PRESIDENT'S MESSAGE

October 2013

And.. it's Fall

The days are cooler, as are the nights but the Trade Show was hot! Thank you again to all for making it such a great event. Special thanks goes to Mark Hale, our ever patient Treasurer for taking emails, calls and messages from me on what must have seemed like an hourly basis. The annual Trade Show was a sell out with many of the vendors from prior years taking up their spots on the floor as well as quite a few new faces and companies. Now, the Concordia Club can get planning for their Oktoberfest celebrations!

Our next meeting will be held on October 24th at Golf Steak House and I would encourage all our members to come out and enjoy the camaraderie and the educational aspect; McCarthy Engineering will be talking about the use of Long Range Laser Scanning in accident reconstruction. We have also included the list of all meeting dates, and locations and hope to see you all out at the meetings. Again, if anyone has any suggestions for speakers, or topics, please feel free to contact anyone on the executive. I hope everyone had a good time at the Trade Show, and will be enjoying the changing colours and the ever faint ... ziggy ziggy ziggy.. .oi oi oi of impending Oktoberfest in the KW region!

October 2013

The Bulletin Index

Inside your October issue you will find:

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If you have any questions, concerns or comments, please do not hesitate to contact any of the above committee members.

SOCIAL CHIT-CHAT

We welcomed the fall with yet another fabulous annual tradeshow! There were gifts, drinks, networking and lots of laughter! A big thanks to all the vendors, attendees and of course to all those who helped with the organization of this great event!

Save the date for this month's dinner and networking meeting to take place on October 24th. Rod Jadischke of McCarthy Engineering will be presenting on the use of long range laser scanning in accident reconstruction and believe me this is one presentation you do not want to miss!

Hungry? Bored of your everyday brown bag lunch? Not anymore! This Fall watch the streets for Manish Patel's Fo Cheezy Gourmet Grilled Cheese Food Truck! Serving a variety of savory cheese filled treats as well as offering gluten free and dairy free options, this food truck is bound to add some delicious to your lunch!

If you have an ad or an article you would like to place in the KW OIAA bulletin Please contact Randy Higgins – randy@pdskw.ca - 519-570-0438 x 242

Schedule of K-W Chapter Monthly Meeting 2013-2014

Date	Topic
October 24th, 2013	Educational Meeting
November 28th, 2013	Chili Cook Off
December 7th, 2013	Kids Christmas Party
January 30th, 2014	Educational Meeting
February 27th, 2014	Educational Meeting
March 27th, 2014	Provincial Conference
April 24th, 2014	Elections and Fun Night
May 29th, 2014	Educational Meeting
June 26th, 2014	Annual Golf Tournament

Details of each event will be in that month's bulletin

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ENTER TO WIN

BULLETIN NEWSLETTER PHOTO CONTEST

The Kitchener-Waterloo Chapter OIAA Bulletin publication is known for traditionally representing an historical monument or event on its cover as an icon of our Region's history. This year, we are inviting all KW OIAA members to take part in a **Photo Contest to find next year's cover photo for our 2014-2015 Bulletin newsletter**. Submissions can be made online or via email to any of our executive team members and should include a short bio explaining the significance of the photo to Waterloo Region and/or the OIAA (examples below). The selected photo will remain on the cover of the Bulletin monthly for the duration of the 2014-2015 year circulation and the winner will receive recognition in the Bulletin as well as a free year's subscription and a big bottle of Grey Goose. Please submit your contest entries here: _____(URL to upload)

DEADLINE FOR SUBMISSION IS MIDNIGHT ON TUESDAY DECEMBER 31st 2013 AND THE WINNER WILL BE ANNOUNCED AT THE JANUARY DINNER MEETING

Some examples for you to get into the spirit:

In 2012-2013, the Bulletin cover held an image of the West Montrose Covered Bridge (or "Kissing Bridge") which, according to the Waterloo Region Official Tourism Website, is: "recognized as an historic site by Ontario's Archeological & Historic Sites Board" and is "Ontario's last remaining covered bridge" with a "198' span across the Grand River. Visitors come from all over the world to see and photograph this picturesque bridge."

In 2013-2014, the Bulletin will show Woodside House on its cover, the Birthplace of William Lyon MacKenzie King and, according to Parks Canada's website (www.pc.gc.ca) was also "the boyhood home of William Lyon Mackenzie King, Canada's longest-serving Prime Minister. The house has been restored to the Victorian style of the 1890s. The importance of this residence is best reflected in King's own words: "The years that left the most abiding of all impressions and most in the way of family associations were those lived at Woodside."

What will the 2014-2015 Bulletin photo be?? WE NEED YOUR HELP!

Good Luck!!!
Your Executive Team
2013-2014

Kitchener-Waterloo Adjusters Association
Chapter of Ontario Insurance Adjusters Association

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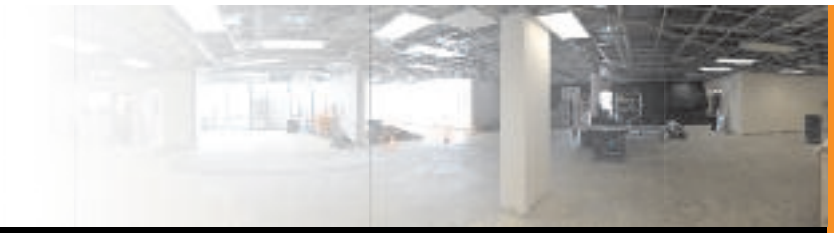

Property Damage Claims – When is a Building Permit Required?

Mina Tesseris, P. Eng.

What is a building permit? As simple as it may sound, a building permit is issued by the building authority (usually the municipality) to allow commencement of construction based on the documentation submitted and approved by the authority. The building permit process is a mechanism for ensuring that the proposed construction follows the appropriate Provincial and local regulations. In Ontario, it is illegal to construct, renovate or change the existing use of a building without first obtaining a building permit.

To minimize challenges and ensure fluent scheduling during the events following a property claim, it is important to confirm with the building authority whether or not a building permit will be required. The need for building permits arises from the Building Code Act which states that: "No person shall construct or demolish a building or cause a building to be constructed or demolished unless a permit has been issued therefor by the chief building official." One might ask what constitutes a "building" and what is meant by the terms "construction" and "demolish". For the purposes of interpretation, the Act defines these terms as follows:

a) "construct" means to do anything in the erection, installation, extension or material alteration or repair of a building and includes the installation of a building unit fabricated or moved from elsewhere and "construction" has a corresponding meaning

b) "demolish" means to do anything in the removal of a building or any material part thereof and "demolition" has a corresponding meaning

c) "building" means
   i) A structure occupying an area greater than ten square metres (i.e. 108 square feet) consisting of a wall, roof and floor or any of them or a structural system serving the function thereof including all plumbing, works, fixtures and service systems appurtenant thereto,
   ii) A structure occupying an area of ten square metres or less that contains plumbing, including the plumbing appurtenant thereto (plumbing is defined as a drainage system, a venting system and a water system or parts thereof)

iii) Plumbing not located in a structure, a sewage system (essentially any type of system which retains or processes sanitary waste); or
iv) Structures designated in the Building Code including:

- A retaining wall exceeding 1,000 mm in exposed height adjacent to,
  - Public property
  - Access to a building, or
  - Private property to which the public is admitted,
- A pedestrian bridge appurtenant to a building,
- A crane runway,
- An exterior storage tank and its supporting structure that is not regulated by the Technical Standards and Safety Act, 2000.
- Regulated signs that are not structurally supported by a building,
- A solar collector that is mounted on a building and has a face area equal to or greater than 5m^2,
- A structure that supports a wind turbine generator having a rated output of more than 3 kW,
- A dish antenna that is mounted on a building and has a face area equal to or greater than 5 m^2,
- A communication tower exceeding 16.6 m above ground level,
- An outdoor pool and
- An outdoor public spa.

It is evident in reading the Building Code Act that a building permit must be obtained whenever a structure meeting the definition of a building suffers damage requiring material alteration or repair.

Obtaining a building permit for construction projects requires careful planning and consideration of the amount of time required for authorities to process a building permit application and issue a building permit.

Building permit applications and associated requirements under the local building bylaw often vary between municipalities. The applicant for the building permit must either be the owner or an authorized agent (often a contractor) of the owner who will be involved throughout the duration of the project. Those unfamiliar with the permit application process may have unrealistic expectations regarding the amount of time it takes for the building permit to be issued for their new building project. This can be frustrating for the applicant. Frustration can be even greater in the case where a permit is sought for repair after damage

due to the fact that the damage was unplanned and the building owner was not prepared for it. Prior to 2006, there were no requirements in the Ontario Building Code (OBC) prescribing the maximum amount of time for building officials to process permit applications. In 2006, a change was made to the OBC setting out time periods within which a permit is to be issued or refused. This change was intended to ensure consistency in levels of service across jurisdictions.

The time period prescribed in the 2006 OBC ranges from 10 days to 30 days depending on the type of building. If a building official refuses to issue the permit, the official must provide all of the reasons for the refusal in writing. Some of the more common reasons for refusal include incomplete permit application forms, errors and/or omissions on drawings that do not meet the OBC, drawing sizes that are not in accordance with the submission requirements described in the Municipal Building By-law, documents that are prepared by unqualified persons, and permit fees due which have not been paid. Interestingly, the Act is silent on whether or not the time periods for issuing or refusing the permit apply when documents are re-submitted following initial refusal. Nevertheless, the most effective means of avoiding construction delays due to the permit process is to ensure the permit application is accurate and complete, drawings and specifications are correct and are prepared by qualified persons and all fees due have been paid.

Insurance claims often involve the need for emergency building repairs where time is of the essence. When a situation poses an imminent danger to the health and safety of any person, the Chief Building Official may make an order containing the particulars of the dangerous conditions and the remedial repairs or other work to be carried out immediately to terminate the danger. Based on this, it is reasonable to carry out repairs or other work regulated by the OBC without a permit immediately following damage if there is an imminent threat to health or safety. The repairs or work must be only for the purpose of eliminating the danger.

The purpose and need for building permits can sometimes be called into question, especially when work appears to be routine and straight forward. However, one need that is often overlooked by many is the need for a repository of inspection and construction documents for buildings. Much like the documents related to land titles that are available at Land Registry Offices, building permit and inspection documents can provide invaluable historical information to building owners and the public. Municipal building authorities fulfill this need through the permit process as all documents related to construction of buildings within their jurisdiction resides in their archiving system.

The recent inquiry into the Algo Mall collapse in the community of Elliot Lake revealed the repercussions of neglecting the importance of a central repository for building construction documents. The inquiry revealed there had been several structural assessment reports by different engineers hired by various owners throughout the life of the building.

Although there was a history of water leakage in the ill-fated parking garage, the engineers' reports which documented the condition were lost in the shuffle of changing ownership and were not provided to the local building department. Although repair attempts had been made by different building owners over time, building permits had not been applied for. Witnesses at the inquiry who had recently inspected the Mall testified they were aware that the building was plagued by water leaks but were not aware of previous engineering reports documenting the leaks. Furthermore, the local building authority had not been provided with copies of the engineers' reports nor were they fully aware of the timing, nature and extent of previous repair attempts. These witnesses testified that had they been aware of the length of time the leaks had been occurring, they would have recommended more rigorous inspections that could have avoided the tragedy. The inquiry resulted in several recommendations related to mandatory structural assessment of existing buildings including submission of these reports to the local building authority where they would be archived.

The legal requirement to obtain a Building Permit can often be overlooked following an insured loss where financial considerations, loss mitigation, scheduling of resources and other factors can take priority. Where insurers and insurance adjusters are involved with managing the repair process following damage, they would be well advised to include obtaining a building permit on their "To Do" list to ensure that repairs have been undertaken with the expected level of care. Finally, when there is uncertainty regarding building permit requirements for repair work, remember to inquire with the local building authority as the requirements will vary from one municipality to another.

Mina Tesseris, P. Eng. LEED AP BD + C
Technical Leader of Building Sciences
R.J. Burnside & Associates Limited

Mina Tesseris, P. Eng. LEED AP BD + C, is a Senior Engineer and Technical Leader of Building Sciences at R.J. Burnside & Associates Limited. His area of practice for insurance clientele includes investigation of damaged buildings. He is also a qualified Building Code expert. Mr. Tesseris may be reached via email at mtesseris@rjburnside.com.

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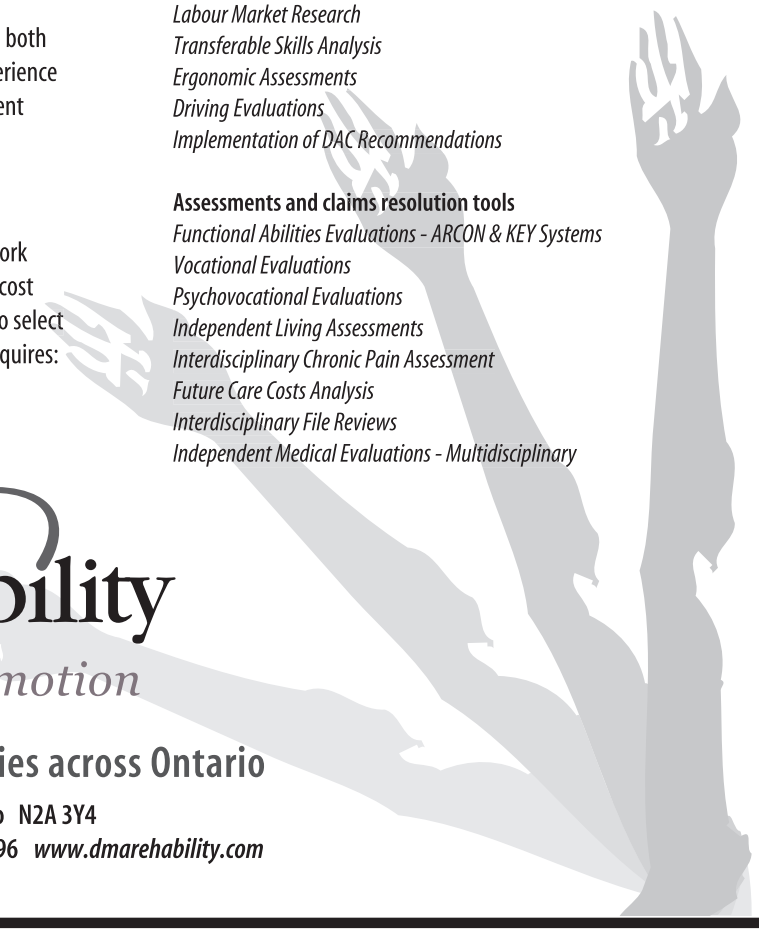

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TORONTO DELEGATE REPORT

September saw a sell out crowd at One King West for the 2013-2014 term OIAA kickoff event. The cocktail reception was held at the historic TD bank vault room and was a great start to the year. This event was held in conjunction with a conference that was held for OIAA chapter executives and we had great representation from all corners of the province. Chapter executives reviewed the legal, accounting and many other rules and responsibilities that are part of the operation of each individual volunteer based OIAA Chapters. The conference was a great way to ensure the strength and continued professionalism of each chapter in the years ahead.

The next Toronto event will be the annual Past President's Night and we hope you can join us. A reminder that the OIAA Christmas party registration will open on October 22, 2013 this year.
As always details and registration are available at www.oiaa.com and you can stay tuned to OIAA events by following @PresidentOIAA on twitter and joining us on facebook.

October 9th, 2013

Past President's Night – King Edward Hotel, Toronto ON

November 13th, 2013

Seminar and Cocktails - One King West, Toronto ON

December 11th, 2013

Christmas Party – Westin Harbour Castle, Toronto ON

February 5th, 2014

2014 Professional Development and Claims Conference – Metro Toronto Convention Centre, Toronto ON

March TBA, 2014

Curling Bonspiel – Richmond Hill Curling Club, Richmond Hill, ON

April 9th, 2014

TBA

June TBA, 2014

Golf Tournament

Regards,

Michael McLeod
Kitchener Waterloo OIAA Chapter Toronto Delegate

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Loss Transfer: *When Indemnity is not a Slam Dunk*

Authored by:

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Those of us who practice in the Accident Benefits arena are often called upon to address Loss Transfer disputes and the intricacies of indemnity. Frequently asked questions include:

- Why don't they just pay us? After all, we sent our Notice, Requests for Indemnity and all of the invoices – what more do they need?
- Why don't they just give us what we need to determine payment? All they sent us was their Notice, Requests for Indemnity and all of the invoices.

As you can see, what often transpires is a "failure to communicate".

Loss Transfer was initially conceived as a mechanism to spread the risk, acknowledging that insurers of certain classes of vehicles, due to their size, weight, nature or use would either cause more damage/injury or suffer more damage/injury than others. By way of illustration, a transport truck is likely to cause more damage/injury – and result in higher A/B payouts – than a private passenger vehicle. Similarly, a motorcyclist is likely to suffer more damage/injury and hence higher A/B payouts than occupants of a private passenger vehicle.

Recognizing that all vehicles need to "share the road" and that all insurers need to "share the load" and "share the pain," Loss Transfer was implemented by way of s. 275 of the *Insurance Act* R.S.O. 1990 c. I.8, as amended, O. Reg. 664 and as far as fault is concerned, O. Reg. 668. In addition, FSCO Bulletins A-9/92: Loss Transfer, A-12/92: Loss Transfer Revisited and A-11/94: Loss Transfer Standardized Forms and Procedures set the ground rules and assist the players in the Loss Transfer arena.

Loss Transfer was designed to be played by the rules, with private Arbitrators wearing the striped shirts, calling the shots and blowing the whistles when brawls ensue.

Setting aside disputes on fault allocations and limitation periods (which sometimes result in bench-clearing brawls), disputes concerning indemnity often invoke the need for a whistle blower.

First and foremost, Loss Transfer was predicated on insurers acting reasonably in their administration of claims on a 1st party basis. We can safely say however that the sport has evolved and the goal posts have changed. There are more rookies in uniform trying to complete the passes and adjusting demands have piled on to the point that "instant replay" is often relied upon to penalize the instigator.

How then to answer the questions highlighted above, specifically, what is enough to score payment and why is Loss Transfer not a slam dunk?

FSCO Bulletin A-11/94 suggests that insurers (the 1st party and the 2nd party insurer) should discuss how the Loss Transfer process should operate by agreeing on the frequency of indemnification requests, the information to accompany the request and whether the 2nd party insurer is prepared to share in claims control expenses. The idea was that if insurers engage in a regular dialogue, Loss Transfer will operate smoothly. The Bulletin also attempts to address what information 2nd party insurers (the indemnifying insurers) are entitled to receive. The Bulletin suggests that the 2nd party insurer would be entitled to receive a Summary of Benefits paid as well as basic information as to the condition of the person receiving the benefits. The information provided should verify that the amounts were actually paid to the insured (or presumably for their benefit). The Request for Indemnification Form should suffice and it was "not anticipated that the 2nd party insurer would be entitled to receive a complete copy of the Accident Benefits file, detailed medical or other personal information about the insured person". Newsflash: the goal posts have moved.

Firstly, the players on the field need to be reminded that the OCF-1 contains an acknowledgement by the insured that information collected by the insurer may be used as reasonably necessary for recovering payment from insurers liable in law for amounts paid in connection with the claim. Further, information may be disclosed by the 1st party insurer to enable the 1st party insurer to carry out payment recovery. Disclosure may be made to other insurers, insurance adjusters and solicitors. In other words, disclosure of the claims information is acknowledged and consented to by the insured when they apply for benefits from the 1st party insurer.

Notwithstanding this, some insurers still refuse to provide claims information to the 2nd party insurer without the written consent of the insured (which is redundant, having regard to the consent in the OCF-1) or without the order of an Arbitrator in a Loss Transfer proceeding. (This also is redundant and a costly exercise, creating a dispute where none may exist).

The striped shirts (Loss Transfer Arbitrators) have dealt with what is enough in a number of decisions for a number of purposes.

In *State Farm vs. Citadel* (Arbitrator Guy Jones, Feb 2006), Arbitrator Jones addressed whether Citadel was entitled to production of "all the medical documentation" in State Farm's Accident Benefits file. Citadel requested copies of medical documentation in State Farm's file so that it could assess the reasonableness of the payments made by State Farm. State Farm argued that without written authorization from the injured parties, it could not and would not provide the information to Citadel. (This case took place in respect of a 2003 loss and accordingly, the wording of the applicable OCF-1 may have differed). State Farm cited a number of bases for their refusal including relevance and privacy legislation. State Farm also called the request for the medical documentation a "fishing expedition" and invoked FSCO Bulletin 11/94 (referenced above).

Arbitrator Jones confirmed that the Bulletin did not have the force of law but agreed it should be given substantial weight by Arbitrators. He also confirmed that it was well settled law that 1st party insurers are obliged to provide proof of reasonableness of the payments made. In support of this proposition, he noted *Jevco vs. Guarantee Company*, a decision of Mr. Justice Moldaver, July 29, 1994, wherein the judge agreed that in Loss Transfer cases, proof of payment is not enough to establish a Loss Transfer claim. Mr. Justice Moldaver held that in order to establish that payments were properly made, there was an obligation to produce the file, including medical reports received. Arbitrator Jones felt that the reasoning of Mr. Justice Moldaver was compelling. He found that where the reasonableness of payments was in issue and payments were made on the basis of medical reports, it only makes sense to allow the party that would ultimately have to pay the opportunity to review those reports. While it may not be appropriate to produce the entire Accident Benefits

file where the reasonableness of payments is in issue, certainly the medical documents were relevant.

In addressing the applicable privacy legislation, Arbitrator Jones again invoked the concept of implied consent. He noted that when a person makes a claim for Accident Benefits they agree to provide certain medical information that is collected and analyzed by the Accident Benefits insurer. The *Insurance Act* provides a statutory right of subrogation known as Loss Transfer which creates an implied consent for the release of information not only to the 1st party insurer but also potentially to the ultimate payor, the Loss Transferee. Given the breadth of the implied consent, he ordered State Farm to provide medical information to Citadel. He also noted that even if he were incorrect, he would nonetheless order the records to be produced. Given this decision and the wording of the OCF-1, it is not surprising that 2nd party insurers would call a foul when medical information required to assess the reasonableness of payment is not provided.

As the scrimmages have evolved, requests for information have broadened to include requests for the complete file of the 1st party insurer.

Arbitrator Lee Samis addressed this type of demand in two decisions, *Aviva vs. Zurich* (April 13, 2012) and *Royal & Sun Alliance vs. Wawanesa* (April 17, 2012). In the *Aviva* decision, while Aviva had provided Zurich with "many documents", Zurich had repeatedly taken the position that it needed more information with respect to the claim. Zurich persisted with a general request for "the complete file". In *Royal & Sun Alliance*, Royal had settled the 1st party claim for a lump sum. Wawanesa was not satisfied with the mere production of the settlement documents and copies of the cheque but wanted to understand how the settlement was calculated and which portion of the settlement related to various components, i.e. past claims or future claims.

In both cases, Arbitrator Samis reviewed the applicable provisions of the *Insurance Act*, O. Reg. 664, and the *Arbitrations Act*.

With the benefit of hindsight, Arbitrator Samis noted that over the last two decades there had been an exceptionally high degree of controversy associated with Accident Benefits claims. Arbitrator Samis confirmed that determination of the proper amount payable with respect to an Accident Benefits claim is anything but straightforward. He noted that claims handling decisions are informed by contentious facts, disagreement among experts, questioned motivations and the monumental procedural burden associated with the handling of the claim. Consequently, it is difficult to say with confidence whether a particular claim deserved payment given the multitude of nuanced factors that must be taken into account.

Responding insurers need the comfort of knowing that the reimbursement claimed is a fair amount, determined in accordance with the regulations and paid by application of reasonable and judicious claims handling decisions. Arbitrator Samis specifically noted that payment does not equal reimbursement. In other words, entitlement to Loss Transfer is not a slam dunk. The 1st party insurer must be prepared to demonstrate reasonably appropriate claims handling. (He was also careful to comment that this did not equate to a standard of perfection, given that even a careful, prudent insurer will nonetheless make mistakes which become clearly visible with hindsight).

He noted that the entitlement decision is often nuanced, involving considerations of reasonableness, necessity, credibility, causation and a host of other issues. A standard of perfection is unrealistic, as well-informed claims experts will often disagree on claims decisions. At the other end of the spectrum, claims handling could be so deficient that it would demonstrate indifference or disregard of ordinary, prudent claims handling procedures and should not be sanctioned by blindly ordering full reimbursement at the expense of the responding insurer. In this context, a Loss Transfer claim necessarily involves consideration of how a claim was handled.

In the context of how and why payment was made, internal file notes of the handling insurer and claims file communications, including correspondence to and from the applicant and others, needs to be considered. Arbitrator Samis found that any sense of confidentiality associated with these notes or internal communications was an inappropriate expectation. He noted that claims handlers in this day and age know or should know that production of file materials can be required in a variety of litigation forums and in other processes. He therefore concluded that the claims handling documents which touched on claims decisions were producible documents. Where issues were raised as to quantum and claims handling, there could be no other conclusion but that some of the ordinary file records of the insurer were producible documents to illuminate the claims handling decisions and disclose the criteria applied or disregarded as to each decision made. He went so far as to state that "I can think of nothing more relevant to the claim, to the question of whether or not amounts paid were reasonably paid as benefits under the SABS". He found transparency necessary in order for the 2nd party insurer to address reimbursement requests. In that context, he confirmed that the OCF-1 contains specific authorization for the release of the claims file in these circumstances. Having said all of that, he declined to order production of the "complete Accident Benefits file" instead ordering disclosure of relevant documents on a principled basis. Accordingly, once the groundwork is laid, a 1st party insurer may run, but cannot hide from disclosure of documents relevant to the claims handling procedure, including all file notes.

The leveling of the playing field established by the disclosure obligations means that insurers need to be cognizant that their Loss Transfer requests will be subject to a play by play. If the documentation disclosed does not support playing by the rules or if there is a suggestion of match fixing to the detriment of the 2nd party insurer, be aware the whistle will be blown and the 1st party insurer will be carded.

Insurers need to be aware that Loss Transfer is not a slam dunk. The instant replay is very much available and strict scrutiny will be placed on adjusting decisions. Accordingly, insurers need to document their claims handling decisions and the reasons for them in order to advance the ball down the field and ultimately score the goal of reimbursement.

In answer to the questions outlined above:

- You must be prepared to disclose documentation required to support reasonable claims handling decisions. In quantum cases, a simple disclosure of invoices will not suffice. Be prepared to play ball and document your file accordingly.
- If you want more than has been produced be specific in terms of the requests. Ask for what you believe is necessary to facilitate payment beyond the invoices. Be aware the 1st party insurer will not be held to a standard of perfection but must be able to support the reasonableness of the claims and the adjusting process.

At the end of the day, insurers seeking recovery for lump sum payments must be prepared to justify the allocation of the amounts paid in settlement by means of a reasoned claims adjustment process. They must also be prepared to demonstrate that they adjusted the file appropriately throughout, including conducting insurer examinations and responding to the 1st party. It is doubtful that reimbursement will be ordered in situations where the 1st party insurer has thrown in the towel on the 1st party claim.

Clearly the scope of production required will to some extent be dependant on the size of the reimbursement request. Insurers will have to determine whether they will incur the costs of a quantum dispute on a minor claim. On larger claims however with significant sums in dispute, insurers will want to invoke the striped shirts in order to ensure fair play.

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