IN THE MATTER OF The *Insurance Act*, R.S.O. 1990, c. 1.8, 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:

JEVCO INSURANCE COMPANY

Applicant

and

PAFCO INSURANCE COMPANY and COOPERATORS GENERAL INSURANCE COMPANY

Respondents

COSTS DECISION

Heard:December 9, 2014

Counsel:

Victor Bulger for theApplicant, Jevco Insurance Company

Tricia McAvoy for the Respondent, Pafco Insurance Company

Bruce Keay, for the Respondent, Cooperators General Insurance Company

SCOTT W. DENSEM: ARBITRATOR

Introduction

My Award in this arbitration was issued August 7, 2014. I held that Jevco was entitled to recover loss transfer indemnification from Pafco, and Cooperators in the amount of **$642,845.90**. I further held that Pafco and Cooperators were responsible to indemnify Jevco in equal shares of **$321,422.95** each. I also found that Jevco was entitled to interest on the loss transfer indemnification amount, to be worked out by the parties, or me, if necessary.

In my Award, I invited the parties to make written and/or oral submissions regarding costs before I dealt with the costs issue. Written submissions were submitted by Jevco including a Costs Outline and supporting dockets. Jevco, as well as Pafco, and Cooperators made oral submissions on the costs issue to me on December 9, 2014.

Jevco is seeking fees in the amount of $22,925.00, HST on fees of $2,980.25, and disbursements in the amount of $13,703.84, for a total costs claim of $39,609.09. Jevco provided an itemized breakdown of the time spent in dealing with the arbitration, and counsel provided dockets detailing the time spent and activities conducted.

Pafco's counsel indicated in her submissions that Pafco was not disputing the quantum of Jevco's claim for costs insofar as the amount of time spent on the matter, and the disbursements are concerned.

Counsel for Cooperators did make a couple of general comments respecting quantum. He submitted that Jevco's claim for loss transfer indemnity exceeded $700,000.00 just days before the arbitration hearing. At the hearing Jevco reduced its

demand to approximately $666,000.00. As a result of my Award, a further reduction of approximately $23,000.00 was made. Therefore, Jevco's recovery approached $100,000.00 less than the case presented shortly before the arbitration.

Cooperator's counsel also submitted that Jevco could have taken a lesser role in the proceedings since the thrust of the dispute was how loss transfer indemnity ought to be apportioned between Pafco and the Cooperators.

Cooperator's counsel did not however, raise any serious concerns with respect to the amount set out in Jevco's Costs Outline.

I have reviewed the Costs Outline submitted by Jevco, specifically the summary of the work done by Jevco's counsel, Victor Bulger, and the supporting dockets for the work.

Although I have not parsed the documents, I will say in general terms that the amounts being claimed for partial indemnity rates, and the time spent in the matter do not appear to me to be excessive. If anything, I would say they appear very reasonable for the amount of money at stake in this proceeding, and the nature of the issues involved.

Mr. Bulger was called to the bar in 1985. He is a very experienced, senior member of the insurance bar. In my opinion a partial indemnity rate of $200.00 per hour for the work he did is exceedingly reasonable.

Neither Pafco nor the Cooperators seriously challenged the quantum of the claim for partial indemnity fees and disbursements as presented by Jevco, and I think both

were reasonable in more or less accepting the quantum of the claim as being fairly presented.

For the purpose of fixing costs, I am prepared to accept the quantum of the claim as presented by Jevco in its Costs Outline totalling $39,609.09 ($25,905.24 inclusive of HST for fees, and $13,703.84 for disbursements) as the starting point for applying the relevant considerations respecting entitlement to costs.

My authority to award costs of arbitration drives from three sources. The statutory sources include the *Arbitration Act, 1991* and subsection 9 of Regulation 283/95. The *Arbitration Act*, *1991*, contemplates that the arbitrator has discretion with respect to awarding costs because it says, "*An arbitral tribunal **may**award the costs of an arbitration.*[1]

This discretionary authority is analogous to the court's authority to award costs granted by section 131 of the *Courts of Justice Act*. Section 131 (1) provides as follows:

> 131. (1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

Section 54 (2) of the*Arbitration Act, 1991* provides that the costs an arbitrator may award consists of the parties'legal expenses, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration.

Subsection 9 of Regulation 283/95 provides as follows:

[1] Section 54 (1). Arbitrator's emphasis.

> 9 (1) Unless otherwise ordered by the arbitrator or agreed to by all parties before the commencement of the arbitration, the costs of the arbitration for all parties, including the cost of the arbitrator, shall be paid by the unsuccessful parties to the arbitration.
>
> (2) The costs referred to in subsection (1) shall be assessed in accordance with section 56 of the *Arbitration Act, 1991*.

Essentially section 56 of the *Arbitration Act, 1991*provides in certain circumstances for the assessment of arbitration costs by an assessment officer in the same manner as costs under the rules of court.

The Arbitration Agreement entered into by the parties dated January 11, 2011 provides as follows:

> ARBITATOR'S ACCOUNT
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> 9. The parties agree that the unsuccessful party or parties shall be responsible for the account of the arbitrator, as ordered by the arbitrator and subject to the discretion of the arbitrator.
>
> 10…
>
> LEGAL COSTS
>
> 11. The parties agree that the unsuccessful party or parties shall pay to the successful party or parties the costs of this arbitration, or a percentage thereof, as awarded by the arbitrator, with the quantum of such costs to be fixed by the arbitrator under the (*Arbitration Act*) and subject to the discretion of the arbitrator.

There is no provision in the legislation governing arbitrations that explicitly states that an arbitrator fixing costs should consider the same factors that an assessment officer or a judge considers in assessing costs, including the factors in Rule 57.01. In fact, apart from the provisions I have cited, there is no provision in the legislation

governing arbitrations that gives any specific direction as to how an arbitrator should fix costs.

In my view however, it would be inconsistent with the legislative provisions, and with the case law, for an arbitrator to fix costs in a manner different from what is required by the Rules of Court.

In reviewing arbitrator's costs awards, the courts have most certainly approached the matter by applying the provisions of the *Courts of Justice Act,* section 131 (1), and the factors set out in Rule 57.01 (1) of the Rules of Civil Procedure.[2]

Therefore, as submitted by Jevco in its written submissions, I agree that in determining Jevco's entitlement to costs I should have regard to the factors set out in Rule 57.01 (1) of the Rules of Civil Procedure. There is really no disagreement amongst the parties in this case as to the principles to be applied in the exercise of my discretion with respect to costs.

The main issue which requires my involvement in respect of the costs matter is whether Jevco's entitlement to costs should be reduced because of Jevco's handling of the claimant's SABS claim – specifically its handling of the claimant's application for catastrophic impairment.

The factors to be considered for this issue are 57.01 (1) (e) – "*the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding*," and 57.01 (1) (0.b) – "*the amount of costs than an unsuccessful party*

[2] See *Security National Insurance Company v. Wawanesa Mutual Insurance Company* [2014], O.J. No. 609, ONSC, Morgan J. ("*Security v. Wawanesa*").

could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed."

Both Pafco and the Cooperators take the position that Jevco should not be entitled to recover the full amount of partial indemnity costs claimed because Jevco's improper handling of the catastrophic impairment issue in respect of the SABS claimant's claim is in a significant way responsible for this matter ending up in arbitration involving three insurers.

I addressed this issue in my Award in dealing with the substantive question of whether Jevco's entitlement to loss transfer indemnification should be reduced on the basis that it failed to meet the proper standard of care for an insurer seeking loss transfer indemnity. In brief, the law is that such a loss transfer insurer must not act in bad faith or grossly mishandle the adjustment of the SABS claim to the point where benefits well in excess of what is appropriate are paid, in order to be entitled to full indemnity from another insurer on the basis of loss transfer.

I held that on the evidence I was not satisfied Jevco had breached this high standard so as to be disentitled to some measure of loss transfer indemnity. My conclusion on this issue was influenced by the fact that while Jevco's claims handling may have contributed to causing a costly proceeding, there was no irreversible prejudice suffered by either insurer. Both Pafco and The Cooperators accepted that Jevco's decision to pay catastrophic level benefits to the claimant was justifiable. The only question was:How should the ultimate responsibility for payment of those benefits be apportioned between Pafco and the Cooperators?

I did find however that Jevco's failure to ask its multi-disciplinary medical team whether the claimant had suffered a catastrophic impairment as a result of either or both of the accidents was "…*a very poor decision, and is in large measure responsible for the dispute over the apportionment of benefits which has required arbitration to resolve.*"[3]

Jevco, apparently in reliance upon Dr. Richard Guscott's medical-legal report submitted on behalf of the claimant in support of the claimant's catastrophic impairment application, requested an opinion from its multi-disciplinary medical team as to whether the claimant was catastrophically impaired only in reference to the August 27, 2006 accident. Jevco did not include any reference to the July 7, 2006 accident in its assessment request.

I concluded in my Award that this decision was deficient to the point of being negligent.[4] Jevco knew or ought to have known from the extensive investigation and medical documentation in its possession throughout the life of the claim that, as I outlined in my Award, there was ample evidence indicating that both the July 7, 2006 and August 27, 2006 accidents contributed to the claimant's condition, however that condition was ultimately categorized.

In making this comment, I am not suggesting that Jevco's error was failing to come to the correct conclusion on ultimate responsibility between the accidents.The error was in providing instructions to its medical team deficient to the point that the

[3] Arbitration Award, page 112.
[4] Arbitration Award, page 109

assessors were effectively foreclosed from opining on any other basis than whether the August 27, 2006 accident caused the claimant to be catastrophically impaired.

As an insurer who knewthat it would be seeking loss transfer indemnity from the two insurers involved for the respective accidents, Jevco had a duty to those insurers to be even-handed in placing before its catastrophic impairment examiners any reasonable possibility supported by the available evidence in respect of whether the claimant was catastrophically impaired, and leaving the conclusion to the medical experts as to whether only one or the other or both of the accidents was responsible.

As I concluded in my Award:

> Jevco knew that there were two, second party loss transfer insurers involved from whom it was seeking indemnification. In fairness to both insurers, Jevco ought to have made it clear in its retainer letter that Benchmark should consider both accidents in determining whether Mr. Stewart was catastrophically impaired. By citing only the August 27, 2006 accident in its referral letter, Jevco negligently influenced the outcome of the assessment and thus impaired Pafco's position as a second party, loss transfer insurer.[5]

The difficult question is, what impact did Jevco's handling of the catastrophic impairment application have with respect to the need for, and the conduct of this arbitration proceeding?

Counsel for Pafco and Cooperators submit that under the circumstances neither of them could be criticized for the fact that this matter had to be arbitrated. Pafco submits that based on my Award, the position it has taken from the outset of the

[5] Arbitration Award, page 109.

arbitration has been vindicated. Pafco accepted that the claimant was catastrophic and that Jevco had properly paid catastrophic level benefits to the claimant. Pafco was also prepared to reimburse Jevco for a portion of SABS paid to the claimant, but declined to pay more SABS when it appeared that Jevco was targeting Pafco for the reimbursement of catastrophic impairment level benefits. Pafco's only dispute was that it did not feel that only the accident involving its insured was responsible for the claimant's condition. Pafco asserted that the accident involving the Cooperators insured was at least equally responsible.

Cooperators makes a similar argument. Counsel for Cooperators submits that it was Jevco who placed the three insurers on a "collision course" by failing to do the requisite critical analysis of the evidence at the time Jevco was referring the matter to its medical team for the catastrophic assessment. Cooperators submits that it cannot be blamed for its reliance on the conclusion of Jevco's catastrophic impairment assessment because Jevco has subsequently – in this proceeding – been found to have improperly handled the catastrophic impairment application. Cooperators submits that the catastrophic impairment assessment commissioned by Jevco gave it a legitimate basis to dispute the fact that it had a responsibility to indemnify Jevco for catastrophic impairment level benefits paid to the claimant. Like Pafco, all along Cooperators was prepared to indemnify Jevco for a certain amount of SABS paid to the claimant that it felt was fairly attributable to its accident. Like Pafco, Cooperators did not dispute Jevco's payment of catastrophic impairment level benefits. Based on the medical evidence available at the time, and the position taken by Jevco in seeking payment of

catastrophic impairment level benefits from only Pafco, Cooperators submits that it was more than justified in arbitrating the matter to a conclusion.

For these reasons, Pafco and Cooperators submit that Jevco's costs entitlement should be significantly reduced, if not entirely disallowed.

Jevco submits that it is the successful party in the arbitration in the sense that it recovered over 95% of the amount that it sought in loss transfer indemnification. Since neither Pafco nor Cooperators were willing to indemnify Jevco, Jevco had no alternative but to arbitrate the matter, and it did so with substantial success.

Jevco's counsel, I think quite properly and reasonably, concedes that Jevco's handling of the catastrophic impairment application issue could have been better. Jevco also submits however, that it is speculative to conclude that had there been a different outcome from the catastrophic impairment application – such as a finding that the claimant was catastrophically impaired from both accidents, that Pafco and Cooperators would have accepted this result and agreed to indemnify Jevco on a 50/50 basis to the extent of Jevco's recovery in arbitration. Jevco submits that there is simply no way of knowing whether that would have been the case.

Jevco submits that it had no option but to proceed to arbitration. Very early on both Pafco and Cooperators stopped making payments in response to Jevco's Loss Transfer Indemnity Requests. At that time neither Pafco nor Cooperators were conceding that Jevco was entitled to be indemnified for catastrophic level SABS paid, and in any event, even when it appeared Pafco and Cooperators were not disputing Jevco's entitlement to be indemnified for the catastrophic level of benefits paid, they

could not agree as between them who should do the indemnifying. From the standpoint of the arbitration proceeding itself, Jevco maintains that it has always been its position that it did not matter which of Pafco or Cooperators reimbursed Jevco, and that the main focus of the dispute was always the issue of apportionment.

For these reasons Jevco submits that there should be no reduction to its costs entitlement. If there is a reduction, it should be minimal.

I am of the view that Jevco's very poor, even negligent handling of the catastrophic impairment application is not a sufficient reason to entirely disentitle Jevco to recover costs. Jevco's failure to leave open for consideration by its medical team the July 7, 2006 accident as being a material contributor to the claimant's catastrophic impairment did result in what I would term and incomplete opinion from that medical team. As I concluded in my Award, the relevant opinions from the catastrophic impairment assessment, particularly those of Dr. Kurzman and Dr. Marotta, appear to me to be broadly enough written that had the catastrophic impairment assessors been formally instructed to consider the impact of the July 7, 2006 accident as well as the August 27, 2006 accident, the conclusion of the assessors would have been that both the accidents materially contributed to the claimant's catastrophic impairment.

Had this been the conclusion of Jevco's catastrophic assessment however, I agree with Jevco's counsel that it is somewhat speculative to conclude that Pafco and Cooperators would have accepted that finding and agreed to provide virtually complete loss transfer indemnity to Jevco on a 50/50 basis, obviating the need for arbitration.

One cannot simply ignore however, the impact of Jevco's failure to put the issue before the catastrophic impairment examiners in such a way that all reasonable options were open to them in providing their conclusions. In my opinion, it is not too speculative to conclude that had the catastrophic impairment assessors been properly instructed, and their conclusion was that both accidents materially contributed to the claimant's catastrophic impairment, the chances that the apportionment issue could have been resolved without arbitrating the matter through to an Award would have been significantly increased.

It is also conceivable that an opinion from the catastrophic impairment assessors that both accidents materially contributed to the claimant's catastrophic impairment may have influenced Pafco and Cooperators to fund Jevco's indemnification on a 50/50 basis so as to remove the need for Jevco's involvement in arbitration, even if they still wanted to arbitrate the apportionment issue between themselves.

There are some facts which militate against this possibility, such as the dispute raised with Jevco over the amount of attendant care benefits paid, which was arbitrated, and did result in a reduction of Jevco's loss transfer indemnity claim. This was however, a relatively minor amount compared to the total amount in dispute, and it was more likely resolvable without involving Jevco in an apportionment arbitration.

Proceeding in this manner could have removed one set of insurers costs from arbitration, even if not entirely, perhaps in a significant way. This would have reduced overall the amount of costs that an unsuccessful party or parties would have to deal with from the standpoint of not just what was owed others, but their own costs as well.

I will say however, that Pafco and Cooperators were not precluded from taking this approach in the absence of a finding from the catastrophic assessors that both accidents materially contributed to the claimant's catastrophic impairment. The lack of such a finding simply meant that there was less incentive for Pafco and Cooperatorsto try to work out a funding agreement to avoid having Jevco involved in arbitration on the apportionment issue. Viewed in this way, I do not think it would be appropriate to say that it was only Jevco's mishandling of the catastrophic impairment assessment which made arbitration to a conclusion involving all three insurers inevitable.

It is important to take note of the fact that the Ontario Superior Court and the Court of Appeal have recently emphasized factor 57.01 (1) (0.b) in fixing costs of a proceeding.

In *Security v. Wawanesa*, Morgan J. Stated the following:

> The fixing of costs is a discretionary exercise under section 131 (1) of the Courts of Justice Act, RSO 1990, c. 43. In considering this discretion, I am guided by the factor set out in rule 57. 01 (1) of the Rules Of Civil Procedure. These include, *inter alia,* "the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed.

In Ontario v. Rothmans Inc.[6] the Court of Appeal stated the following:

> …hourly rates and the notion of indemnification, while clearly important are not the only relevant considerations...the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant (emphasis added by the Court).

[6] [2013] O.J. No. 2367 (C.A.) ("*Ontario* v. *Rothmans")*

In my view Jevco's improper handling of the catastrophic impairment application significantly contributed to this matter having to be arbitrated to a decision. Considering factor 57.01 (1) (0.b), this should have a significant impact on Jevco's entitlement to costs, and in fixing an amount that is fair and reasonable for Pafco and Cooperators to pay as "unsuccessful" parties *vis a vis* Jevco.

It was Jevco's improper handling of the catastrophic impairment application that, in my opinion, significantly decreased the chance that the paying loss transfer insurers, Pafco and Cooperators, would be able to reach any agreement on apportionment of responsibility for loss transfer indemnification of Jevco. This significantly increased the likelihood that the matter would have to be arbitrated through to a conclusion thereby increasing everyone's costs.

Since I am not dealing with issues such as the amount of time spent on a particular step in the proceeding, or whether a certain hourly rate claimed is reasonable, the fixing of costs in this case does not lend itself to any type of mathematical precision.

Taking everything into account I find that the $39,609.09 amount set out in Jevco's Costs Outline should be reduced to a costs entitlement of **$25,000.00.** The responsibility for payment of these costs should be shared equally between Pafco and Cooperators in the amount of **$12,500.00** each.

With respect to my account in connection with fixing costs of the arbitration, I am of the view that this is an appropriate case for the parties to share equally the payment of that account (one-third each).

Should I have omitted to address any matters in connection with the costs issue, or if there are any other matters which require my attention, counsel should contact my Coordinator to arrange a telephone conference.

Dated at Toronto,January 18, 2016

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Scott W. Densem, Arbitrator