IN THE MATTER OF the *Insurance Act,* R.S.O. 1990, c. I.8, as amended
AND IN THE MATTER of the *Arbitration Act*, S.O. 1991, c.17, as amended
AND IN THE MATTER of an Arbitration

BETWEEN:

ECONOMICAL MUTUAL INSURANCE COMPANY

Applicant

- and -

ECHELON GENERAL INSURANCE COMPANY

Respondent

DECISION

Appearances:

Economical Mutual Insurance Company (Applicant): Daniel Strigberger

Echelon General Insurance Company (Respondent): Jamie Pollack and Stacey Morrow

Introduction:

This matter comes before me pursuant to the *Arbitration Act*, 1991 to arbitrate a dispute between 2 insurers with respect to a priority issue pursuant to the *Insurance Act,* R.S.O. 1990, c. I.8, as amended, section 268 of the *Insurance Act* and more particularly its regulation: Regulation 283/95 as amended.

By way of background the claim arises out a motor vehicle accident that occurred on October 26, 2012. Ciro Waweru (hereinafter referred to as "the claimant") was crossing an intersection when she was struck by a vehicle insured by Economical Mutual Insurance Company (hereinafter referred to as "Economical"). The claimant applied to Economical for Statutory Accident Benefits on the grounds it was the striking vehicle. Economical paid the Statutory Accident Benefits in accordance with Regulation 283/95 but took the position initially in this

dispute that Echelon Insurance Company (hereinafter referred as to "Echelon") was the priority insurer. It is to be noted that the claimant was accepted as catastrophically impaired.

Echelon insured the claimant's mother, Margaret Waweru. Economical took the position that the claimant was principally dependent for financial support or care on her mother and that Echelon was therefore the priority insurer.

Economical gave Echelon a priority dispute notice on January 29, 2013 and thereafter initiated this arbitration against Echelon. In or around January 13 of 2016 Echelon accepted priority.

Over the course of the next year or so Economical and Echelon exchanged information with respect to what benefits had been paid by Economical on behalf of the claimant. The actual claim of Ms. Waweru was also settled. However Economical and Echelon could not reach agreement on all the accident benefits paid to Ms. Waweru. It was ultimately determined that there was a dispute with respect to payments made for attendant care and payments made for mileage as a medical and rehabilitation benefit. It is that dispute that came before me pursuant to the parties Arbitration Agreement filed just prior to the arbitration.

The arbitration itself proceeded over 3 and a half days. Witnesses were called including an expert witness on behalf of Economical: James Cameron, Michael McNeill an independent adjuster at Crawford & Company called on behalf of Echelon and Jeff Smith a claims technical advisor at Economical. Extensive document briefs were filed including the relevant portions of the Economical file relating to the benefits in dispute, OCF-6s with respect to the services provided that were in dispute as well as OCF-21s, the expert report of James Cameron dated March 6, 2017, various adjusting notes from Economical and some information with respect to the employment of Margaret Waweru as well as tax returns. Counsel also filed Factums and were given an opportunity for oral argument.

The Issue in Dispute:

Counsel agreed that the only remaining issue is one of reimbursement. I am asked to decide whether Echelon should pay Economical $65,429.43 for attendant care benefits paid to the claimant for services "incurred" by the claimant through the care provided by her mother, Margaret Waweru. The second aspect of reimbursement that I am asked to decide is whether Echelon owes Economical $8,350.98 for medical and rehabilitation benefits more particularly mileage costs paid to service providers.

As part of determining these issues I also have to determine what the standard of care is and the onus of proof in priority disputes where there is an issue with respect to reimbursement. Counsel advise and I agree that there does not yet appear to be any case that has considered these issues.

By way of summary Economical takes the position that it adjusted the claimant's file in a reasonable and appropriate manner. The monies paid to the claimant were pursuant to the *Statutory Accident Benefits Schedule*, relevant case law and practice at the time and absent any bad faith in the handling of the claim or gross negligence, once payment has proven to be made Echelon is obliged to reimburse Economical having accepted priority.

Echelon's position is that while they accept that the payments have been made they submit the payments should not have been made or there was insufficient evidence to support reimbursement. Echelon submits that there was insufficient investigation into the entitlement from an "incurred" perspective in so far as the attendant care payments were concerned. With respect to the mileage Echelon submits that it was contrary to the SABS. Echelon submits that while the payments have been proven to be made that Economical has not established that the payments should have been made. Echelon likens their position to one in a loss transfer claim and says Economical should be held to a standard of "reasonableness" with respect to its adjusting and handling of the claimant's accident benefit claim and that they have not met that standard.

Facts and Summary of Evidence:

a) Attendant Care

While there was no Agreed Statement of Facts generally the parties agreed on the facts. The disagreement is with respect to the conclusions one would draw from those facts.

There was no question that the claimant was entitled to attendant care insofar as her injuries were concerned. There is also no dispute with respect to the quantum of that attendant care. Rather the question that is raised is whether or not the attendant care provider, Margaret Waweru (the mother), sustained an economic loss that would qualify her to be paid for the attendant care provided to her daughter. It is agreed by the parties that Margaret Waweru was not a professional care provider and therefore pursuant to the *Statutory Accident Benefits Schedule* for accidents on or after September, 2010 there had to be proof of an economic loss. There did not appear to be an issue that the mother provided the attendant care services to her daughter.

The evidence before me supported that Margaret Waweru prior to this accident was employed with the Sterling Spa and Inn. She was employed there on a full time basis working as a housekeeper.

The first application for attendant care received by Economical came by way of letter dated January 22, 2013 from Ross and McBride LLP, counsel to the claimant. This letter enclosed an OCF-6 dated January 20, 3013 in which attendant care was claimed from December 23, 2012 to January 20, 2013 in the amount of $15,591.98. At this time the claimant required 24 hour care. Also accompanying that letter were documents described as "attendant care receipts". These

were in a typewritten form (all identical) setting out the attendant care services provided by the mother on a weekly basis.

The letter of January 22, 2013 also dealt with the question of economic loss. The covering letter noted that Margaret Waweru had sustained an economic loss. Attached to the letter was a Record of Employment from the Sterling Inn and Spa. This document noted that the last day for which a payment for work had been made was January 2, 2013. It further noted and I quote:

> "Requested leave of absence to be the primary caregiver to her daughter who is sick".

The document is dated January 13, 2015.

The evidence of Economical was that they accepted the Record of Employment as being sufficient proof of Mrs. Waweru's economic loss and agreed to commence payment of attendant care. This is reflected in the letter of February 15, 2013 where Economical writes to Ms. Waweru confirming that they will issue payment for attendant care as follows:

1. December 23 to December 31: $580.65 (9 days of 31 times $6,000.00 a month); and

2. January, 2013: $6,000.00.

Therefore Economical did not pay the amount requested in the OCF-6 but paid what was appropriate considering the maximum monthly limit of $6,000.00. The letter goes on to request that all further expenses be submitted on a monthly basis for payment consideration. There is no request in the letter that monthly proof also be provided with respect to proof of economic loss.

Over the course of the next few months various OCF-6s continue to be submitted and Economical continued to pay attendant care based on the economic loss established by the Record of Employment.

By letter dated July 2, 2013 Economical wrote to Ross and McBride asking them to advise in writing if Margaret Waweru had returned to her employment at the Sterling Inn and Spa. If so Economical asked when did she return and what were the hours she was working. It also requested any supporting document from her employer that may help to show the details.

Ross and McBride responded by letter dated July 16, 2013 advising that they were able to confirm that Margaret Waweru had not returned to her pre accident employment at the Sterling Inn and Spa or any other employment. They advised that she continued to be a full time attendant care giver to her daughter. Economical did not request any further evidence in support of the statement from Ross and McBride.

In September of 2013 the claimant returned to school at Waterloo and moved in with her brother. They were living on campus. Margaret Waweru continued to reside in Niagara Falls and continued to submit attendant care invoices for the care provided to her daughter.

By letter dated October 21, 2013 Economical wrote to the claimant noting that they had recently received a claim for attendant care for the time period August 25 to September 24, 2013 for $6,000.00. Economical asked for clarification with respect to those expenses noting that the claimant had returned to Waterloo but that the expenses submitted suggested that she was still living in Niagara Falls with her mother as the provider. The letter asked whether those expenses submitted were accurate. There was nothing in the letter about proof of economic loss. The documents do not disclose that any response was received to this request. There was no follow up by Economical with Ms. Waweru with respect to their October 21, 2013 request and Economical did not question similar attendant care submissions provided for the months of October and November.

By letter dated November 18, 2013 Economical wrote to Ms. Waweru enclosing a blank assessment of attendant care needs (Form 1) which they requested be completed by an OT and submitted by December 11, 2013. There were no questions asked with respect to the October, 21st letter nor were any questions asked about the issue of the mother's economic loss.

Economical received an updated assessment of attendant care needs dated December 2, 2013. The attendant care needs were reduced from $6,000.00 a month to $1,171.82 per month. Economical wrote to Ms. Waweru advising her of this change in her attendant care rate by letter dated December 12, 2013. The new rate was effective January 1, 2014. The letter noted and I quote:

> "This benefit is only payable if the expenses are incurred and there has been an economic loss. An expense is not incurred by an insured person unless:…the person who provided the goods or services 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 sustained an economic loss as a result of providing the goods and services to the insured person".

The letter went on to say that once Economical receives the above requirements they will consider all future expenses. There was no further information provided by Ms. Waweru or her mother with respect to economic loss.

Economical continued to pay the attendant care benefit based on OCF-6s and submissions received at $1,171.82 per month throughout January through to May of 2014. Then on May 20, 2014 Economical wrote to Ms. Waweru asking for a new attendant care Form 1 to determine her attendant care needs and requesting that it be submitted by June 17, 2014. At some point over the next few months Economical arranged a Section 44 assessment to determine Ms. Waweru's entitlement to attendant care. By letter dated September 30, 2014 Economical

advised Ms. Waweru that no further attendant care would be payable based on the Section 44 assessment which concluded that no further attendant care was required.

By this time Economical had received a report from Maximum Independence (Jennifer Kennedy, Occupational Therapist). This report was faxed to Economical on June 16, 2014 and confirmed that the claimant had moved to a new apartment in Waterloo and was living off campus with a roommate. However the OT confirmed that the claimant's mother was continuing "to attend her apartment often to provide care throughout the week".

After the notice of termination of September 30, 2014 Economical received another series of OCF-6s requesting further attendant care be paid. By letter dated November 20, 2014 Economical indicated no attendant care would be paid beyond October 4, 2014 and provided a final cheque for attendant care up to October 8, 2014. The letter did not make any request for proof of any economic loss.

In February of 2015 Ross and McBride notified Economical that Ms. Waweru had had a relapse. Further her mother had had a stroke. The claimant once again was requiring significant attendant care. The provider was her brother in light of her mother's inability to provide care. There is no dispute with respect to the attendant care that Economical paid to the brother and Echelon fully reimbursed Economical for attendant care paid to the brother.

The last communication that Economical had with Ms. Waweru on the issue of economic loss is the letter of April 22, 2015. This letter was written before there was clarification that the attendant care provider was the claimant's brother. The letter requests information for both mother and brother to satisfy Economical that there has been an economic loss.

The OCF-6s that were submitted lacked any detail. The OCF-6s simply stated that the attendant care was provided by the mother as per for the Form 1 and made a very brief reference to 2 or 3 activities with no breakdown. Economical did not request any breakdown.

With respect to the outstanding attendant care relating to the care provided by the mother only Echelon ultimately made a payment of $18,000.00 towards the outstanding amount designated to over the first 3 months of attendant care taking the position that the Record of Employment established an economic loss for that time period but thereafter there was insufficient proof of economic loss on the part of the mother to justify any further reimbursement.

Income tax summaries were filed at the hearing. It is noted that these are date stamped February 28, 2017 and while the date that Economical and/or its counsel requested these returns is unclear, I find as a fact that the tax returns were not requested by the adjuster for Economical during the handling of the attendant care claim.

The tax returns show that the year prior to the accident (2011) Margaret Waweru had employment income of $6,300.00. For the year 2012 she had total earnings of $15,605.00 and in the year 2013 she had earnings of $925.00. Canada Revenue Agency advised that there was no assessment information provided for the tax year 2014. For 2015 no income is reported but a tax return is filed.

The evidence of Mr. McNeil, witness for Echelon, on the issue of attendant care was that he would have accepted the Record of Employment as proof of economic loss of the mother for a period of "a few months". Thereafter he would have asked for proof of economic loss on a monthly basis.

During cross examination Mr. McNeil advised that it was his understanding that the case of *Gore & Henry* stood for the proposition that once economic loss was proved that the insured met the threshold with respect to the quantum of their attendant care but that each month proof was required of economic loss. He also gave evidence that he would have withheld benefits until he had received proof of economic loss.

Mr. McNeil also gave evidence that in his view a letter from a lawyer advising that someone has sustained an economic loss is insufficient. He gave evidence that he would want something from the employer. He would have asked that the mother contact her employer and have the employer provide a letter confirming that she had not returned to work.

Mr. McNeil also gave evidence that when the claimant returned to Waterloo that he would have made more detailed inquiries with respect to whether the mother was actually traveling from Niagara Falls to Waterloo on a weekly basis to provide attendant care to her daughter. He suggested that he probably would have ordered surveillance to confirm that.

Mr. McNeil also gave evidence with respect to the payment by Economical with respect to Echelon's reimbursement of Economical for a housekeeping expense. Housekeeping was paid in the amount of $3,066.00. Mr. McNeil was cross examined with respect to the fact that a housekeeping benefit was required to be incurred (proof of economic loss) as well as the attendant care benefit. Mr. McNeil was also cross examined on the fact that the housekeeping expenses that were paid by Echelon were paid covering a time period in 2014.

Mr. McNeil's evidence on that point was that he paid it or got an approval to pay it because it was a nominal amount and he "just wanted to take care of it".

With respect to reimbursement of attendant care is the letter of Crawford to Economical dated September 23, 2016. This letter includes the cheque for attendant care in the amount of $18,000.00. Crawford notes in that letter that with respect to attendant care they require documentation for proof of incurred with respect to the attendant care expenses. Mr. McNeil advises:

"We note that the claimant's mother took time off work to care for the claimant, however we cannot find the documentation on where this was followed up on to confirm that she continued to suffer an incurred expense".

No further payments for reimbursement of attendant care have been made.

The OCF-6s submitted by the claimant and the evidence of Jeff Smith on behalf of Economical confirmed that there was no information provided to Economical after the claimant had gone back to school in Waterloo as to the actual dates that her mother traveled back and forth from Niagara Falls to Waterloo to provide attendant care.

Jeff Smith gave evidence that there was a case management report (referred to earlier) that confirmed the mother was traveling back and forth but admitted that the OCF-6s did not provide any information about the mother's days of travel, how she travelled, whether she had bus fare or gas expenses or parking expenses in the course of that travel. Mr. Smith maintained on cross examination, however, that it is a reasonable assumption that if the mother was traveling from Niagara Falls to Waterloo and back to provide attendant care that she had to get there somehow and some type of economic loss would have been incurred through her need to travel.

Jeff Smith also gave evidence that the tax documentation provided with respect to mother was acquired from the claimants lawyer just prior to the start of this arbitration in order to generate proof to support the fact that the mother had suffered an economic loss.

Evidence was also provided through the expert report of James Cameron and his evidence given on August 15, 2017. James Cameron has been involved in the insurance industry since 1967. Since 1994 he has provided consulting services through his own company on claim related issues to both insurers and reinsurance companies. He has provided risk management consultant services to the industry. He has conducted claims analysis and related work for the Office of the Superintendent of Financial Institutions in Canada and conducted claims analysis and related work for over 60 large and small insurance companies. He has spoken at numerous programs and has a history of involvement in both bodily injury and accident benefit claims. Mr. Cameron was accepted as an expert at this hearing.

Mr. Cameron's expert report reviewed the documentation provided to him and having reviewed the file handling with respect to the issue of attendant care he concluded and I quote:

"Having reviewed the materials my opinion is that the Economical adjuster handled the attendant care…claims appropriately. The adjuster was able to balance testing and requiring proof of entitlement with the objective goal of disbursing the policy proceeds in the most effective manner to aid the rehabilitation of this catastrophically injured claimant".

Mr. Cameron's evidence and his report reflected his expert opinion that once an economic loss was proven and proof was given that the services have been provided then payment of attendant care was appropriate. I draw from Mr. Cameron's evidence that in his expert opinion at the time of this claimant's file handling that there was no obligation on the part of Economical and it would not have been reasonable to expect them to have sought proof of economic loss on a monthly basis.

Other than the fact that the 2014 tax return was never filed and any assumptions one can draw from that there was no evidence presented by either Economical or Echelon as to whether or not the claimant's mother had returned to employment prior to her stroke in 2015.

As part of the evidence before me I reviewed the log notes of the adjuster at Economical. For the time period that the claimant was submitting attendant care while she was at Waterloo each and every time a new OCF-6 was submitted the adjuster made the following notification:

> "Margaret Waweru is provider, clarification of hours, duties provided MW is still visiting and providing care to claimant while she is at school".

There was no note made with respect to the requirement of proof of economic loss.

In the adjuster's log notes prior to the move to Waterloo when an OCF-6 is received his only notation was the time period he had been invoiced for, the amount he was issuing the cheque and the note "Margaret Waweru is provider". Again there is no reference to further proof of economic loss.

The only note in the adjuster's log notes that reflected on economic loss was in February of 2013 when he noted that he received the ROE from the claimant's mother

b) Mileage

It was clarified through submissions that the claim for mileage is in the amount of $8,350.98. The evidence showed that over the course of the handling by Economical of the claimant's medical and rehabilitation expenses that various OCF-21s (auto insurance standard invoices) were submitted to Economical not only seeking payment for treatment but seeking payment for travel by the service provider incurred by them while traveling to provide the treatment. Echelon paid for all the medical and rehabilitation treatment provided but declined to pay the mileage of the service provider on the basis that mileage was not payable to service providers.

Submitted into evidence was a chart prepared by Jeff Smith setting out the amount of mileage being claimed and the corresponding OCF-21. Mr. McNeil in a letter dated October 12, 2016 directed to Economical, reviewed each and every invoice where mileage was paid and what Economical was deducting and declining to reimburse.

Economical's position with respect to mileage was set out in a letter from Mr. McNeil to Economical dated September 27, 2016 wherein he advised that the FSCO bulletin number A-14/14 confirmed that effective September 1, 2010 an auto insurer is not required to pay for a healthcare provider's mileage expenses in connection with the provider's travel.

There is no issue that the mileage expenses were submitted and paid by Economical. Mr. Smith's evidence on this point was that the bulletin came out in December of 2014. Prior to that time Economical paid mileage and subsequent to that time they did not pay mileage for service providers.

Mr. Smith further gave evidence that mileage that was paid by Economical to the claimant's service providers after the bulletin came out was because the treatment plans had been approved prior to the bulletin. Therefore Economical accepted that they had approved the treatment plan with the mileage and were therefore obliged to pay mileage for the approved treatment plan after the December, 2014 date. He also gave evidence that after December, 2014 Economical did not approve mileage on any further treatment plans.

At the opening of the arbitration in this matter Mr. Strigberger requested that James Cameron, the expert, be permitted to give evidence on the industry standard with respect to the payment of mileage based on the FSCO guideline. This was objected to by Mr. Pollack, counsel for Echelon, noting that there was no reference to the issue of mileage in Mr. Cameron's original expert report. I reviewed the expert's report and confirmed that he had not addressed the issue of mileage and I ruled that Mr. Cameron could not give evidence on that point. Therefore the expert's evidence in this matter was limited to assisting on the question of attendant care.

Law, Analysis and Findings:

Applicable Standard of Care

Generally issues in private arbitrations revolve around which insurer ranks in priority for the payment of Statutory Accident Benefits in accordance with Section 268 of the *Insurance Act*. In this case while that started out to be the first issue after approximately 3 years Echelon accepted priority. Somewhat unusually for a priority case the issue now is only one of reimbursement.

Both counsel agreed that there was no case law as to what was the applicable standard of care in determining whether the insurer initially paying the Statutory Accident Benefits in accordance with their obligations under Regulation 283/95 had done so in a manner that justified reimbursement. In other words was there any evidence that the file was handled by that initial insurer in such a poor manner that the insurer ultimately accepting priority could argue that reimbursement was not warranted.

This is something that is seen frequently in private arbitrations relating to loss transfer pursuant to Section 275 of the *Insurance Act*. That case law however generally flows from the OIC bulletin number 11/94 issued by the Superintendent of Insurance setting out some procedures with respect to loss transfer. That bulletin provided:

> "The second party insurer is not entitled to dispute the accident benefit claim made by the first party insurer to its insurer. The second party insurer is entitled to dispute the reasonableness of the payment and that it should not have to reimburse the first party insurer for that payment. The first party insurer is expected to act reasonably in administering an accident benefits claim where benefit payments will be substantially reimbursed by a second party insurer through loss transfer".

In loss transfer many Arbitrators have analyzed and commented on this bulletin. While the bulletin did not carry the force of law it has always been given substantial weight by Arbitrators over time.

The question that I have to resolve is whether the law that has followed from this bulletin and developed with respect to reimbursement in loss transfer relating to the standard of care can be applied to and used in an analysis of reimbursement and the standard of care relating to priority disputes. It is to be noted that the Superintendent of Insurance has not issued a bulletin with respect to priority and the various insurers' obligations as it did in loss transfer. A careful review of Regulation 283/95 shows that it provides no guidance whatsoever on this issue.

Although counsel for Economical made some submissions that the law of unjust enrichment would be helpful in the analysis of the standard of care he also acknowledged that Economical did not disagree with applying the law that has developed around loss transfer to a priority dispute. Echelon on the other hand did not agree with the unjust enrichment theory noting that on any argument the only person unjustly enriched was the insured, but also agreed that I should consider the law surrounding loss transfer reimbursement in making my analysis with respect to the appropriate standard of care.

Having carefully reviewed Economical's Factum and the law relating to unjust enrichment I conclude that I did not find it to be helpful with respect to the standard of care relating to a reimbursement priority dispute. On the other hand the similarity between the loss transfer reimbursement issues and the priority reimbursement issues could not be ignored. While the loss transfer bulletin from the Superintendent clearly does not apply to priority I find that the law that has developed in loss transfer relating to the appropriate standard of care to be examined in reimbursement arguments is applicable to the priority scheme. I find that the priority scheme at least with respect to reimbursement subsequent to a changeover of insurers is akin to and very similar to what happens in the loss transfer case. I find that the obligations of the first insurer handling the priority dispute with knowledge that it may be seeking and ultimately receive reimbursement from a second insurer is very similar if not almost identical to

that of the insurers in the loss transfer case. Perhaps the only difference is that in priority it is expected that there would be a 100% reimbursement while in loss transfer there are arguments with respect to the fault chart which may mean the full amount of payments made by the first insurer are not recoverable.

What then is the standard of care in the loss transfer cases and how does it apply to the situation between Economical and Echelon.

In a decision I rendered in December of 1998 (*Commercial Union Insurance Company of Canada v The Boreal Property & Casualty Company*) I was asked to make an interim decision with respect to productions between the parties. However in the course of rendering that decision I had to look at first principles relating to loss transfer and to what extent the second insurer had the right to seek reimbursement and under what circumstances. I concluded that the indemnifying insurer was entitled to look at the "reasonableness of the payments made" but that that inquiry was limited to confirming that the primary insurer did not:

> "1. Act in bad faith;
>
> 2. Make payments that were not covered under the *Statutory Accident Benefits Schedule* in existence at the time of the loss, ie. pay for a weekly benefit where there no such entitlement; or
>
> 3. In general so negligently handled 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."

I find that those principles that I set out with respect to the "reasonableness of the payments" apply to reimbursement in a priority dispute.

My analysis in the *Boreal* case was followed and has been expanded in a number of decisions which I highlight below and find are applicable to the facts before me and in particular to an analysis of the reasonableness of payments in a disputed reimbursement claim as between insurers in a priority dispute.

The first case is *Progressive Casualty Insurance Company v Markel Insurance Company of Canada* (decision of Arbitrator Malach) 1997 CarswellOnt 7555. This decision predated mine. Arbitrator Malach in analyzing the claim for indemnification in loss transfer noted that these cases often involve "hindsight". He commented that it is always easy to second guess an insurer who had the responsibility of making the on the spot decision. He noted that one must assume that the primary insurer will process the claims in good faith. He concluded and I quote:

"Unless it is established the primary insurer acted in bad faith or grossly mishandled the process of claims for benefit under the SABS, the insurer responsible to indemnify the primary insurer must indemnify the primary insurer for benefits paid to the insured person."

More recently there is the decision of Arbitrator Lee Samis in the case of *Royal & SunAlliance v Wawanesa Mutual Insurance Company* (decision dated April 17, 2012). This was once again a loss transfer case and there was a dispute primarily with respect to documentary production.

Arbitrator Samis noted that claims handling decisions in cases such as this must be looked at realistically. He noted (page 7):

"Perfection is unrealistic. Well informed claims experts will often disagree about claims decisions. The existence of such disagreements surprises no one and is far from sufficient to negate an insurer's statutory right to reimbursement.

At the other end of the spectrum, claims handling that is so deficient from any standard of due diligence, showing an indifference or disregard of ordinary prudent claims handling procures should not be sanctioned by blindly ordering full reimbursement at the expense of the responding insurer. That insurer has had no opportunity for input in the claims handling decisions.

Furthermore a rule that calls for full reimbursement regardless of the reasonableness of claims handling would foster inappropriate claims and would take the necessary balance and counterbalance of the claims process out of play".

I agree with Arbitrator Samis and it is my view that a similar analysis should be applied to reimbursement in a priority dispute.

On this issue there is also the decision in the case of *Jevco Insurance Company v Gore Mutual Insurance Company* (decision Arbitrator Shari Novick February 11, 2013) and on appeal Justice Stewart 2014 ONSC 3741 (CanLii). In this case Arbitrator Novick was asked to rule on whether payments made by Jevco primarily with respect to a settlement of an accident benefit claim for which loss transfer applied could be the subject matter of the reimbursement in circumstances where Gore alleged that the adjuster at Jevco had failed to act reasonably in a number of regards. It was alleged that Jevco had failed to suspend benefits when the insurer did not comply with statutory requirements, failed to conduct Section 44 assessments with respect to the income replacement benefits and failed to follow up on recommendations that the insured undergo retraining and have a vocational specialist assigned to assist in a return to work. Arbitrator Novick ultimately found that Jevco had acted unreasonably and therefore no reimbursement was required with respect to some of the income replacement benefits.

Arbitrator Novick's decision was appealed to Justice Stewart who upheld the Arbitrator's decision. Justice Stewart noted that where a reimbursement is sought under loss transfer from a second party insurer and that second party insurer claims that the payments made were unreasonable that the onus is on the second party insurer to prove that that is so. Justice Stewart notes 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. Again I find that both the onus of proof and what the party declining to pay reimbursement must prove as set out by Justice Stewart is applicable to a priority dispute reimbursement claim.

Therefore in making a decision as to whether or not either the attendant care or the mileage in this case is to be reimbursed by Echelon to Economical I have looked at the manner in which Economical handled the payment of those benefits to determine whether the Economical adjuster acted in bad faith or grossly mishandled the claim such that the amounts paid out that Economical is seeking to recover are grossly unreasonable. I also find the initial burden of proof is on the first insurer to establish the payments were made but then the onus shifts to the new priority insurer to prove on a balance of probabilities that there should be no reimbursement as the claim as been grossly mishandled.

a) Attendant Care

While I find that the handling by Economical of the attendant care payments with respect to the question of economic loss/incurred is poor I did not have any evidence before me that the decision to pay attendant care and the manner in which that decision was made with the available evidence as to economic loss was done in bad faith.

The question is whether the manner in which the adjuster at Economical handled the payment of attendant care at approximately the 6 month mark is such that it is a gross mishandling of the claim or that it results in the amounts being paid out to be grossly unreasonable. Echelon argues that the following aspects of the file handling are such that I should make that finding:

1. After the receipt of the initial ROE Economical did not seek any independent information from the employer to confirm at any time thereafter that the claimant's mother continued to be off work and sustain an economic loss;

2. That Economical should not have accepted the lawyer's letter in October of 2013 as being sufficient evidence that the mother continued to sustain an economic loss;

3. Even if it was reasonable to accept the lawyer's letter without any other independent evidence of there being economic loss Economical should at some point subsequent to October of 2013 and before its termination of attendant care almost a year later have made some further inquiries as to whether there was a continuing economic loss. Echelon suggested through its evidence that that should have been done monthly.

4. Economical failed to make reasonable inquiries of the claimant and/or her mother to confirm attendant care continued to be provided by the mother once the claimant moved from Niagara Falls to Waterloo. A bald statement that the mother was continuing to provide the care was insufficient and Economical should have sought dates and times that the mother attended in Waterloo, how long she stayed there, how she got there, what care she provided when she was there and/or Economical should have had some level of surveillance to confirm the attendant care was being provided.

While I have some sympathy for Echelon's position and I certainly agree that there could have been more due diligence on the part of Economical in following up on the issue of economic loss I do not think that Economical's file handling reached the point that I would describe it as a gross mishandling or grossly unreasonable.

Economical had solid proof through a record of employment from the mother's employer that she had taken a leave of absence to look after her daughter. The claimant's injuries were significant. She was catastrophically impaired. Further I find that it was reasonable for Economical to rely on the claimant's lawyer's letter confirming that the mother remained off work. After all this is a system of insurance coverage that is premised on good faith. There was nothing in the file to raise any "red flags" that would lead one to believe that the lawyer would not provide accurate information. Certainly more could have been done to verify the attendant care being provided by the mother once the claimant moved to Waterloo. I'm not sure that surveillance would have been warranted but more information about the dates and times that the mother was driving from Niagara Falls to Waterloo would have been warranted. There was independent verification of this through the occupational therapist report. However I would have expected that more information could have and should have been sought. I also agree with Echelon that Economical should have at least at some point in 2014 before it terminated benefits asked for further proof that the mother had not returned to work. However based on all the evidence before me I cannot conclude that the failure to do so was a gross mishandling of the claim such that the amounts that were being sought to be recovered were grossly unreasonable. There was no information or evidence before me that the mother had in fact returned to work. I could not see any evidence in this material before me to suggest that the adjuster should have been suspicious that the mother might have returned to work. It was certainly not uncommon for insurers during this time to "autopay" attendant care once there was the initial proof of economic loss.

Therefore I find that while Economical's handling of this file was less than stellar it does not meet the standard of care of gross mishandling that in my view is required to deny reimbursement to Economical.

If I am wrong on this point I also find that even if the handling of the attendant care relating to the mother's services was grossly mishandled that I still would order reimbursement. It is my view that if gross mishandling were proven (and I do find the onus to prove that is on Echelon)

that Echelon would also have to prove that if the file had been handled in a reasonable manner that the payments made would not otherwise have been made. In other words in this case if Economical's adjuster had made inquiries in 2014 as to whether or not the claimant's mother had returned to work that the result of those inquiries would have been that she had and was therefore no longer sustaining an economic loss and therefore the payments would not have been made. There is no such evidence before me.

Neither party lea any evidence as to whether or not the claimant's mother at any time subsequent to the submission of her ROE and before her stroke in 2015 returned to work. In her examination under oath on the issue of dependency she was never asked that question. I was asked to draw some conclusions from the tax returns that were filed. Economical asked me to conclude that no tax return was filed in 2014 because there was no income to report. The only evidence before me with respect to whether or not the mother returned to work is the lack of a tax return. I do note that Ms. Waweru filed tax returns in the years prior to the accident (2011, 2012 and 2013) and filed a tax return in 2015 which showed no earnings other than social services. It is not completely unreasonable to draw a conclusion based on the history of filing tax returns that the claimant's mother did not file a return in 2014 because she had no income to report. However I do not have to draw that conclusion in order to reach a decision that there is simply no evidence before me that had the file been handled differently by Economical that the payments being complained of by Echelon would not have been made. There is no evidence that irrespective of how the file was handled that those payments were wrong. This is a quite different case from those where an income replacement is paid where there's no entitlement or a wrong amount of income replacement benefit is paid because there's not been a proper investigation into the quantum. I therefore conclude that even if the Economical adjuster had grossly mishandled the claim that there would still be an order for reimbursement as there was no evidence that there would have been any difference with respect to the payments made for attendant care if the file had been handled differently.

I am supported in this approach by the decision of Arbitrator Bialkowski in the case of *Jevco Insurance Company v Royal & SunAlliance* (Bialkowski) 2012 CarswellOnt 11342. This was again a loss transfer case. The question was whether payments made by Jevco to the insured should be reimbursed on the grounds that Jevco's handling of the file was grossly mishandled especially with respect to the investigation into whether collateral benefits were available.

Arbitrator Bialkowski found there had been a serious mismanagement of the claim from the outset. In a number of areas he found that the file had been mishandled including the failure to conduct an examination under oath, to take reasonable steps to determine the availability of collateral benefits and the amount and the failure to suspend benefits when it was available to do so. The Arbitrator felt that Royal & SunAlliance had every right to be critical of Jevco's handling of the claim and that Royal & SunAlliance had every right to withhold payment of some indemnity requests until they were satisfied that the collateral benefits noted on the Application for Accident Benefits were not available to the claimant to offset the benefits paid. These benefits included short term disability, long term disability as well as CPP. Arbitrator

Bialkowski found that he had no hesitation on the facts in finding that there was a gross mismanagement or gross negligence on the part of Jevco in handling the claim. However he was not in a position to make a decision as to whether or not there should be reimbursement. Arbitrator Bialkowski noted that there was no evidence before him as to whether there was or was not any collateral benefits available that should have been deducted. Therefore he could not conclude that the conduct of Jevco resulted in a payment to the claimant that ought not to have been made. I find myself in a similar position and I agree with Arbitrator Bialkowski's approach.

I see an analysis in a priority dispute as to whether reimbursement should be made as a 3 stage process.

The first step is that the insurer who handled the claim must prove that the accident benefits were paid for which reimbursement is sought.

Once that first party insurer has met that onus of proof the onus then switches to the party resisting reimbursement to prove that the adjusting of the file meets the test of bad faith or gross mishandling in the processing of the claim.

The third and final step is that once gross mishandling and/or bad faith has been proven the party resisting reimbursement must prove that had the file been handled properly that the payments would then not have been made.

Justice Stewart in the *Jevco v Gore* case (supra) followed such a process. While in that case there was perhaps more speculation as to whether the income replacement benefit would be paid or not Justice Stewart was satisfied that there was sufficient evidence before Arbitrator Novick for her to conclude that had the file been properly handled that the IRB would not have been paid up to the amount it was or for the time period covered.

Therefore I find that with respect to attendant care Economical is entitled to be reimbursed by Echelon in the amount of $65,429.43.

b) Mileage

I apply the same principles with respect to my analysis of the reimbursement of mileage as I did with respect to attendant care. I find that Economical's adjusting of the claim for mileage was not grossly mishandled and did not result in a grossly unreasonable payment being made.

The position of Echelon in this regard is that Economical should not have paid mileage to treatment providers as the law did not require those payments to be made.

The evidence of Economical and the position of Economical was that as soon as the clarifying bulletin was released by FSCO relating to mileage to service providers on December 1, 2014

that Economical no longer approved mileage on new treatment plans submitted after that date. Economical argued that that was a reasonable adjustment of the file and consistent with adjusting practices at the time. A review of the evidence indicates the amounts being claimed in mileage to service providers by Economical relate to treatment plans approved prior to the release of the bulletin in December of 2014. Payments made after that date are with respect to treatment plans approved prior to that date. I find that that is a reasonable adjustment of this claim relating to mileage and does not approach in any way the test of gross mishandling or bad faith. In fact I find that Economical's handling of the mileage claim was reasonable at the time and I have no criticism of what was done based on the evidence before me.

Therefore I find Economical is to be reimbursed by Echelon for the mileage in the amount of $8,350.98.

Order:

I order that Echelon Insurance Company reimburse Economical Mutual Insurance Company with respect to the attendant care payments in the amount of $65,429.43 together with interest to be agreed upon by the parties and mileage in the amount of $8,350.98 together with appropriate interest to be agreed upon by the parties.

If the parties cannot agree on interest I can be spoken to and a further prehearing can be arranged.

Costs:

The Arbitration Agreement provides that legal costs shall be determined by the Arbitrator taking into account the success of the parties, any offers to settle, the conduct of the proceedings and the principles generally applied in courts in Ontario.

While there was certainly some evidence to support Echelon's position that Economical's handling of the attendant care claim was questionable, ultimately they were unsuccessful in that position. I have ordered full reimbursement to Economical and I therefore find that Echelon is responsible for the legal costs of Economical relating to this arbitration on a partial indemnity scale and responsible for the arbitration costs and I so order.

DATED THIS 7th day of December, 2017 at Toronto.

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Arbitrator Philippa G. Samworth
DUTTON BROCK LLP