

**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I.8  
AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c.17  
AND IN THE MATTER OF AN ARBITRATION**

B E T W E E N :

JEVCO INSURANCE COMPANY

Applicant

- and -

ECONOMICAL MUTUAL INSURANCE COMPANY

Respondent

**DECISION**

**COUNSEL**

Sophia Chaudri – Flaherty, Dow, Elliott & McCarthy LLP  
Lawyer for the Applicant, Jevco Insurance Company  
(hereinafter referred to as “Jevco”)

Ian Kirby – Gilbert, Kirby, Stringer LLP  
Lawyer for the Respondent, Economical Mutual Insurance Company  
(hereinafter referred to as “Economical”)

**ISSUE**

In the context of a loss transfer dispute, the issue before me is the extent to which Economical ought to indemnify Jevco for payments it made in full and final settlement of the accident benefits claim of it's insured, Sheila Scott, at a private mediation which took place on November 16, 2010.

The substantive question is whether the disputed payments made by Jevco in the accident benefits claim of Ms. Scott are reasonable, such that Economical should indemnify Jevco for them?

## **FACTS**

The within Arbitration arises from a loss transfer claim with respect to accident benefits payments by Jevco to Sheila Scott as a result of injuries sustained in a motor vehicle accident occurring on August 6, 2007.

The claimant, Sheila Scott, is now a 65 year old woman, born July 5<sup>th</sup>, 1948, who, in the accident, sustained comminuted fractures to her right humerus and a bimalleolar fracture of her left ankle both requiring open reduction and internal fixation as well as soft tissue injuries involving her neck, low back and right shoulder. At the time of the motor vehicle accident she was 59 years of age.

As of the date of the motor vehicle accident, Sheila Scott was employed as a security guard performing front desk monitoring duties. The medical records indicate that she would have to carry heavy boxes of photocopy paper, do a lot of filing in and out of the lower filing cabinet and as safety steward was expected to facilitate the exit from the building of other employees which would require her to have the ability to walk quickly. She had previously worked as a switchboard operator and clerk.

Sheila Scott made application to Kingsway (now Jevco) for accident benefits. Kingsway put Economical on notice of its claim seeking indemnification for statutory accident benefits paid, on March 5<sup>th</sup>, 2008.

Economical accepted that Kingsway had a right to indemnification for statutory accident benefits paid to or on behalf of Sheila Scott and, from time-to-time, received and paid indemnification requests totalling \$80,303.62.

Eventually, certain disputes arose as between Sheila Scott and Kingsway concerning Sheila Scott's ongoing entitlement to statutory accident benefits. Sheila Scott commenced an action against Kingsway.

A private mediation was held between Sheila Scott and Kingsway General Insurance Company on November 16<sup>th</sup>, 2010. According to the mediation summary filed on behalf of Kingsway, there were three substantive disputes:

- (1) income replacement benefits – those had been paid at a rate of \$375.86 per week and were terminated on April 4<sup>th</sup>, 2009. Such termination was based upon the medical evaluations by a neurologist and an orthopaedic surgeon. As such, Kingsway had paid a total of 86 weeks in income replacement benefits;
- (2) attendant care – this benefit was terminated on February 20<sup>th</sup>, 2008 on the basis of an occupational therapy assessment. As of the date of termination, Sheila Scott was receiving monthly attendant care benefits of \$120.00; (Sheila Scott was claiming \$3,138 per month)
- (3) housekeeping – such benefits were paid by Kingsway on a gradually diminishing basis, ultimately being terminated on October 1<sup>st</sup>, 2008, some sixty weeks post-accident date. These benefits were terminated in accordance with an occupational therapy assessment. (Sheila Scott was claiming \$100 per week)

In order to better understand the issue before me it is necessary to review the communications between the parties leading up to the private mediation of November 16, 2010 and settlement of the accident benefits claim on a full and final basis.

Back on May 25<sup>th</sup>, 2009, a representative of Jevco reported to Economical on the result of a FSCO mediation concerning resolution of the statutory accident benefit claims. Included in such e-mail was the following statement:

*"The mediation has been rescheduled to June 22<sup>nd</sup>, 2009. I will be asking our orthopaedic IE assessor to review again and comment on the report of the claimant's orthopaedic surgeon. Considering the claimant is now 61 years of age, and the findings of our (within 104) IE that the claimant does not meet the test for IRB, I cannot, at this point, look at IRB to or far beyond the 104 week mark. However, if she has further surgery it may create an exposure."*

No such review with the orthopaedic IE assessor seems to have been undertaken prior to the private mediation leading to the accident benefits settlement herein.

Kingsway commissioned surveillance of Sheila Scott on November 10<sup>th</sup>, 2010, showing the claimant to be active but inconclusive as to her ability to meet job requirements.

The private mediation between Sheila Scott and Kingsway proceeded on November 16<sup>th</sup>, 2010. During the mediation, there was an e-mail exchange between Jevco's representative and that of Economical. The Jevco adjuster indicated that that at the time of the e-mail, the claimant was at \$150,000 all-in and that he was at \$110,000 all-in. The Economical adjuster indicated that when they had last spoken the Jevco adjuster was thinking settlement in the \$30,000-\$40,000 range. The Economical representative was unable to comment on the settlement numbers being exchanged as she did not have authority. Jevco proceeded to settle the accident benefits claim on a full and final basis for \$115,000 all inclusive.

The available evidence would indicate that no claim for CPP disability benefits had been made.

The evidence before me would indicate that no application for catastrophic impairment was ever made on behalf of Sheila Scott.

On January 26<sup>th</sup>, 2011, Jevco requested indemnification from Economical as a result of the settlement of the statutory accident benefit claims of Sheila Scott. The breakdown of the settlement for which reimbursement was being sought was as follows:

med/rehab incurred expense	\$ 1,658.66
Medical:	\$30,000.00
Rehabilitation:	\$15,000.00
Income replacement:	\$40,000.00
Housekeeping:	\$ 6,000.00

Exam costs:	\$ 5,000.00
Attendant Care:	<u>\$ 3,000.00</u>
Total:	\$100,658.66

On February 2<sup>nd</sup>, 2011, Economical wrote to Jevco questioning the settlement arrived at with Sheila Scott:

On March 7<sup>th</sup>, 2011, Jevco wrote to Economical indicating, *inter alia*:

*"Please tell us if you (sic) position that we were grossly negligent and acted in bad faith when we arrived at the settlement. Basically, this is the only reason for disputing the amount paid to settle the claim".*

By correspondence dated March 11, 2011, Jevco forwarded copies of copies of the s.42 Insurers Examination reports in its possession.

On March 28<sup>th</sup>, 2011, Economical responded to Jevco indicating that the information provided by Jevco and upon which they relied in settling the statutory accident benefits claims of Sheila Scott in fact supported a return to work and to her pre-accident housekeeping/home maintenance tasks. (the conclusions reached in the s.42 Insurers Examinations above)

On April 11, 2011, Jevco wrote to Economical confirming that Economical had been provided with both insurer and Plaintiff medicals. The letter confirmed that the claimant made an excellent witness coming across as credible and believable. At the mediation the claimant had explained that she had tried to return to work but could not handle it.

The material provided to me included a report from the claimant's treating orthopaedic surgeon, Dr. Garach, dated October 2, 2008. The report made recommendations for future treatment including cortisone injections into the right shoulder, physiotherapy, massage therapy, acupuncture, neurological referral and potential further surgery involving the claimant's left ankle, right humerus, right shoulder, neck and lower back. The report confirmed that she required assistance with grocery shopping, meal preparation, washing dishes, laundry, gardening and garbage removal. The report confirmed that she remained disabled from her pre-accident job do to limitations involving standing, walking, lifting and sitting. It was noted that her condition was unlikely to improve significantly in the future.

The materials provided to me did not include any other medicals generated by claimant's counsel or the Mediation Summary likely provided at the private mediation in November 2010.

## **ANALYSIS AND FINDINGS**

At risk of oversimplification, we have a situation here where Economical was indemnifying Jevco for accident benefit payments made to Sheila Scott as a result of serious personal injuries sustained in a motor vehicle accident. Income replacement benefits, attendant care benefits and med/rehab benefits were in dispute. A private mediation was arranged to hopefully resolve all issues on a full and final basis. The claim was settled, but at a much higher amount than that anticipated by the parties in advance of the private mediation. Economical now questions the reasonableness of the settlement.

Given the history of this claim, Economical had every reason to question the reasonableness of the settlement, particularly with respect to the payment of income replacement benefits. Communications between the insurers in advance of the mediation would lead one to believe that it was not anticipated that payment would be made much beyond the 104 week mark. It appears that there was some discussion that the settlement value of the claim was in the \$30,000-\$40,000 range. All claims settled for \$115,000 inclusive of costs. The settlement paid income replacement benefits to approximately April 2011 or roughly 20 months into the "any occupation" period.

The explanation provided by Jevco was essentially that there was conflicting medical evidence as to vocational disability, housekeeping needs and attendant care needs. Jevco explained that the claimant's credibility would likely lead to a finding in the claimant's favour. The claimant had testified that she had tried to return to work and could not handle it. She was, in the view of the Jevco representative attending the private mediation, a credible, believable witness as demonstrated on her Examination for Discovery earlier and at the private mediation.

The onus in proving the "unreasonableness" of an accident benefits payment rests with the second party insurer, in this case Economical. The caselaw which has emerged with respect to the "reasonableness of payment" issue demonstrates that the onus is very high. Only in rare circumstances should a second party insurer question the reasonableness of a full and final settlement. Insurers must operate under the premise that every insurer will act in good faith to properly process and settle the claims. In hindsight it is always easy to second guess an insurer that had the responsibility to make an on the spot decision. Future entitlement is not an easy task to predict and nor is it an exact science. If one party goes into the negotiations with a particular sum in mind, often the figure will have to be adjusted based on a number of contingencies. Support for these principles are found in the following cases:

*Dominion of Canada General Insurance Company v. Royal & SunAlliance Insurance Company, Arbitrator Stephen Malach, August 20, 2011*

*Progressive Casualty v. Markel Insurance Company of Canada, Arbitrator Stephen Malach, May 13, 1997*

*Jevco Insurance Company v. Royal & SunAlliance Insurance Company, Arbitrator Kenneth Bialkowski, June 28, 2012*

*Commercial Union Assurance Company of Canada v. Boreal Property and Casualty Company, Arbitrator Philippa Samworth, December 21, 1998*

On the evidence before me I find that Economical has not met the very high onus upon it to show that the payments made by Jevco were unreasonable. I had no difficulty with the payments made for housekeeping and attendant care as they fell within the 104 week exposure for non-catastrophic claims. I had no difficulty with the medical and rehabilitation components of the settlement given the treatment recommendations and anticipated further surgeries outlined in the report of the orthopaedic surgeon Dr. Garach. I was somewhat troubled by the income replacement benefits payment, which extended approximately 20 months into the "own occupation" period, but find support for the payment on the basis of the comments of Dr. Garach in the fall of 2008 of her vocational disability and the fact that her condition was not likely to improve in the future. Most importantly, it appears that the claimant's credibility as a witness played an important role in the decision to pay income replacement benefits for as long as Jevco did. The caselaw suggests that a second party insurer should not "second guess" a decision made on the spot by the first party insurer. The claimant appears to have persuasively testified that she tried to go back to her largely sedentary job and could not handle it. Overall, I find that there exists sufficient medical evidence and oral evidence from the claimant to conclude that the settlement was not unreasonable. It is often the case, in the face of conflicting medical opinion, that a claimant's credibility and explanation as to why she is unable to return to her largely sedentary job or any other job is so persuasive that it leads to the likelihood that the opinions of the claimant's doctors would be preferred to the insurer's medical experts. It appears that is what happened here. I am therefore unable to conclude that the payments made were unreasonable. The Respondent Economical has simply failed to satisfy the heavy onus upon it to prove that the payments were unreasonable on the face of the available evidence.

### **ORDER**

In light of the aforesaid, I hereby order that Economical reimburse Jevco in the amount of \$100,656.66, together with appropriate interest from the date of the indemnity request calculated pursuant to the Courts of Justice Act. I order that Economical pay to Jevco its legal costs of this loss transfer arbitration on a partial indemnity basis. I order that Economical pay the costs of the Arbitrator.

DATED at TORONTO this 23<sup>rd</sup> )  
 day of December, 2013. )

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KENNETH J. BIALKOWSKI  
 Arbitrator