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 -

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY

Respondent

AMENDED DECISION

COUNSEL:

Paul Omeziri for the Applicant

D'Arcy McGoey for the Respondent

ISSUE:

1. Is Dominion required to reimburse Jevco for the Attendant Care benefits and Housekeeping expenses that Jevco paid out to its insured, Matthew Wood, as a result of his being involved in an accident on June 30, 2011 ?

RESULT:

1. No. Dominion is not required to repay Jevco for these amounts, as Jevco's payment of these benefits to Mr. Wood were made without reference to the criteria for "incurred expenses" set out in section 3(7)(e) of the *SABS.*

BACKGROUND:

1. Matthew Wood was seriously injured in an accident on June 30, 2011, when his motorcycle collided with a car operated by Ronald Duke and insured by Dominion of Canada General Insurance Company ("Dominion"). Mr. Wood applied to Jevco Insurance Company ("Jevco") for payment of accident benefits under the *Schedule.* Jevco paid benefits to Mr. Wood, and now seeks re-imbursement for the benefits it paid out to him pursuant to the Loss Transfer provisions in section 275 of the *Insurance Act.*

2. Dominion does not dispute that its insured was completely at fault for the accident, or that the Loss Transfer provisions apply. It takes issue, however, with the quantum of benefits that Jevco paid out to Mr. Wood, and resists repayment of the amounts paid to him for Attendant Care and Housekeeping Expenses.

3. The crux of the dispute between the parties revolves around the definition of "incurred expense" in the post-September 1, 2010 *Schedule*. Dominion asserts that as no evidence was provided by the Claimant to support that an economic loss was sustained by the alleged service providers, as the provision requires, Jevco should not have paid these benefits to the Claimant.

RELEVANT PROVISIONS:

Insurance Act – section 275

> *(1) The insurer responsible under subsection 268 (2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of*

automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose.

(2) Indemnification under subsection (1) shall be made according to the respective degree of fault of each insurer's insured as determined under the fault determination rules.

Statutory Accident Benefits Schedule

3. *(7) For the purposes of this Regulation,*

(e) subject to subsection (8), an expense in respect of goods or services referred to in this Regulation is not incurred by an insured person unless,

(i) the insured person has received the goods or services to which the expense relates,

(ii) the insured person has paid the expense, has promised to pay the expense or is otherwise legally obligated to pay the expense, and

(iii) the person who provided the goods or services,

(a) did so in the course of the employment, occupation or profession in which he or she would ordinarily have been engaged, but for the accident, or

(b) sustained an economic loss as a result of providing the goods or services to the insured person;

19. *(1) Attendant care benefits shall pay for all reasonable and necessary expenses,*

(a) that are incurred by or on behalf of the insured person as a result of the accident for services provided by an aide or attendant or by a long-term care facility, including a long-term care home under the Long-Term Care Homes Act, 2007 or a chronic care hospital;

22. *(1) The insurer shall pay for reasonable and necessary additional expenses incurred by or on behalf of an insured person as a result of an accident for housekeeping and home maintenance services if, as a result of the accident, the insured person sustains an impairment that results in a*

substantial inability to perform the housekeeping and home maintenance services that he or she normally performed before the accident.

EVIDENCE:

4. The parties provided written submissions on this discrete issue, along with case law supporting their arguments. Jevco's claims adjuster's notes were filed, as well as other relevant documents and correspondence. Counsel in this proceeding conducted an Examination Under Oath of Mr. Wood in January 2014, and a transcript of the evidence he provided was also filed.

5. Jevco paid $19,025.64 in Attendant Care benefits to Mr. Wood, as well as $7,126.41 in Housekeeping expenses. The total amount in dispute is therefore $26,152.05.

6. The evidence filed sets out the following facts: Matthew Wood was fifty-two years old at the time of the accident. He was driving his motorcycle to work when a car insured by Dominion went through a stop sign and struck him on his left side. Mr. Wood was thrown from his motorcycle as a result of the impact, and landed ten to fifteen feet away. His left boot was ripped off his foot as a result of the collision.

7. Mr. Wood sustained two fractured ribs, and his left side was swollen from his hip up to his shoulder. He also suffered a "crush injury" to his left foot, which caused fractures to several bones in the area, as well as ruptured tendons and nerve damage. He spent a week in the hospital, and was advised not to bear weight on his left foot for eight weeks. He attended physiotherapy treatments for one year, and also received cortisone injections to his ankle.

8. The Claimant lived in Wallaceburg, Ontario in a bungalow that he owned with his common-law spouse, Tammy White. Jevco arranged for an Occupational Therapist named Daniel Horban to visit Mr. Wood at his home in July 2011, to assess his needs. Mr. Horban initially assessed the Claimant's Attendant Care needs to be $7,611 per

month. He also provided the opinion that Mr. Wood needed 16 ¾ hours of housekeeping assistance per week at that point.

9. Mr. Horban re-assessed the Claimant's needs a few months later. On September 30, 2011 he determined that Mr. Wood's Attendant Care needs had decreased to $515 per month, but that he still required 16 ¾ hours of housekeeping assistance each week. In subsequent visits he recommended further reductions to both Mr. Woods' Attendant Care and Housekeeping needs.

10. Jevco sent a series of letters to Mr. Wood with respect to his entitlement to Attendant Care and Housekeeping benefits. An initial letter dated July 29, 2011 acknowledges receipt of his Application, and outlines the criteria for payment of various benefits. It contains the following statements with respect to Attendant Care and Housekeeping benefits:

> *Attendant Care or assistance with your daily personal care is submitted as an incurred expenses (sic) to a maximum of $3,000 per month for non-catastrophic injuries. For any expenses we receive the name, address, phone number and signature of the person who provided assistance to you will be required for verification purposes.*
>
> *Housekeeping and Home Maintenance is also an incurred expenses (sic). The maximum payable, per section 22 of the SABS is $100 per week for reasonable assistance with any pre-accident tasks that you are not able to. This benefit is only payable for a maximum of 104 weeks. Again for any expenses received we will require the name address phone number and signature of the person who provided you with this assistance.*
>
> (emphasis added)

11. On August 22, 2011 the Jevco adjuster wrote to Mr. Wood again and advised that she had received Mr. Horban's report containing an assessment of his Attendant Care and Housekeeping needs. She noted that whereas Mr. Horban had recommended payment of $7,611. per month in Attendant Care, the maximum amount allowable under the *SABS* is $3,000 monthly. She also stated that as "this is an incurred expense kindly submit Application for Expenses OCF-6 to Jevco Insurance for consideration of payment." The

same request, with identical wording, is made with respect to the Housekeeping expenses that Mr. Horban had determined were required.

12. A further letter was sent to Mr. Wood on October 17, 2011. It enclosed Mr. Horban's report and noted the new amounts recommended. The adjuster also repeated that Attendant Care and Housekeeping benefits are "and incurred expense" and requested the submission of an OCF-6 form for consideration of payment.

13. On February 6, 2012 a further letter was sent to the Claimant, enclosing another report from Mr. Horban. It notes the revised amounts recommended, and asks Mr. Wood to "note the changes to your attendant care /housekeeping benefits when submitting your incurred expenses to Jevco Insurance". Similar letters are sent to Mr. Wood on July 6 and November 15, 2012. I note that no mention is made in any of these letters that the Claimant must have either paid or promised to pay the amounts being claimed, or that the people providing the services in question must have sustained an economic loss as required by section 3(7)(e) of the *Schedule.*

14. It is not disputed that Mr. Wood submitted a series of OCF-6 Expense Forms claiming payment for Attendant Care and Housekeeping services. I note that none of them include a description of the services provided or the name of the service provider. Most of the forms simply state "as per Occupational Therapy assessment report by Danny Horban" and include the amounts assessed.

15. The materials filed also include a letter from Mr. Wood addressed to "To Whom It May Concern", dated July 8, 2013. It states that the Claimant has been receiving payments from Jevco Insurance for both Attendant Care expenses and Housekeeping/home maintenance expenses "due to my inability to do for myself". It goes on to state that the "Attendant care expenses are being used to pay Tammy White for her time in helping with my house cleaning and some personal needs" and that he is also receiving compensation for "housekeeping and home maintenance expenses which I pay

Rick Willsey for his services on helping with lawn and garden maintenance and also small repairs". Ms. White is the Claimant's spouse, and Mr. Willsey is his neighbour.

16. The first pre-hearing call in this arbitration proceeding was convened in October 2012. By May 2013 Dominion had conceded that it would be responsible to indemnify Jevco under the Loss Transfer provisions. Counsel for Dominion advised at that point, however, that his client was taking the position that the payments made to Mr. Wood for Attendant Care and Housekeeping expenses were made without any supporting evidence of having been "incurred", as required by section 3(7)(e) of the *Schedule*, and they should therefore not be obligated to indemnify Jevco for these amounts.

17. As stated above, Mr. Wood was examined under oath in January 2014. When he was asked by counsel for Dominion whether anyone from Jevco had requested proof that he had paid either Ms. White or Mr. Willsey for the services they provided prior to writing this letter in July 2013, he said that he had not been asked for any such proof. He stated that the Jevco adjuster had advised him in July that she required a letter to that effect, saying that she was sorry to have to ask for it "but the other insurance company is demanding that".

18. When Mr. Wood was asked what his understanding of the word "incurred" was in this context, he responded that "if I filled out the sheet that I incurred these expenses that – by filling out this sheet, I…acknowledged the expense".

19. Mr. Wood further testified at his examination that Tammy White worked as a clerk at a metal mill in the area, and that she had taken a few days off of work to help him after the accident. He also recalled that she had left work early, "now and then" to assist him if he needed help. He explained that Ms. White was on salary and would not have lost income as a result of leaving work early. He offered that she would likely have lost some wages if she took a day or two off of work. When he was asked whether anyone from Jevco had asked him whether Ms. White was employed or suffered an economic

loss as a result of providing the services in dispute, he initially responded that they had not, and then added that he could not recall.

20. Mr. Wood also explained that Mr. Willsey had used his gas lawn mower to mow the Claimant's lawn and to clear his snow. He testified that he had paid Mr. Willsey when he received his cheques from Jevco. Mr. Wood could not recall whether anyone at Jevco had asked him whether Mr. Willsey had suffered an economic loss as a result of providing the services alleged.

PARTIES' ARGUMENTS:

21. Both parties set out detailed arguments in their factums, the gist of which I will summarise below.

Jevco's submissions:

22. Counsel for Jevco submitted that an Arbitrator under the *Insurance Act* does not have the jurisdiction to determine that a second party insurer may reimburse a first party insurer who has paid benefits to a Claimant anything less than the full indemnification claimed, on the basis that the payments made were unreasonable. He cited the language in section 275 (1) and (2) of the *Act* and asserted that nothing in the words used suggests any discretion, or limits the right to indemnification to benefits paid out that were reasonable or appropriate. Counsel contended that unless fault is in issue, or the first party insurer has paid money that was not a "benefit", an Arbitrator does not have the jurisdiction to either reduce or eliminate the amount of indemnification sought.

23. Counsel acknowledged that this argument had not been addressed by arbitrators or courts before. He cited Arbitrator Campbell's statement in *Jevco Insurance v. Royal Insurance Company* (July 22. 1992) in support of his position. This arbitrator found that a second party insurer should pay interest on the benefits paid out by the first party insurer to the effect that "the insurer should be fully paid for any amounts paid by it to the injured party".

24. Alternatively, counsel for Jevco submitted that if I do have the jurisdiction to reduce the amount sought from Dominion, I may only do so if I find that Jevco's actions in paying the Attendant Care benefits and Housekeeping Expenses to Mr. Wood were either grossly negligent or amounted to the gross mismanagement of his claim. He cited two decisions by Arbitrator Malach (*Jevco Insurance v. Guardian Insurance Company of Canada* (August 28, 2000) and *Dominion of Canada v. Royal and SunAlliance Insurance* (August 20, 2001) in support of this submission, and urged me to find that Jevco's actions in this case could not be characterised in this way.

25. Counsel also cited Arbitrator Samworth's comments in her decision in *Commercial Union Assurance v. Boreal Property & Casualty* (December 21, 1998). The Arbitrator allowed that a second party insurer is entitled to question the reasonableness of payments made by a first party insurer, but that it is limited to confirming that the first party insurer did not act in bad faith, make payments that were not covered under the *Schedule* in existence at the time of loss, or "so negligently handle the claim that payments were made greatly in excess of that which the insured would have been entitled had the file been managed by a reasonable claims handler". Counsel contended that the facts of this case do not fit within any of the above examples.

26. Mr. Omeziri also asserted that in order to succeed, Dominion must show that the handling of Mr. Wood's claim by the Jevco adjuster fell below the standard of care expected of a reasonably competent claims adjuster, in the same way that the conduct of physicians, dentist or other professionals would be assessed against that of their peers if negligence was alleged. He claimed that if the Jevco adjuster had acted in accordance with the industry practice at the time, it would be unfair to characterise her actions as negligent or amounting to a gross mishandling of the claim.

27. With respect to the requirement that the Attendant Care and Housekeeping expenses paid by Jevco meet the criteria for "incurred" expenses, counsel noted that historically, FSCO arbitrators, as well as the Divisional Court in the *Belair Insurance v. McMichael* decision (at [2007] 86 O.R. (3d) 68) have determined that the term "incurred"

should be interpreted broadly. He cited various FSCO decisions prior to the change in the *SABS* definition in which arbitrators found that if an insured established a need for a service, it should be considered to have been "incurred", regardless of whether the service was actually received or paid for.

28. Counsel acknowledged that the post-September 1, 2010 *Schedule* added the requirement that the person providing the service must have sustained an economic loss as a result of providing the service. He noted, however, that the term "economic loss" is not defined in the legislation or regulations. He also noted that when the Court of Appeal was asked to define that term for purposes of the *SABS* in the case of *Henry v. Gore Mutual* (2012) 351 D.L.R. (4th) 572, it declined to do so. Counsel cited Arbitrator Wilson's finding in *Deol v. Gore Mutual* [2013] O.F.S.C.D. No. 113 that given the lack of a definition or any guidelines regarding what level of loss would qualify, "any economic loss suffered by the treatment provider, however minimal" would suffice.

29. Counsel noted that in any event, there were no decisions to provide guidance on how the new requirement of economic loss should be interpreted at the time the payments in question were made to Mr. Wood in the last half of 2011 and 2012. He asserted that when Jevco began adjusting Mr. Wood's claim, it was not clear what information or documentation should be requested of a Claimant in this regard. He contended that the adjuster had acted reasonably when she relied on the Occupational Therapist's assessment of the Claimant's needs, and then asked Mr. Wood to submit OCF-6 Expense Forms acknowledging that the benefits were incurred.

Dominion's submissions:

30. Dominion argued that Jevco paid benefits to Mr. Wood that he was not entitled to receive under the *Schedule,* and that Dominion should therefore not be required to indemnify Jevco for those amounts. He noted that as Mr. Wood's accident occurred after September 1, 2010, the revised definition of "incurred expense" in the *SABS* would apply, and that any claims for Attendant Care or Housekeeping Expenses should have been considered with those new requirements in mind. Counsel noted that the provision has

three clear requirements – namely that the insured person receive the service in dispute, have either paid or promised to pay for the service, AND that the person allegedly providing the service sustained an economic loss as a result of providing it.

31. Counsel contended that it is clear from the adjuster's notes and the letters filed, that Jevco was either unaware of the requirement that an economic loss be sustained by the person providing the service as a result of them doing so, or chose to ignore the requirement. He submitted that it was clear from the documents filed that Mr. Wood was never asked to provide any evidence of an economic loss having been incurred, and that he was simply asked to submit an OCF-6 Expense Form to "acknowledge the expense". If the amount requested was in keeping with what Mr. Horban recommended, Jevco made full payment. He argued that Jevco accordingly paid the benefits in question without regard to the clear requirement in the *SABS* that an economic loss be sustained, and that this constituted gross negligence.

32. Counsel for Dominion also referred to Arbitrator Samworth's decision in *Commercial Union v. Boreal, supra,* and the three examples of conduct that would "open the door" to an inquiry by a second party insurer of the reasonableness of payments made by a first party insurer. He submitted that Jevco's payments of Attendant Care and Housekeeping expenses to Mr. Wood fall within the second category of conduct identified of making "payments that were not covered under the *SABS* in existence at the time of loss", and therefore can be challenged.

33. Counsel referred to Mr. Wood's testimony at his Examination Under Oath, and submitted that it was clear that Ms. White did not sustain an economic loss when she left work early to assist the Claimant or when she took a few days off of work to do so. He suggested that Mr. Wood's letter of July 8, 2013, and Jevco's counsel's leading questions during his examination, were attempts to provide evidence that the expenses met the new definition of "incurred" after the arbitration proceeding was commenced, and should not be considered. He submitted that in any event, this evidence fell short of establishing that the alleged service providers sustained an economic loss, as required.

Case filed after submissions:

34. Just over one month after the parties' submissions were received, but prior to my having had the opportunity to review them, counsel for Jevco forwarded a copy of a FSCO arbitration award involving *Ms. Asokumaran and TD Home and Auto Insurance Company* (May 30, 2014). In that decision Arbitrator Alves considered whether the approximately $5,000 spent by a friend of the Applicant's to purchase a bus pass and tickets in order to travel to Ms. Asokumaran's home to provide care to her constituted an "economic loss".

35. The arbitrator found that the cost of the pass and tickets did constitute an "economic loss" within the meaning of the *Schedule*, although she was unable to determine whether these items were obtained (and the economic loss sustained) as a result of the services having been provided. She accordingly directed that that issue be canvassed at a subsequent hearing.

36. I solicited further submissions from counsel on this case and its relevance to the issue before me. Counsel for Jevco submitted that the decision was useful because it confirmed that there is no specific definition for "economic loss" and that the case law in the area is still evolving. Counsel for Dominion contended that the case was not relevant because in the instant case, Jevco had agreed to pay the benefits sought without requesting or being provided with any evidence that an economic loss had been sustained, whereas in the case filed, the amount of the loss was not disputed. He noted that the insurer's argument in that case was that an "economic loss" could only be found to have been sustained if the person providing the service suffered a loss of income or wages, rather than having spent money to purchase items.

ANALYSIS & FINDINGS:

37. To begin, I decline to accept Jevco's submission that arbitrators appointed under the *Arbitration Act* to hear Loss Transfer disputes do not have the jurisdiction to consider whether a second party insurer is liable to indemnify a first party insurer for all of the benefits it has paid out to a Claimant. In keeping with the well-established case law in the

area, I find that I can consider whether a second party insurer's resistance to making full reimbursement can be sustained in limited circumstances. I note Arbitrator Malach's comments in the case of *Jevco Insurance v. Guardian Insurance Company, supra,* at pages 4-5:

> *Section 275(1) clearly sets out that the first party insurer is entitled to indemnification from the second party insurer in relation to benefits paid under the SABS to an applicant. This section clearly determines the right to indemnification for benefits paid under the SABS. Since the right to indemnification has been granted, it would then be up to the second party insurer to prove that there should be no indemnification in a particular case. Section 275(1) by its wording, in effect, shifts the onus to the second party insurer to prove payments made were not reasonable.*

38. I agree with these statements and note that this analytical framework has been followed for close to twenty years. There cannot be an absolute right to full indemnity, as contended by Jevco, regardless of the circumstances. That said, the Loss Transfer scheme is not designed to allow a second party insurer to "second guess" all of the decisions made by a first party insurer in its adjusting of a claim. The insurer resisting full reimbursement faces a strict onus to prove that the first party insurer's actions in paying the disputed expenses amount to gross negligence or a gross mishandling of the claim.

39. As I stated in the case of *Jevco v. Gore Mutual (*February 11, 2013) –

> *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…*
>
> *(at page 15)*

I also decline to accept Jevco's argument that the adjuster's decision to pay the benefits in question should only be questioned if it fell below the standard of care expected of a reasonably competent claims adjuster following industry practice at that time. This notion – by which the alleged negligence of professionals such as physicians, dentists and engineers is assessed – has not been imported into the insurance claims adjusting context,

and in any event, no evidence was provided by the parties regarding the industry practice at that time.

40. Both parties cited Arbitrator Samworth's comments in the interim award in the case of *Commercial Union v. Boreal, supra,* as follows:

> *There is no doubt that the indemnifying insurer is entitled to look at the reasonableness of payments but …that inquiry is limited to confirming that the primary insurer did not – (1) act in bad faith, (2) make payments that were not covered under the SABS in existence at the time of loss, i.e. pay for a weekly benefit when there were no such entitlement, or (3) in general, so negligently handle the claim that payments were made greatly in excess of that which the insured would have been entitled had the file been managed by a reasonable claims handler.*
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> *(at page 6)*

This statement provides useful guidelines in applying the general term of gross negligence or mishandling to cases of this type, and I find it to be a good articulation of the limited circumstances in which a second party insurer may resist indemnification under the Loss Transfer provision of the *Act*. The question then becomes – did Jevco's actions in paying the Attendant Care and Housekeeping benefits to Mr. Wood fall within one of these categories?

41. I find that they do. I agree with Dominion's submission that these payments made were "payments that were not covered under the *SABS* in existence at the time of loss", and would therefore fall within the second of the three examples cited above.

42. The evidence strongly suggests that the Jevco adjuster did not turn her mind to the requirement that both Attendant Care and Housekeeping expenses would only be considered to be "incurred" if the person (if not a professional) allegedly providing the service sustained an economic loss. She also seemed to disregard the requirement that the amounts submitted were those that Mr. Wood had promised to pay or was legally obliged to pay, as required by section 3(7)(e) of the *Schedule*. The letters she sent to the Claimant only asked for the names and contact information of the people allegedly providing him with care. They do not ask whether he has paid or promised to pay expenses relating to

the care received, nor whether the providers would have sustained an economic loss as a result of providing the services claimed.

43. It is not disputed that Mr. Wood submitted various OCF-6 Expense Forms to Jevco, seeking payment of benefits. Many of the forms simply refer to Mr. Horban's recommendations regarding the Attendant Care and Housekeeping expenses to be provided. At no point did the Jevco adjuster respond to the Claimant and advise him of the other requirements in section 3(7)(e) of the *Schedule* regarding the criteria for claiming these expenses.

44. While I appreciate that the earlier arbitration awards addressing the definition of "incurred expenses" under the previous version of the *Schedule* may have provided a broad interpretation of that term, the language changed in September 2010, approximately ten months prior to Jevco receiving the first of Mr. Wood's request for payment of these benefits. This is not a situation where the language is vague and capable of many interpretations. The requirements in section 3(7)(e) are clear – an expense is NOT considered to be incurred unless the three criteria – namely, that the claimant has received the services to which the expense relates, that he has either paid the expense, promised to pay it or is legally obligated to do so AND that the person providing the service must have sustained an economic loss as a result of providing them – are met.

45. Mr. Wood's letter of July 8, 2013 "to whom it may concern" does not assist Jevco in this case. It is clear from Mr. Wood's evidence at the Examination Under Oath that it was written at the request of the Jevco adjuster, after she told him that "the other insurer was demanding it". If anything, it proves that the adjuster realised at that point, likely after being asked by counsel in this arbitration, that she had not requested the proof that she was required to have before paying the Attendant Care benefits sought by the Claimant. In any event, her attempt to obtain evidence after the fact was misguided, as the letter provided by Mr. Wood did not address the requirement that Ms. White or Mr. Willsey sustained an economic loss as a result of having provided the services discussed.

46. A review of Mr. Wood's evidence at his examination reveals that he was confused by the questions put to him regarding whether Ms. White or Mr. Willsey had sustained an economic loss as a result of the assistance they allegedly provided him. It seemed clear from the answers provided that he had simply not been asked by Jevco whether this was the case, and could not comprehend why this was being asked of him some years later.

47. I note that the Jevco adjuster's request that Mr. Wood write the letter he did in July 2013 was made approximately two years and ten months after the *SABS* definition of "incurred expense" had been revised. I also note that the first level court decision in *Henry v. Gore Mutual*, *supra*, was issued in June 2012, more than one year prior to that. While Mr. Omeziri is correct in stating that the court declined to define the term "economic loss", it is important to note that the judge stated –

> *'Economic loss' is not defined in the regulations…It is a threshold finding for "incurred expense" but is not intended as a means of calculating the quantum of the incurred expense. I accept that the amended provisions now eliminate claims by non professional service providers who have not sustained an economic loss.*
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> *(at page 3)*

I cannot therefore accept his argument that there were no court or arbitration decisions available at that time that considered the new criteria for an "incurred expense" and the requirement for an economic loss, from which the adjuster could seek guidance.

48. I also do not find the case of *Asokumaran and TD Home and Auto Insurance, supra,* to be of assistance. It is clear from the Arbitrator's review of the case law on the issue of what constitutes an "economic loss", that the discussion in the aftermath of the revised definition of "incurred expense" has revolved around what may constitute an economic loss, rather than whether an insurer must seek proof of it having been sustained.

49. In my view it is clear from the evidence filed that the Jevco adjuster was simply not aware of the requirement in section 3(7)(e) of the *SABS* that proof of economic loss was required before Attendant Care and Housekeeping benefits sought were paid. I find

that she paid the full amounts claimed under both of these headings in disregard of the clear language in that provision. As stated above, I find that this conduct falls within the second example of the *Commercial Union v. Boreal* exceptions and constitutes gross mismanagement of the claim.

50. Dominion is accordingly not required to indemnify Jevco for the amounts it claims for Attendant Care benefits and Housekeeping expenses. I understand that Dominion does not object to reimbursing Jevco for the other benefits paid out to Mr. Wood, and if they have not done so, should make payment promptly.

51. I remain seised of this matter in the event that the parties encounter any issues in implementing my findings above.

COSTS & ARBITRATION FEES:

52. I do not have a copy of an Arbitration Agreement in my file, and am not aware of whether one was executed by the parties.

53. In the absence of an agreement, I will assume jurisdiction to award costs provided to me pursuant to section 54 of the *Arbitration Act*. The parties experienced mixed success. While Jevco was successful in its efforts to obtain indemnity under the Loss Transfer provisions of the *Act* (Dominion accepted its obligation part way through the arbitration), the bulk of the time spent on this matter related to the dispute over whether the benefits paid by Jevco to Mr. Wood for Attendant Care and Housekeeping should be subject to reimbursement. Dominion was successful on this issue. Accordingly, I find that Dominion is entitled recover 75% of its costs from Jevco on a partial indemnity basis.

54. The Arbitration fees and disbursements will also be split in a similar fashion. I will render my account to both parties, split 75% / 25% in favour of Dominion.

55. If counsel cannot agree on the quantum of costs to be paid, I invite them to contact me and a teleconference will be convened to discuss and resolve this issue.

DATED at TORONTO, ONTARIO this __23rd____ DAY OF SEPTEMBER, 2014.

_____

Shari L. Novick
Arbitrator