudicator went on to state as follows (at para 51):

> With great respect, I trust this is obvious: insurance adjusters are not medical professionals and they should not be held to that standard. Insurance companies

> have a duty of good faith to adjust an insured's file as claims are submitted, as new information becomes available, as their condition deteriorates, *etc.* However, while there is a duty of good faith, I find it is unreasonable and quite unfair to expect adjusters who come and go with some regularity to micromanage the assessments of qualified professionals to ensure that their reports respond directly to the specifics of a claim or else risk exposure to a s. 10 award if they do not.

The adjudicator made similar comments regarding the special award as it pertained to the home modification expense. He noted that it was an "error by the Tribunal to use the significant discrepancy in the proposed costs of the reports or her preference for [the claimant's] home modification report as a basis for an award."

Moreover, the adjudicator agreed with Unica that it was unfair, inaccurate and an error of fact for the Tribunal to suggest that the whole of the claimant's medical evidence somehow pointed definitively at only one true or obvious outcome or that Unica ignored the medical evidence relating to the claimant's needs when it partially approved the benefits in dispute.

Notably, the adjudicator addressed Unica's submission that the underlying decision would have significant implications for the insurance industry with respect to the ability of insurance adjusters to rely on independent medical examiners and that this award waters down the threshold for what constitutes a special award.

On this point, the adjudicator agreed, and he held that there was no behaviour described in the decision itself that addressed the award that rises to the level of "excessive, imprudent, stubborn, inflexible, unyielding or immoderate" conduct warranting a s. 10 award in line with that set out in *Plowright*.

The adjudicator ultimately set aside the special award and concluded that "the Tribunal erred in ordering a 25% award under s. 10 of O. Reg. 664 because the award was not supported by the evidence of Unica's conduct, the reasons supporting the award were not sufficient to justify the magnitude of the award and the rationale provided significantly waters down the threshold of what constitutes unreasonable withholding and delay."

The Takeaway

In my earlier article on the underlying decision, I noted concerns regarding the implication the decision would have on insurance adjusters as insurance adjusters are not medical experts and an insurer should be able to rely on the expertise of assessors who conduct benefit-specific assessments.

Thankfully, this decision addresses this issue directly and clarified that insurance adjusters are indeed not medical experts and are entitled to rely on medical experts.

More importantly, the adjudicator set aside a very concerning and rather significant award that simply was not warranted based on the evidence available.

Moving forward, the test for a special award has not been watered down and only conduct that is excessive, imprudent, stubborn, inflexible, unyielding or immoderate as set out years ago in *Plowright* should attract a special award.