IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, SECTION 275 and ONTARIO REGULATION 668

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

JEVCO INSURANCE COMPANY

Applicant

- and -

GORE MUTUAL INSURANCE COMPANY

Respondent

DECISION

COUNSEL:

Paul Omeziri and Darrell March for the Applicant

David Raposo for the Respondent

ISSUE:

1. Were the payments made by Jevco to the Claimant in exchange for a full and final settlement of his accident benefits claim reasonable? If not, how much of the $296,715 that Jevco seeks from Gore Mutual pursuant to the Loss Transfer provisions in section 275 of the *Insurance Act* must Gore Mutual repay ?

RESULT:

1. Not all of the payments made were reasonable. Gore Mutual must repay the sum of $125,000 plus applicable interest to Jevco, as opposed to the amounts it has claimed.

BACKGROUND:

William Roloson was involved in an accident while driving his motorcycle on Highway 7 on August 1, 2001. A car driven by Edna Watkins and insured by Gore Mutual Insurance Company ("Gore") cut in front of his motorcycle, and while attempting to swerve out of the car's path, he lost control of the motorcycle and was thrown off. Mr. Roloson suffered a closed head injury, rib and hip contusions, and injuries to his neck and back as a result of the accident. He experienced headaches and dizziness, symptoms associated with lumbar radiculopathy and sciatica, and psychological symptoms for several years afterwards.

Mr. Roloson submitted an application for accident benefits to Kingsway General Insurance (now known as Jevco Insurance Company, hereinafter referred to as "Jevco"), the insurer of his motorcycle. Jevco paid some benefits to Mr. Roloson in the early stages of the claim**.** He was later provided with an advance payment of $60,000 on the eve of a scheduled FSCO arbitration in November 2008. The claim was then resolved on a full and final basis in June 2009, for a further lump sum payment of $250,000. Jevco seeks indemnification from Gore for much of the above amounts, pursuant to the Loss Transfer provisions in section 275 of the *Insurance Act.*

Gore accepts that its' insured was fully liable for the accident. It made various loss transfer payments to Jevco in response to indemnification requests made between January 2002 and August 2008, which total less than $13,000. It resists payment of the indemnification requests made by Jevco in November 2008 and July 2009, totalling $296,714.65. It contends that Jevco grossly mishandled the handling of Mr. Roloson's claim, and that the payments made in settlement of the claim in late 2008 and 2009 were not reasonable.

EVIDENCE:

The parties each filed Document Briefs containing several documents that were generated in the course of the accident benefits claim. These included reports from two Independent Adjusters who were retained by Kingsway to adjust the claim, as well as reports from a case manager assigned to the claim. Log notes kept by the various Kingsway adjusters who were involved with the claim at different stages were also filed, as was some of the correspondence between the adjusters and the Claimant's representatives at different points in time.

The parties also filed an Agreed Statement of Facts, addressing several facts surrounding the claim that are not disputed.

In addition to the above, Jevco called two witnesses to testify at the hearing – Mr. Roloson, and Chrislyn Alexander, the Jevco adjuster who assumed the handling of Mr. Roloson's claim in the fall of 2008, when the matter was heading to arbitration. Jevco did not call any witnesses who were involved in the file during the first seven years of the claim.

The evidence established the following facts:
Mr. Roloson was forty-five years old at the time of the accident. He was self-employed and worked as a sub-contractor for a company called Thermoshell, installing and replacing oil tanks and furnaces. It was very physical work, and required frequent heavy lifting. The financial records filed show that in 2001, the year of the accident, he earned a net income of just over $50,000 on approximately $148,000 of gross business income.

Mr. Roloson was initially off work for approximately six weeks, recovering from his injuries. He returned to work in late September 2001. He testified that while he had employed one helper to assist him with lifting the tanks before the accident, he had to hire an additional worker after the accident to do the lifting that he was no longer able to do. While the exact amount of Income Replacement Benefits ("IRB's") received by Mr.

Roloson is not clear, it appears that he was appropriately compensated under the *Schedule* by Kingsway for his lost income during that period.

Mr. Roloson recalled that he was able to work "off and on" after that, but that he continued to experience significant pain in his back and left leg. He advised that Thermoshell terminated its contract with him in 2003, because he could not keep up with the demands of the work. He testified that he was able to perform some lighter work for other companies such as Shell and Petrocan from late 2003, through 2004 and 2005, but that he did not do any work after that. He stated that he had spent much of 2006 and 2007 in Alberta, caring for his mother who had had a heart attack.

The Claimant confirmed that other than the IRB's that he received when he was off work in 2001, he received no further compensation from Jevco for lost income until the 'advance payment' of $60,000 was made in November 2008.

The insurer similarly did not fund much treatment for Mr. Roloson. Four Treatment Plans were submitted to Kingsway between August and December 2001, all of which were accepted and funded. These were the only OCF 18 Forms submitted throughout the period of the claim. The documents filed indicate that the Claimant retained Neinstein and Associates as his legal representatives in February 2003, and that Jevco assigned a case manager to oversee the claim in March 2004. There appeared to be regular written contact between these individuals and various medical and rehabilitation professionals regarding Mr. Roloson's need for treatment, and radiological investigations in 2003 and 2004. It appears that approximately $8,000 was paid out by Kingsway for treatment (and possibly assessments) up to the end of 2002.

In June of 2003 Mr. Roloson's legal representative sent a letter to the Independent Adjuster (IA) retained by Jevco advising that Mr. Roloson had stopped working in January 2003, and was not in receipt of any income since then. He requested that the Claimant's income replacement benefits claim be reviewed, and advised that Mr. Roloson required retraining. While the adjusting log notes contain a few references to

arranging a section 42 assessment/ Insurer Examination ("IE") in order to determine the Claimant's entitlement to IRB's in late 2003, none were scheduled. Jevco had obtained medical information that revealed that the Claimant had pre-existing degenerative disc disease, and the adjusting entries reveal that its clear focus at that point was on investigating whether his existing medical issues and functional limitations were attributable to the accident or to his pre-existing condition.

Counsel for the Claimant retained the services of David Antflick in October 2004, to review the medical documentation and conduct a vocational assessment on Mr. Roloson. Mr. Antflick noted that the Claimant had dropped out of school in the sixth grade, and had only ever worked at jobs requiring heavy physical labour. At the time of the assessment, Mr. Roloson was attempting to do furnace removal and installation work, but advised that because he had to hire extra workers to perform the heavy tasks, he was not actually earning any income.

Mr. Antflick reported that while the Claimant may be able to persevere in this "unsuitable work for a few more years through sheer dint of determination...I strongly doubt that he will be able to continue much beyond that." He stated that unless a lighter form of employment could be found for Mr. Roloson, he would "probably leave the labour force 10 or more years earlier than he anticipated or would otherwise have been likely".

This report was forwarded by Mr. Neinstein to the Independent Adjuster acting on Jevco's behalf in March 2005. His cover letter repeated his earlier request for retraining, and asked the insurer to assign a vocational specialist to meet with Mr. Roloson in order to implement a retraining plan. The IA's subsequent report to his principal in April 2005 summarises the Antflick report, and advises of counsel's request that a vocational specialist be assigned. He requests the Jevco representative to contact him in order to discuss the issue, but there is no reference in the documentation to a discussion having taken place.

The case manager retained by Jevco forwarded her final report to the IA in April 2005. She explained that she had been unable to obtain the family doctor's opinion on a neurologist's finding that Mr. Roloson's functional limitations were not solely attributable to the accident in question. She also reported that she had discussed the matter with the IA, and suggested that he recommend to his principal at Jevco that a section 42 assessment be conducted in order to determine the Claimant's entitlement to benefits. No such assessment was conducted.

In a further report to Jevco in June 2005, the IA advised that the Claimant's counsel had called him to discuss the file, and had repeated his request that a vocational specialist be assigned to work with Mr. Roloson. The one adjusting log note in July refers to the IA's report and states that Jevco would not consider assigning a vocational specialist, as the Claimant had returned to his pre-accident employment. This statement is clearly incorrect and is indicative of Jevco's approach to the claim at that point. Amazingly, the log note goes on to say that a "closing letter" had been sent out in May 2005, and that if no response is received, the file would be closed. A note dated August 19, 2005 states that the file would in fact be closed.

Mr. Roloson's counsel sent a further letter to the IA in late January 2006. He stated that payment of his client's weekly benefits have been "largely overlooked and neglected", and advised that Mr. Roloson had sustained significant business losses. He advised that the amounts owing would be quantified by forensic accountants and that the fact that Mr. Roloson had returned to work did not disentitle him from receiving compensation for any income shortfall. He enclosed a copy of a FSCO appeal decision in that regard. Yet again, no response was received from the insurer.

Mr. Neinstein then retained Price Waterhouse Cooper in June 2006 to calculate the amounts owing to Mr. Roloson. He filed an Application for Mediation at FSCO in August 2006, in which he stated that Jevco had never responded to his request that further IRB's be paid. He alleged that over $80,000 in IRB payments were owing to the Claimant.

A FSCO mediation was held on November 6, 2006, at which none of the issues were resolved.

Mr. Neinstein filed an Application for Arbitration with FSCO in January 2007. At the pre-hearing discussion held on June 25, 2007, dates for the arbitration hearing were set for later that year. It appears from the correspondence filed that the parties subsequently agreed to adjourn those dates to November 2008. I note that Mr. Neinstein sent a letter to counsel for Jevco in January 2008, advising that as no post-104 week assessments had been conducted more than five years after the two-year mark, he would be taking the position that IRB's were owed to Mr. Roloson until at least August 2006, when his application for mediation was filed.

The Agreed Statement of Facts filed at the hearing sets out the findings of various assessors who either treated or assessed Mr. Roloson. Of note is the fact that the first assessments scheduled by Jevco to assess whether the Claimant met the post-104 week test for receipt of IRB's were scheduled approximately six and one-half years after the date of the accident, in March 2008. Mr. Roloson did not attend the scheduled assessments. Jevco did not suspend his benefits under the *Schedule* as a result of his non-attendance.

The assessments were then rescheduled and took place in September 2008. The consensus of all four assessors was that Mr. Roloson did not suffer a complete inability as a direct result of the accident that prevented him from engaging in any employment for which he is reasonably suited by education, training and experience.

An Application for Determination of Catastrophic Impairment (OCF – 19) was submitted by Mr. Roloson's counsel in June 2008. A group of assessors at Work Able Centres assessed the Claimant on behalf of the insurer, and determined in October 2008 that he did not meet the required criteria to be determined to be catastrophically impaired under

the *Schedule* (even if ratings under (f) and (g) were combined). No rebuttal report was obtained.

Ms. Alexander`s evidence

Despite the findings in these reports, Jevco made an advance payment of $60,000 to Mr. Roloson in November of 2008, and a further lump sum payment of $250,000 in June 2009 in exchange for a full and final release. Ms. Alexander, the adjuster who assumed carriage of the matter on Jevco's behalf in October 2008, explained that the $60,000 payment for IRB's was already "in the works" when she was assigned to the file, and that she had approved the payment. She stated that the subsequent $250,000 payout was comprised of $150,000 for income replacement benefits, $85,000 for future medical and rehabilitation expenses, a further $5,000 for expenses and $10,000 in legal costs. She confirmed that when the advance payment is considered, a total payment of $210,000 was made for IRB's.

She testified that none of these amounts included interest, and that she had not taken into account the fact that the Claimant had included a request for a "special award" in his Application for Arbitration.

When asked why she had instructed her counsel to settle the claim for the above amounts, Ms. Alexander stated that she had relied on the accounting report on file, which indicated that Mr. Roloson was owed approximately $120,000 in IRB's to the end of 2007, and that he would be eligible to collect $400 per week into the future. She also stated that she had reviewed the post-104 week assessments done in October 2008, and considered both the Occupational Therapist`s findings that the Claimant had various limitations, and the neuro-psychovocational assessment that included a finding that Mr. Roloson had suffered a moderate psychological impairment as a result of the accident.

Ms. Alexander conceded that despite the above findings, the assessors at Work Able had concluded that the Claimant did not meet the criteria for entitlement to post 104-week

IRB's – namely that he did not suffer a complete inability to engage in any employment for which he was reasonably suited by training, education and experience.

Ms. Alexander also testified that she had considered the findings of David Antflick, the vocational assessor retained by counsel for the Claimant, to the effect that Mr. Roloson's vocational options were limited. Finally, she stated that while the assessors had concluded that Mr. Roloson did not meet the definition of catastrophic impairment under the *Schedule,* she felt that the insurer faced the potential exposure of the Claimant obtaining a rebuttal report that reached the opposite conclusion, given that he had suffered a head injury.

When asked about the decision to pay $85,000 for future medical and rehabilitation services, Ms. Alexander stated that she felt that Mr. Roloson would have a greater need for treatment of his back injury as he got older, and that he would have transportation needs in attending these treatments. She acknowledged that no amounts were owing for past medical or rehabilitation treatments. When she was asked whether she had taken into account any other types of treatments that the Claimant would need, she responded that she had not.

Ms. Alexander could not explain why no Insurer Examinations were scheduled before late 2008, nor why a case manager had been assigned to the file, as she only became involved in the file in late 2008. She acknowledged that the reports issued by the case manager include a recommendation that assessments be carried out in early 2005. She also acknowledged that the reports received by Jevco from the Independent Adjusters retained mentioned that Mr. Neinstein, the Claimant's counsel, had advised on several occasions that Mr. Roloson was no longer working and had demanded that some form of retraining be provided to him, but that no such steps had been taken.

Mr. Roloson`s evidence

Mr. Roloson testified that he is currently not working, and feels that he cannot work as a result of the injuries that he suffered in the accident. He stated that he also has been

diagnosed with "paranoid schizophrenia", and receives regular psychological treatment funded by OHIP. His application for CPP disability benefits was approved in March 2011, and benefits were awarded retroactively from May 2008. He testified that he regularly takes morphine for pain relief, and that while the cost of this medication is covered by Trillium (a government-funded program), he estimated that it would cost approximately $ 4-500 per year.

Mr. Roloson settled his tort claim in 2009 for approximately $470,000.

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.

Regulation 664 -

> **9.** (1) In this section,
>
> "first party insurer" means the insurer responsible under subsection 268 (2) of the Act for the payment of statutory accident benefits;
>
> "second party insurer" means an insurer required under section 275 of the Act to indemnify the first party insurer.
>
> (2) A second party insurer under a policy insuring any class of automobile other than motorcycles, off-road vehicles and motorized snow vehicles is obligated under section 275 of the Act to indemnify a first party insurer,
>
> > (a) if the person receiving statutory accident benefits from the first party insurer is claiming them under a policy insuring a motorcycle and,
> >
> > > (i) if the motorcycle was involved in the incident out of which the responsibility to pay statutory accident benefits arises, or

PARTIES' ARGUMENTS:

Counsel agreed that when a second party insurer from whom reimbursement is sought under the Loss Transfer provisions alleges that the payments made to a Claimant by the first insurer were unreasonable, the onus is on the second party insurer to prove that. Both sides referred to the same cases that have historically been cited, which provide that the onus is a strict one, and that 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. (*Progressive Casualty Insurance v. Markel Insurance* (Arbitrator Malach, May 13, 1997*), Jevco Insurance v. Guardian Insurance* (Arbitrator Malach, August 28, 2000*), Dominion of Canada v. Royal and SunAlliance (*Arbitrator Malach, August 20, 2001*), Jevco v. AXA Insurance (*Arbitrator Malach, March 9, 2004*), Primmum v. Aviva (*Arbitrator Jones, March 24, 2008).

Each side, however, focused on different aspects of the evidence, and emphasized particular comments from arbitrators and the courts who have considered these issues in support of their respective arguments.

Jevco's arguments:

Counsel for Jevco contended that Gore Mutual is obligated to indemnify Jevco for the full amount it seeks under the Loss Transfer provisions, as there is no evidence supporting its contention that Mr. Roloson's claim was grossly mishandled by Jevco. He submitted that Jevco's efforts in adjusting the claim should not be reviewed against a standard of perfection, and referred to the decision in *Primmum v. Aviva (supra)* in *w*hich Arbitrator Jones commented that Primmum's handling of the claim had certainly not been perfect, but concluded that the settlement it had reached with the Claimant was not grossly unreasonable and that the claim had not been grossly mishandled. Counsel also noted that the arbitrator characterised the onus faced by Aviva in its challenge of the reasonableness payments made as being a "very stringent test to meet".

Mr. Omeziri contended that as Mr. Roloson had returned to work for certain periods after the accident, information and business records were required in order to determine his post-accident earnings. He stated that it was very difficult to calculate the correct quantum of IRB's payable, and submitted that this was the reason for Jevco's delay in paying these amounts out to the Claimant. He noted Ms. Alexander's statement that she had relied on the accounting report obtained by Jevco that calculated that Mr. Roloson was owed $120,000 in IRB's to the end of 2007, and that the maximum of $400 per week would be payable for ten more years into the future, and argued that this supported Jevco's decision to ultimately settle the IRB claim for the amounts that it did.

Counsel also referred to Mr. Roloson's evidence that he has not been able to work for the last several years, and that he was able to negotiate a substantial settlement of his tort claim against Gore Mutual. He also noted that the Claimant was approved for and has been collecting CPP disability benefits for the last few years. He contended that in light of these facts, the IRB settlement reached was more than reasonable.

Finally, counsel referred to the 2001 version of the *Schedule* that was in effect at the time of this accident, and noted that Claimants were not required at that time to file Treatment Plans in support of their requests that an insurer fund treatment. He also submitted that section 17(1) of the *Schedule* permitted an insurer to appoint a case manager in a "non-CAT" claim, as opposed to the current regime in which case managers can only be appointed on files in which a Claimant has been determined to be catastrophically impaired.

Gore Mutual's arguments:

Counsel for Gore acknowledged that his client faces a heavy onus to prove that the impugned payments are not reasonable, but contended that Jevco had grossly mishandled the processing of Mr. Roloson's claim and that Gore Mutual should accordingly not be required to repay the full amounts sought. He noted that the relevant cases do not define what constitutes 'gross mishandling' of a claim, and submitted that the test to apply is whether the first insurer acted reasonably in the circumstances.

Mr. Raposo contended that Jevco had not acted reasonably in adjusting Mr. Roloson's claim, for many reasons. He pointed to the fact that no Insurer Examinations ("IE's") had been conducted for the first seven years of the claim, and that no real explanation has been provided for this omission to date. In response to Jevco's argument that they had been waiting for documentation from the Claimant in order to calculate the quantum of IRB's owing, he submitted that that would not have prevented Jevco from arranging medical assessments in order to assess the threshold question of Mr. Roloson's entitlement to benefits.

Counsel contended that it was disingenuous for Jevco to have ignored the findings of the Claimant's medical assessors regarding the seriousness of his injuries at the time that they were provided, and to now assert that they relied on these reports in order to justify the large amounts that were ultimately paid out to settle Mr. Roloson's claim. Counsel noted the many letters sent to Jevco by Mr. Neinstein advising that his client was no longer working, and essentially pleading with Jevco to review his IRB entitlement. He also noted the several statements made by his counsel that Mr. Roloson required retraining, and that a vocational assessor should be provided to assist in determining what alternate employment his client could perform. He submitted that Jevco simply ignored these requests, and argued that this constituted gross mishandling of the claim, as the *Schedule* requires insurers to arrange for timely IE's, and if required, retraining. He argued that if these steps had been taken by Jevco, the amounts required to have been paid out to settle Mr. Roloson's IRB claim would have been significantly lower.

Mr. Raposo also argued that the $85,000 paid by Jevco in settlement of Mr. Roloson's med-rehab claim was grossly unreasonable. He noted that the total paid out for treatment in the first seven years of the claim was under $10,000, and that while the *Schedule* in force at that time may not have required that an insured file a formal Treatment Plan in order to obtain funding for treatment, there was no evidence in this case to suggest that Mr. Roloson had sought funding for any treatment beyond the four Treatment Plans submitted in 2001.

Counsel also noted that at the time of the settlement in 2009, Jevco would have only faced two more years of "exposure" under the *Schedule.* Given Ms. Alexander's evidence that no amounts were outstanding for any past treatment incurred, and that she had only considered his back injury when she was assessing his treatment needs, counsel contended that it was highly unlikely that $85,000 of treatment would be incurred for a back injury over the span of two years. He also submitted that the decision to appoint a case manager in this file was not reasonable and also constituted gross mishandling of the claim, particularly in light of Ms. Alexander's confirmation that the case manager's recommendations had not been followed.

Finally, counsel for Gore noted that no benefits were paid out at all in 2005, 2006 and 2007, despite the fact that Mr. Roloson's counsel was seeking payment and no IE's had been conducted to assess his entitlement to benefits. He noted Mr. Neinstein's January 2008 letter advising that given that no assessments had been conducted, he would be asserting that Mr. Roloson was entitled to be paid IRB's until at least August 2006 (being the date an Application for Mediation was filed with FSCO), at the upcoming arbitration. Counsel argued that in the face of the subsequent conclusions of the IE assessors who determined that Mr. Roloson did not meet the post 104-week test, and the finding that he did not meet the definition of catastrophic impairment in the *Schedule*, it was clear that Jevco's decision to pay $210,000 to settle the IRB claim was made because it had failed to adjust the claim in a reasonable and competent manner during its first seven years. He argued that in light of these facts, Gore should not be required to reimburse Jevco for the amounts claimed.

ANALYSIS & FINDINGS:

I agree with the principles enunciated by Arbitrator Malach and Arbitrator Jones in the cases cited above, to the effect that the second insurer who resists a request for reimbursement under the Loss Transfer provisions of the *Act* faces a strict onus to prove that the payments made were unreasonable in the circumstances. I also agree with the concerns expressed over second party insurers (and arbitrators) exercising their natural urge to second guess a first insurer's adjusting decisions several years down the road,

with the benefit of hindsight. Clearly the question to be asked is not whether better decisions could have been made in the adjusting of a Claimant's claim, but rather whether the insurer seeking reimbursement for the benefits it has paid out either acted in bad faith or showed gross negligence or gross mismanagement in the claims handling process, so that the payments it made were "greatly in excess of that which the insured would have been entitled to, had the file been managed by a reasonable claims handler" (interim decision of Arbitrator Samworth, December 21, 1998, *Commercial Union Assurance Company of Canada v. Boreal Property & Casualty Company).*

In many of the cases cited by the parties, arbitrators and judges dismissed the arguments made by second party insurers that they should not be required to repay the first insurer, or be required to reimburse a lesser amount. I note, however, that in *Jevco Insurance* v. *AXA Insurance, supra,* Arbitrator Malach determined that Jevco had paid 21% more in attendant care benefits than it reasonably ought to have paid to the Claimant. He consequently reduced the amount that AXA was required to repay by $55,000, finding that Jevco's representative should have been aware of a Court of Appeal decision that was released prior to the settlement having been negotiated that was directly applicable to the Claimant's circumstances, which if applied, would have resulted in a lower settlement. Arbitrator Malach also cited the fact that the claim for attendant care was presented seven years late, and that the Jevco representative had paid the Claimant the maximum monthly benefit claimed for the entire period, in excess of what its experts had recommended.

As well, I note that in *Primmum v. Aviva, supra,* while Arbitrator Jones rejected Aviva's argument that the settlement Primmum had reached with the Claimant was grossly unreasonable or constituted gross mishandling of the claim, he nevertheless reduced the amount of travel expenses claimed by over $25,000, and lowered its claim for reimbursement for treatment expenses by a further $1,500.

I have reviewed all of the documents filed, and the witnesses' evidence tendered at the hearing, against this legal backdrop. The striking fact in this case is that Jevco paid

relatively minor amounts to the Claimant during the first seven years of the claim. While the voluminous productions filed at the hearing did not actually include a summary of payments made to Mr. Roloson, it appears that roughly $8,000 was paid out for all medical and rehabilitation treatment provided and assessments conducted until early 2008. Only six weeks of IRB payments were made in 2001. A period of six or seven years followed, in which no payments were made. An "advance payment" of $60,000 was authorised by Ms. Alexander in late 2008, and six months later a lump sum of $250,000 was paid by Jevco to settle the claim. When the Loss Transfer Indemnification requests for these amounts were forwarded to Gore, they understandably questioned the decision made by Jevco to pay a further $310,000 and resisted repayment.

There may conceivably be circumstances in which that unusual pattern of payment by an insurer is justified. However, I find that in this case, the $310,000 paid out by Jevco in 2008 and 2009 to settle Mr. Roloson's accident benefits claim was unreasonable. In my view, there are many examples of actions taken by Jevco, and often glaring inaction, that puts this case over the threshold of "gross mishandling". The most obvious one is the fact that **no** Insurer Examinations were conducted until late 2008, more than seven years after the Claimant's application was submitted. The examiners assessed Mr. Roloson at that point against the "post-104 week test" in the *Schedule,* despite the fact that the two-year point had passed over five years earlier, and his counsel had been consistently requesting since early 2003 that his entitlement to IRB's be reviewed.

It is not clear why no IE assessments were conducted earlier. The log notes and correspondence between the Jevco representatives and outside advisors such as the IA and case manager contain many recommendations that assessments be conducted, but these were never acted upon. No evidence was called by Jevco to explain or justify these decisions, and I can therefore only conclude that no such evidence exists.

Equally compelling is the fact that numerous requests were made by Mr. Neinstein, counsel to the Claimant, that retraining assistance be provided to Mr. Roloson. Mr. Roloson had dropped out of school in sixth grade and had only performed very heavy

types of work before the accident. He had worked successfully as a subcontractor to large companies, and by all accounts, was motivated to work. Jevco had an obligation under the *Schedule* to facilitate his reintegration into the labour market, which it ignored, despite repeated requests from his counsel to do so.

One can only speculate what the outcome of a structured retraining program would have been. There was some evidence to suggest that Mr. Roloson would have been able to transition to a lighter type of employment with the right support. More germane to this dispute, however, is the fact that if retraining support had been provided by Jevco and had resulted in Mr. Roloson returning to some from of work, his entitlement to IRB's would certainly have been reduced.

When Ms. Alexander was asked what factors she had taken into account when she instructed her counsel to settle the case for the large amounts set out above, she referred both to experts retained by the Claimant's counsel, such as David Antflick, as well as some of the assessors who had conducted the IE assessments and noted various limitations experienced by Mr. Roloson. I agree with counsel for Gore's contention that having chosen to ignore the recommendations made by experts retained by Claimant's counsel all along, Jevco should not be permitted to benefit at this late date from referring to and relying on those opinions and recommendations.

I might also be more inclined to consider Jevco's argument that the $210,000 it paid to settle the Claimant's IRB claim does not amount to gross mishandling, if the IE assessors had concluded that Mr. Roloson met the "complete inability" test. In fact, none of the four assessors reached this conclusion. Similarly, if the CAT assessments arranged by the insurer that were conducted in late 2008 had determined that the Claimant was catastrophically impaired within the meaning of the *Schedule,* I would understand Jevco's interest in settling the IRB claim for over $200,000. In the absence of those findings, however, I can only conclude that the main reason that the Jevco representative decided to pay that amount was because she was aware that the claim had been mishandled for several years, and that Jevco faced significant exposure at the upcoming

FSCO arbitration, that would likely result in a large award to Mr. Roloson, with significant interest owing and a "special award" potentially added to that.

In addition, I find that the $85,000 paid by Jevco to settle the Claimant's medical / rehabilitation claims was clearly unreasonable and meets the threshold of "gross mishandling". While the evidence was not clear on how much treatment was funded by the insurer, it appears that less than $10,000 in treatment costs were submitted by the Claimant from August 2001 to mid-2008. Ms. Alexander confirmed that no amounts were owing for past treatment incurred by Mr. Roloson when she was negotiating the settlement of his claim.

Consequently the $85,000 paid out – $42,500 for medical benefits, and $42,500 for rehabilitation benefits – was all meant to address future treatment needs. Given that the Claimant was not found to be catastrophically impaired, Jevco faced just over two years of exposure to further claims for treatment at the time of the settlement. Ms. Alexander testified that she only considered Mr. Roloson's future treatment needs in relation to his back injury, and did not consider any treatment he may have required to address his head injury, or psychological needs. In my view, that figure is well beyond the range of "reasonableness" when all of the circumstances are taken into account. A settlement in the range of $20-25,000 would have been much more in keeping with the evidence known at that time.

One troubling aspect of this case, and in fact the whole issue of assessing reasonableness of payments after they are paid, is the question of what role to ascribe to 'reliable hindsight', or evidence tendered at the hearing that was not available to the first insurer at the time the claim was being handled. In this case, Mr. Roloson appeared at the hearing and provided testimony about the evolution of his injuries and his medical condition, and his challenges in finding work. He specifically advised that his tort claim against Gore Mutual was settled for a fairly large sum in 2009, and his application for CPP disability payments was accepted. He is no longer working. Counsel for Jevco argued that when this evidence is taken into account, it appears that his client's decision to settle the claim

for the amounts that it did represent an underpayment, and that in hindsight, the claims could have been settled for higher amounts.

After giving this issue much thought, I have concluded that I should not place much weight on Mr. Roloson's evidence regarding his current circumstances. As odd as that may seem at first blush, it seems only fair that the test to assess reasonableness of payments made by a first insurer who has received an application and is handling a claim should be approached with a consideration of what facts were known to it at the time it made the decisions to pay or deny various benefits.

To find otherwise would create a 'slippery slope' of dangerous proportions. Second party insurers would often be tempted to challenge the payments they were being asked to repay, in the hope that a Claimant would ultimately be found after the fact to not be entitled to each dollar of IRB or treatment costs paid out. Conversely, first party insurers would constantly worry about whether they were paying too much to settle claims, and whether a second party insurer would look over their shoulder and challenge their decisions. The Claimants involved would bear the consequences of this uncertainty, and the settlement of accident benefits claims in which Loss Transfer indemnification is being sought could be undermined.

ORDER:

For the reasons set out above, I find that Gore Mutual is not required to pay Jevco the full amounts claimed in its last two indemnification requests. Instead, I order Gore to pay $100,000 to Jevco for the IRB's it paid out to Mr. Roloson, and $25,000 toward the payments it made for his Medical and Rehabilitation benefits, for a total of $125,000, plus interest.

COSTS:

In accordance with the Arbitration Agreement signed by the parties, Gore Mutual is entitled to its costs of the arbitration on a partial indemnity basis. While my findings above do require Gore to repay part of the amount claimed by Jevco, I consider them to be the "successful party". If counsel cannot agree on the quantum of costs payable, I invite them to contact me and a further discussion will be convened.

Jevco is also responsible for paying my fees and all disbursements incurred in relation to the arbitration. My account will follow under separate cover.

DATED at TORONTO, ONTARIO this ____ DAY OF FEBRUARY, 2013.

_____

Shari L. Novick
Arbitrator