CITATION: Certas Home and Auto Insurance v. Intact Insurance, 2024 ONSC 1122
COURT FILE NO.: CV-22-686957-0000
DATE: 20240222

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF section 275 of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended,

AND IN THE MATTER OF the *Arbitration Act, 1991*, S.O. 1991, c. 17, as amended,

AND IN THE MATTER OF a claim for accident benefits by Sarah Lenssen from injuries sustained in a vehicle accident which occurred on August 30, 2010.

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:	)	
CERTAS HOME AND AUTO INSURANCE COMPANY	)	*Patrick M. Baker* and *Jasvinder K. Singh* for the Applicant
Applicant	)	
- and -	)	
INTACT INSURANCE COMPANY	)	*Lori J. Sprott* and *Joseph Lin* for the Respondent
Respondent	)	
	)	**HEARD**: January 31, 2024

PERELL, J.

Contents

REASONS FOR DECISION

A. Introduction

[1] On August 30, 2010 Sarah Lenssen was injured in a motor vehicle accident involving the vehicle she was driving and a cement truck that was insured by Intact Insurance Company. Ms. Lenssen was an insured person under a motor vehicle liability policy issued by Certas Home and Auto Insurance Company, and pursuant to the *Insurance Act*[1] and its regulations, Certas paid her statutory accident benefits ("SABs").

[2] Many years later, Certas sought indemnification from Intact for its payments to Ms. Lenssen pursuant to the loss transfer scheme under the *Insurance Act*. Intact reimbursed Certas for some of the SABs, but alleging that Certas had grossly mismanaged Ms. Lenssen's SABs claim, Intact declined to reimburse Certas for $392,919.94 comprised of: (a) $384,400.00 for Income Replacement Benefits; (b) $3,419.94 for Attendant Care Benefits; and (c) $5,100.00 for Housekeeping Benefits.

[3] The insurers not agreeing about the indemnification, the loss transfer dispute proceeded to arbitration pursuant to the *Arbitration Act, 1991*.[2] By Arbitration Decision dated August 18, 2022, Arbitrator Shari Novick ordered Intact to reimburse Certas $32,000 with respect to the Income Replacement Benefits and that no other reimbursement was required.

[4] Certas now appeals the Arbitrator's decision.

[5] For the reasons that follow, Certas' appeal is dismissed.

B. Facts

1. No Fault Automobile Insurance Accident Benefits Scheme

[6] Pursuant to the *Insurance Act* and its regulations under Ontario's no-fault automobile insurance accident benefits scheme, an insured driver injured in an automobile accident is entitled to defined accident benefits (statutory accident benefits or "SABs"). In the first instance, the SABs are paid by the "first insurer." Pursuant to a loss transfer scheme, the first insurer may be entitled to be reimbursed by the "second insurer."[3] In the immediate case, there is no dispute that Certas was the first insurer and that Intact was the second insurer.

[7] The first insurer's right to indemnity under the loss transfer scheme, however, is not absolute. The first party insurer remains obligated to adjust its claim in a reasonable manner, and where the second party insurer demonstrates that a first party insurer acted in bad faith or grossly mishandled the insured's claim such that the amounts paid are grossly unreasonable, a second

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[1] R.S.O. 1990, c. I.8.
[2] S.O. 1991, c. 17.
[3] *Markel Insurance Company of Canada v. ING Insurance Company of Canada*, 2012 ONCA 218.

party insurer may be relieved of its obligation to indemnify.[4]

2. The Management of Ms. Lenssen's SABs Claim

[8] Ms. Lenssen was born on November 19, 1964. She left school after Grade 11. At the time of the accident, she was living with a common law partner and their two children. She has four other children from a previous marriage.

[9] After she left school, for a time, Ms. Lenssen was employed as a hairdresser. Beginning in May 2005 and until the accident, she was employed as a manual labourer in the eviscerating department of Maple Leaf Foods. Her job involved standing for a complete shift and consistent overhead movements. Her gross income in the year before the accident was $18,554.63. She did not have medical insurance coverage through Maple Leaf Foods. At the time of the accident, she was forty-five years old.

[10] On **August 30, 2010**, Ms. Lenssen was driving on Dashwood Road, in Crediton, Ontario, when her vehicle, which was insured by Certas,[5] was rear-ended by a cement truck and pushed into another vehicle. The cement truck was insured by Intact.

[11] Ms. Lenssen's vehicle was totally destroyed. She suffered personal injuries. She attended the emergency department on **August 31, 2010** and was diagnosed with "whiplash, neck stiffness, and a right wrist injury. She was subsequently diagnosed with a mild labyrinthine concussion, a high-grade bone contusion on her right wrist, and right shoulder chronic myofascial pain syndrome.

[12] Two years after the accident, Ms. Lenssen was diagnosed as suffering from chronic pain and Driving Anxiety and Major Depressive Disorder. As early as 2012, some of the assessors of her medical condition opined that it was unlikely that she would return to work; her prognosis was guarded.

[13] Ms. Lenssen did not return to work following this accident. She applied for and received Short Term Disability benefits to the policy maximum date of **December 13, 2010**. She did not have access to Long Term Disability benefits.

[14] In **March 2013**, Ms. Lenssen underwent a psychological and vocational assessment. The assessment was that she was competitively unemployable because of her physical limitations, pain, psychological condition, educational level, and minimal transferable skills. However, the assessors concluded that she would benefit from employment counselling, and upgrading her skills. They recommended that she return to school to improve her computer skills and to complete her GED (General Educational Development), a high school diploma equivalent.

[15] In **May 2013**, Ms. Lenssen was examined by Dr. Cobrin. His diagnosis was that she suffered from Driving Anxiety and Major Depressive Disorder. Her prognosis for a recovery was unknown.

[16] In **2014**, Certas completed an Employment Counselling Report and recommended to Ms. Lenssen that she improve her computer skills and complete her GED. In November 2014, Ms.

[4] *Jevco Ins. Co. v. Gore Mutual Ins. Co*., 2014 ONSC 3741.

[5] More precisely, she was insured by State Farm Insurance, which is referred to as Certas due to various corporate mergers.

Lenssen's lawyers confirmed that Ms. Lenssen was enrolled in a GED course.

[17] In **2015**, Ms. Lenssen underwent a psychological insurer examination (IE) to determine whether she was eligible for further Income Replacement Benefits ("IRBs"). The examiner was again Dr. Cobrin. He noted that Ms. Lenssen had clinical scales suggestive of a person with significant tension, unhappiness, and pessimism. Her low energy, tension and withdrawal made it difficult for her to engage in treatment; she was highly prone to developing psychological problems in relation to stressful events; and her accident-related anxiety impacted her ability to drive to work on a continuous basis. Dr. Cobrin diagnosed Ms. Lenssen with Driving Anxiety and Major Depressive Disorder. Her prognosis remained unknown.

[18] Dr. Cobrin, however, concluded that she did not suffer a complete inability to return to any occupation. In the jargon of the insurance industry, Dr. Cobrin's conclusion was that Ms. Lenssen did not satisfy the test for a complete inability to return to work after 104 weeks of income replacement benefits.

[19] Based on Dr. Cobrin's report, in its adjusting notes, Certas noted that Ms. Lenssen did not suffer from a complete inability to engage in any employment for which she is reasonably suited by way of education, training, and experience. Certas' claim log notes of **September 14, 2015** state:

> […] It does not appear that at present [insured] is suffering from a complete inability to engage in any employment or self-employment for which she is reasonably suite[*sic*]. It does not appear that psychological factors are significantly limiting her ability to participate in everyday activities, in that she reported recently to be relatively active, going to school, maintain the household, going for evening walks, *etc*. Given this it is unlikely that psychological factors would cause her to suffer a complete inability to work.

[20] However, upon receipt of Dr. Cobrin's report, Certas made the decision to continue paying Ms. Lenssen's IRBs rather than terminating the benefit. It submitted that it came to this decision because Dr. Cobrin's conclusions were refutable and inconsistent with his earlier assessments and because it would be irresponsible for Certas to deny the benefits.

[21] As noted in the adjuster's claims note, Ms. Lenssen was going to school, and Certas decided that the IRB should continue until she had her GED.

[22] Also on September 14, 2015, Certas noted in its log notes as follows:

> CL RP recommends IRB continue and to be reviewed upon completion of GED at which time she will have obtained necessary computer skills and level of education necessary for a successful reintegration.

[23] On **September 16, 2015**, the adjuster sent Ms. Lenssen an "EOB" form (Explanation of Benefits). The form stated:

> We have reviewed the enclosed Section 44 Psychological report(s) dated September 2, 2015. We have made the determination that you continue to suffer a substantial inability to perform the essential tasks of your employment. Completion of your GED has not yet been completed as per recommendations made within the s.25 Employment Counselling Report dated March 3, 2015.

[24] On **September 17, 2015**, a different adjuster was assigned to Ms. Lenssen's file.

[25] In **mid-April 2016**, the second Certas adjuster reviewed Ms. Lenssen's file with her manager. The manager noted Dr. Cobrin's assessment and the manager queried whether Ms. Lenssen intended to complete the GED. The manager queried whether pursuant to s. 57 of the

SABs regulations, Ms. Lenssen should obtain rehabilitation treatment to engage in employment or shorten the period of benefits. Pursuant to s. 57, an insurer may stop benefits if the claimant fails to obtain rehabilitation treatment.

[26] On **April 22, 2016**, the second adjuster spoke with Ms. Lenssen's lawyer. The adjuster inquired whether Ms. Lenssen was attending treatment in accordance with her obligation to do so under s. 57 of the *Statutory Accident Benefits Schedule*. The lawyer advised that the adjuster should make requests for information in writing.

[27] On **May 2, 2016**, Ms. Lenssen's lawyer wrote to Certas to advise that she had completed a computer course and had completed her GED on December 2, 2015. The letter indicated that Ms. Lenssen had enrolled in a second computer course.

[28] On **May 4, 2016**, Certas recorded in its notes that Ms. Lenssen had completed her GED.

[29] Although Ms. Lenssen now had her GED, Certas did not review her receipt of income replacement benefits, nor did it implement its adjusting plan to arrange for a vocational rehab consultant. Nor did it invoke s. 57 of the SABs schedule.

[30] On **September 16, 2016**, Certas' claims adjuster erroneously noted that Ms. Lenssen had not completed her GED. The income replacement benefits continued.

[31] On **April 4, 2017**, the claims adjuster reviewed the claims file again and queried in the notes whether the GED was achieved. Certas continued paying the income replacement benefit.

[32] In **September 2017**, a Certas "Claims Specialist," who audits files to determine the adequacy of reserves, reviewed Ms. Lenssen's file and incorrectly noted that Ms. Lenssen had satisfied the post-104 test for continuing benefits. The Claims Specialist correctly noted that she was continuing to receive income replacement benefits.

[33] In **January 2018**, the claims adjuster noted that the income replacement benefits were continuing because Ms. Lenssen met the "post-104 test."

[34] In **June 2018**, Ms. Lenssen's file is assigned again to a different adjuster, the third adjuster to have carriage of the file. The reference to Ms. Lenssen having met the post-104 test is repeated in this adjuster's notes of **July 30, 2018**, **November 20, 2018**, **February 19, 2019**, and **April 22, 2019**. Meanwhile, Ms. Lenssen continues to receive income replacement benefits.

[35] Pursuant to the no-fault automobile insurance scheme, on **July 17, 2018**, Certas, as the first party insurer submitted a Request for Indemnity ("RFI") to Intact as the second party insurer. The RFI requested $190,474.64.

[36] In **August 2018** and **October 1, 2018**, the third Certas adjuster spoke with Ms. Lenssen's lawyer. The lawyer reported that there was no change in Ms. Lenssen's condition and that she was not further continuing her retraining or education.

[37] The adjuster's notes from late **November 2018** to the end of **April 2019** refer solely to attempts to contact Intact's loss transfer adjuster.

[38] On **May 2, 2019**, Certas submitted an RFI for $16,400.00 to Intact.

[39] Ms. Lenssen's file at Certas notes that she satisfied the "post-104 test" on **September 18, 2019**, **March 20, 2019**, and **April 30, 2020**.

[40] In **2020**, Ms. Lenssen underwent another round of further insurer examinations (IEs) to

determine whether she was entitled to ongoing Income Replacement Benefits.

[41] In 2020, Dr. Rajgopal opined that from an orthopedic perspective Ms. Lenssen did not meet the complete inability test for an entitlement to post 104-week income replacement benefits.

[42] In his reports, dated **September 14, 2020** and **October 20, 2020**, which reports are not materially different, Dr. Jerome, a psychologist, concluded that Ms. Lenssen suffered from chronic pain and moderately severe mixed states of depression. Dr. Jerome concluded that she suffered a complete inability, as a result of her accident, to engage in any employment for which she was reasonably suited by education, training, or experience.

[43] Certas did not to provide any medical, rehabilitative or vocational support for Ms. Lenssen beyond 2014. She would have been entitled to the vocational support until August 30, 2020.

[44] On **February 2, 2021**, Ms. Lenssen settled her accident benefits claim with Certas for an additional $250,000. This is equivalent to twelve years of benefits at the rate of $400 per week or $20,800 per annum and would provide her with benefits until she was sixty-eight years old. The total of the income replacement benefits received by Ms. Lenssen was $384,000.

[45] Intact declined an offer to participate in the settlement negotiations.

3. The Arbitration

[46] The indemnification claims adjuster at Intact and the claims adjuster at Certas exchanged correspondence and information about Certas' request for an indemnification. Intact's adjuster was prepared to pay some but not all of the request for indemnification.

[47] On **July 21, 2021**, Certas submitted an RFI to Intact requesting $286,800.00. When Intact refused to indemnify Certas, Certas initiated arbitration proceedings against Intact. The parties signed an Arbitration Agreement dated **June 21, 2022**. The parties agreed to appoint Shari Novick as Arbitrator.

[48] At the arbitration, the parties filed medical notes and clinical notes and reports from various vocational assessments. Copies of Certas' log notes from Ms. Lenssen's accident benefits file were filed. The parties agreed that the arbitration would be determined based on the documentary record and an exchange of written and oral submissions.

[49] Certas and Intact respectively provided written submissions, and on **June 21, 2022,** Arbitrator Novick presided at a three-hour virtual hearing for oral argument. The hearing was not recorded.

[50] On **August 18, 2022**, Arbitrator Shari Novick released her decision. In her decision, she reviewed her jurisdiction and defined the issues in dispute. She set out in some detail the factual background, which I have described above. Her analysis and conclusions about the questions of law, questions of fact, and questions of mixed fact and law are set out in paragraphs 76 to 100 of her award as follows:

> ANALYSIS & REASONS:
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> 76. As noted above, a second party insurer who resists reimbursing a first party insurer seeking indemnity for benefits paid under section 275 of the Act faces a heavy onus to prove that the payments made were unreasonable. As stated by Justice Stewart in *Jevco Insurance v Gore Mutual Insurance*, *supra*, the "onus is a strict one, and 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". I must review the limited evidence that I have been provided with through that lens.

77. I find no evidence of bad faith on Certas' part, nor is any alleged. Intact does contend, however, that the adjuster's decision to continue paying IRBs to Ms. Lenssen after receiving Dr. Cobrin's report in September 2015 advising that she no longer met the test for entitlement constitutes gross mishandling or mismanagement of her claim. It is tempting to review the steps taken in adjusting a claim and criticize them, with the benefit of hindsight. The line between "armchair quarterbacking" and highlighting unreasonable decision making may be a fine one. I noted in *Aviva v RSA, supra*, that a second party insurer cannot resist repayment simply because they would have made different adjusting decisions, but that if significant mistakes are made by a first insurer that result in benefits having been paid out at a higher level than they would have been if the claims handler had acted reasonably, the onus can be met.

78. Having considered the evidence before me, especially the log notes filed, I agree with Intact's contention that some aspects of Certas' adjusting of Ms. Lenssen's claim can be described as "gross mishandling".

79. […] The adjuster arranged a further assessment with Dr. Cobrin in August of 2015, two years later, and it is this report that is the focus of the parties' submissions.

80. I have reviewed Dr. Cobrin's report closely. He determined that the Claimant continued to suffer from a Major Depressive Disorder but noted her reports of increased activity. He also noted that she was attending school on a regular basis and managing a busy household. He concluded that while she had not yet reached maximal medical recovery, she no longer suffered a complete inability to engage in any employment for which she was reasonably suited, and that there were no psychological barriers limiting her from performing the jobs that had been identified in the Transferable Skills Analysis conducted a few years earlier.

81. Counsel for Certas was very critical of this report in her submissions and contended that the conclusions reached by Dr. Cobrin were not supported by his findings. My task is not to assess the strength of Dr. Cobrin's opinion, but rather to focus on the decisions made by Certas in managing the claim. The log notes reveal that the handling adjuster reviewed the report in detail, and despite the opinion provided, made the decision to continue paying IRBs. Importantly, her notes state that Ms. Lenssen's entitlement to IRBs "will be reviewed upon her completion of GED at which time she will have obtained necessary computer skills and level of education necessary for a successful re-integration as noted in the section 44 TSA".

82. Intact argues that the fact that the adjuster decided to continue paying IRBs despite Dr. Cobrin's opinion that she no longer met the eligibility test is sufficient to support a finding that Certas grossly mishandled the claim. I do not agree. While many insurers would have relied on an IE assessor's opinion in these circumstances and terminated the benefits, I find that the adjuster's decision to continue paying IRBs in these circumstances does not amount to gross mishandling or mismanagement of the claim.

83. As pointed out by counsel for Certas, first party insurers owe a duty of good faith to their insureds. Entitlement to IRBs should be assessed based on the available evidence. There was ample medical evidence and other information in the file that pointed to Ms. Lenssen's ongoing difficulties and limitations. The vocational assessments that had been conducted pointed to a serious need for retraining and skills upgrading and emphasized that the need for the Claimant to complete her high school diploma before she would realistically be able to return to employment. In my view, an insurer who agrees to follow the recommendations of a vocational assessor who has made valid and reasonable recommendations in support of a claimant's reintegration into the workplace is to be applauded, rather than criticized.

84. I do find, however, that the adjuster's decision to continue paying IRBs despite Dr. Cobrin's findings was communicated to the Claimant in a sloppy manner. The Explanation of Benefits form sent to the Claimant along with Dr. Cobrin's report on September 14, 2015 is worded in a confusing manner and refers to the wrong eligibility test. It ends with the sentence "completion of your GED has not yet been completed as per recommendations made within the s. 25 Employment Counselling Report dated March 3, 2013". While this implies that the completion of the GED may determine the Claimant's eligibility for further benefits, that is far from clear.

85. The log notes indicate that Ms. Lenssen's claim was reassigned to another adjuster on September 16, 2015, two days after the above note was sent. I find this timing to be curious. No explanation was provided as to why this change took place almost immediately after an important decision was made. Ultimately, nothing turns on this fact, or on the confusing message on the EOB form. These factors do however raise questions about the level of attention provided to handling a serious claim.

86. In any event, it is clear from the log notes that the decision to continue paying IRBs in the face of the assessor's opinion that she no longer met the test was based on the adjuster's acceptance of the recommendations made by the vocational assessor that Ms. Lenssen should complete her GED, and some computer training, before she attempted to re-integrate into the workplace. This is clearly expressed and repeated several times in the notes, and referenced in the EOB issued. In keeping with this clear intention, the notes that follow reveal that several attempts were made by the new adjuster over the next six months to check in with the Claimant's representative about the expected completion date of the Claimant's GED program.

87. The evidence indicates that Certas is finally advised on May 4, 2016 that Ms. Lenssen had completed the program four months earlier, in January 2016. The representative also advised that Ms. Lenssen had completed one computer course and would be starting a second course shortly. No explanation is noted as to why Certas was not advised of this earlier, when it occurred. In any case, having waited eight months to hear this news, I would have expected the adjuster to have taken steps soon after that to put a plan in place toward reintegrating the Claimant into the work force. Surprisingly, there is no reference in the notes to any steps having been taken once the adjuster is advised that this milestone has finally been achieved.

88. Given the emphasis placed on Ms. Lenssen completing her GED, I would have expected to see notes recording contact with vocational rehabilitation consultants, or to arranging further assessments to determine the best course to take in supporting Ms. Lenssen's return to work. This lack of follow-up or action of any kind is not explained in any way in the evidence before me, and in the face of the initial adjuster's clearly expressed intention to review the Claimant's IRB entitlement "upon her completion of GED at which time she will have obtained necessary computer skills and level of education necessary for a successful reintegration as noted in the section 44 TSA", is puzzling.

89. A review of the log notes for 2017 and the first half of 2018 show a surprisingly lax approach to adjusting the claim, given the news that the Claimant had completed her GED. Many of the notes during this period refer to the Loss Transfer requests made to Intact. It is possible that the focus had shifted away from re-integrating Ms. Lenssen back into some type of sedentary work, in favour of pursuing indemnity under the Loss Transfer provisions from Intact for the benefits being paid. Whether or not that is the case, the evidence suggests that Certas "dropped the ball". In my view, the fact that nothing was done to follow through with the recommendations from the Employment Counselling Report that were initially relied on, or to adjust the claim in any meaningful way for more than two years after Certas was advised that Ms. Lenssen had obtained her GED, constitutes gross mismanagement of the claim.

90. Further, incorrect references to Ms. Lenssen having been determined to have met the compete inability "post 104-week test" begin to appear in the notes in late 2017. Her claim is then assigned to a different adjuster in mid 2018, and his initial review of the file, recorded in the notes, also includes the incorrect statement that "IRBs continue per s. 44 conclusions". His efforts also seem to focus on pursuing Intact for Loss Transfer indemnity, and on obtaining update clinical notes and

records. It is unclear whether this resulted from the mistaken assumption that the Claimant had been determined to have met the complete inability test, or because Certas assumed that Intact would be making full indemnity for the IRBs paid out. Either way, the log notes during this period reveal a complete lack of action in adjusting the claim or taking steps to facilitate the Claimant's return to work, as was emphasized by the earlier adjuster.

91. While I accept that different adjusters may choose to follow different approaches, I find that the failure to take any steps for more than three years to pursue the clear plan expressed after the decision was made to ignore the assessor's opinion that the Claimant no longer met the entitlement test for IRBs and allow her some time to complete her GED and update her computer skills, and pursue her re-integration into the workplace, constitutes gross mishandling of the claim.

92. As noted above, a full and final settlement of Ms. Lenssen's accident benefits claim was reached in February 2021. The Settlement Disclosure Notice confirms that $250,000 was paid for all past and future IRBs. While I was not provided with any direct evidence on how that sum was arrived at, it is clear that that amount equates to twelve years of benefits at the rate of $400 per week. As noted by counsel for Intact, that would extend payment of IRBs until February 2033, when Ms. Lenssen will be sixty-eight years old. The SABS provide for a "post 65 ramp down" of benefits, and according to the formula provided, Ms. Lenssen would be entitled to a weekly benefit of only $152 after turning sixty-five in 2030.

93. I would have preferred if the parties had called some evidence to explain how this amount was arrived at, or why this sum was paid. It appears from the numbers that Certas did not factor the "post 65 ramp down" into the calculation and did not apply a discount in exchange for a lump sum, as is usually done when negotiating a full and final settlement at this level. Given the lack of evidence on this point, I hesitate to place too much importance on this. However, I am satisfied that the questions raised by this lump sum payout, coupled with the fact that Certas clearly "dropped the ball" after being advised that the Claimant had completed her GED program, supports a finding that Certas grossly mishandled Ms. Lenssen's IRB claim and that the amount of $384,400 that is being sought is grossly unreasonable.

94. Given the above, I find that Intact is not obligated to repay Certas for the full amount sought. The question then becomes what amount should be repaid to Certas, if any. While it is not the role of an arbitrator to step into the shoes of an adjuster handling the claim, I find that I may make general assumptions, based on the evidence before me.

95. In my view, it would have been reasonable for Certas to have followed the plan laid out by the adjuster in September 2015, and repeated many times in the log notes over the several months that followed, that upon completion of her GED, Ms. Lenssen would undergo vocational retraining and steps would be taken to re-integrate her into the workforce into a sedentary job. I appreciate that this may not have been easy, or without challenges and disruptions, and would likely have taken several months. Certas was advised in early May 2016 that Ms. Lenssen had obtained her GED. I find it likely that with the proper support, she would either have began a new job within one year after that, or have been determined by an assessor (again) to have not met the "complete inability test". Under either scenario, she would likely not have been entitled to further IRBs.

96. Accordingly, I find that Intact should reimburse Certas for IRBs paid to the Claimant from September 15, 2015 — or whatever date it has paid up to — until May 4, 2017, one year after Certas was advised that Ms. Lenssen had completed her GED. By my count, that amounts to eighty-five additional weeks, and at $400 per week, yields a total of $34,000.

97. Counsel for Certas referred to the conclusion reached by the IE assessor in 2020 that the Claimant met the "complete inability test" and contended that this was proof that Ms. Lenssen's condition was deteriorating and that she would not have been able to return to any type of work. I discussed the challenges posed in relying on facts not known at the time adjusting decisions are made, but that later come to light, in *Jevco v Gore Mutual*, *supra*. I stated there that the test to assess reasonableness of payments made by a first insurer should be approached with a consideration of

> what facts "were known to it at the time it made decisions to pay or deny benefits", as to do otherwise would create a "slippery slope" that would potentially undermine settlements of any AB claims in which Loss Transfer indemnity is sought. I continue to endorse that view.
>
> 98. I also agree with Intact's position that in the absence of any invoices presented for the disputed periods, it should not be required to make any further payments to Certas beyond what has already been reimbursed for Attendant Care Benefits and Housekeeping Benefits paid to the Claimant. While counsel for Certas advised that assessments were conducted that determined that Ms. Lenssen was eligible for these benefits for the time periods discussed, Certas should not have paid benefits without invoices or claims having been submitted by the Claimant setting out the number of hours expended, and the type of services provided (for Attendant Care Benefits). If these had been received, the adjuster should then have analysed the claims to ensure that the amounts sought were reasonable.
>
> 99. There is no evidence to suggest that any invoices were submitted for these periods. I find that Certas' decision to pay these benefits in the absence of any supporting documentation also constitutes gross mishandling of the claim.
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> 100. For all of the above reasons, I find that Intact is required to reimburse Certas the sum of $34,000, plus applicable interest, for IRBs paid to Ms. Lenssen for the time frame noted in paragraph 96 above. I decline to order Intact to pay any of the other amounts sought.

[51] Thus, the Arbitrator concluded that Intact was not responsible to indemnify Certas for attendant care benefits and housekeeping benefits because there were no invoices or documents corroborating that these benefits had been claimed. This aspect of her award is not appealed.

[52] The Arbitrator decided that Certas had grossly mishandled its claim and that it was not entitled to full indemnity from Intact. She did not find fault in Certas' decision to continue the income replacement benefits notwithstanding Dr. Cobrin's assessment that she was no longer qualified for the benefits. However, she found mismanagement in Certas' failure to follow up on its own plans to review the situation after Ms. Lenssen had completed her GED, at which time she might have obtained computer skills and a level of education to reintegrate into the workforce.

[53] The Arbitrator found that Certas' decisions were sloppy, worded in a confusing manner, and that Certas had described the wrong eligibility test for benefits. She found that Certas' approach was lackadaisical and dilatory and that it had failed for over three years to implement its own adjusting plan for Ms. Lenssen and to assist her back to employment. The Arbitrator found that Certas intended to review Ms. Lenssen's entitlement to income replacement benefits upon GED completion but without explanation did not do so.

[54] The Arbitrator concluded that Certas "dropped the ball", and that its handling of Ms. Lenssen's claim "constitutes gross mismanagement of the claim." The Arbitrator found that had the file been properly managed, Ms. Lenssen's income replacement benefits would have been discontinued one year after the completion of her GED. She recognized that with hindsight later medical opinions indicated that Ms. Lenssen would not have been able to reenter the workplace as had been envisioned, but the Arbitrator said that the merits of management decisions had to be measured against the facts known at the time the decision was made to pay or deny benefits. Accordingly, she decided that Intact should indemnify Certas $32,000 and not the $384,400.00 claimed for income replacement benefits.

C. Standard of Review

[55] This is an appeal pursuant to s. 45 of the *Arbitration Act.*

[56] The parties agreed that for appeals of an arbitrator's decision in a dispute between insurers about the no-fault accident benefits scheme of Ontario's *Insurance Act*, the arbitrator's decision was reviewed in accordance with appellate review standards, which is to say that questions of law are reviewed to a standard of correctness but questions of fact and questions of mixed fact and law are reviewed to a standard of reasonableness.[6]

[57] Questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.[7]

[58] Where the ground of appeal raises a question of fact, the appellate court must pay substantial deference to it. The appellate court cannot set the decision aside simply because it views the evidence as showing a different probability from that found below. Before it may properly interfere, the appellate court must conclude that the submitted error amounts to a "palpable and overriding error". The word "palpable" means "clear to the mind or plain to see"[8], and "overriding" means "determinative"[9] in the sense that the error "affected the result".[10] The Supreme Court has held that other formulations capture the same meaning as "palpable error": "clearly wrong", "unreasonable" or "unsupported by the evidence".[11]

[59] Examples of palpable error include: (a) findings made in the complete absence of evidence (this could also amount to an error in law); (b) findings made in conflict with accepted evidence; (c) findings based on a misapprehension of the evidence; (d) findings of fact, drawn from primary facts, that are a result of speculation rather than inference; and (e) findings of fact based on evidence that has no evidentiary value because it has been rejected by the trier of fact.[12]

[60] Matters of mixed fact and law lie along a spectrum; where the error of the decision-maker can be traced to a clear error in principle, it may be characterized as an error of law and subjected to a standard of correctness; where the legal principle is not readily extricable, then the matter is subject to a standard of palpable and overriding error.[13]

D. Analysis and Discussion

[61] I am not persuaded that the Arbitrator made any reviewable error. I agree with her reasoning and her conclusions. In my opinion, the arbitrator's legal conclusions were correct and

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[6] *Manitoba Public Insurance v. ICBC*, 2023 ONSC 3658; *Intact v. Dominion and Wawanesa*, 2020 ONSC 7982; *Allstate Insurance Company v. Her Majesty the Queen*, 2020 ONSC 830; *Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Housen v. Nikolaisen*, 2002 SCC 33.
[7] *Canada (Director of Investigations and Research, Competition Act) v. Southan Inc.*, [1997] 1 S.C.R. 748.
[8] *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 5.
[9] *Schwartz v. Canada*, [1996] 1 S.C.R. 254.
[10] *L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401 at para. 55.
[11] *L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401 at paras. 55, 56.
[12] *Waxman v. Waxman*, [2004] O.J. No. 1765 at paras. 296, 306, 335, and 349 (C.A.).
[13] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53; *MacDonald v. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842 at paras. 1-41, leave to appeal refused [2016] S.C.C.A. No. 39; *Housen v. Nikolaisen*, 2002 SCC 33.

her findings of fact and findings or mixed fact and law are without palpable and overriding error. The findings of fact are reasonable and were derived from the evidence.

[62] There was ample evidence that Certas grossly mismanaged Ms. Lenssen's file, which the Arbitrator described as "dropping the ball".

[63] Why "dropping the ball"? Because the file indicates that Certas' plan was to provide Ms. Lenssen with income replacement benefits until she completed her own rehabilitation program for reentry into the workplace by taking computer courses and her GED. Certas dropped the ball because although it knew that she had completed these courses and although it knew Dr. Cobrin's opinion that she did not meet the test for a continuation of benefits, Certas mistakenly noted that Ms. Lenssen satisfied the test for income replacement benefits after 104 weeks and Certas continued to provide her with benefits. Throughout, Certas failed to provide Ms. Lenssen with medical, rehabilitative or vocational support beyond 2014, notwithstanding that she would have been entitled to the vocational support contemplated by Certas' own plan until August 30, 2020.

[64] Thus, Certas failed: (a) to review, understand, and implement its own adjusting notes; (b) to adjust Ms. Lenssen's claim in accordance with Certas' own plan following completion of Ms. Lenssen's GED; (c) to assist Ms. Lenssen with vocational rehabilitation in accordance with Certas' own adjusting plan; and (d) it continued paying the income replacement benefit contrary to its own plans and assessments. In short, there was gross mismanagement.

[65] Certas submits that the Arbitrator erred by focusing solely on the adjuster's log note in 2015 and making assumptions and speculations based on that one note from 2015. There is no merit to this submission. The Arbitrator reviewed the totality of the documentary evidence to reach her conclusions.

[66] Certas submits that the Arbitrator erred by ignoring the medical evidence before her that supported Certas' decision to continue paying the IRBs. Once again, there is no merit to this submission. The Arbitrator did not ignore the medical evidence, and she reasonably explained why if Ms. Lenssen's claim had been properly managed, the income replacement benefits would have been terminated approximately a year after Ms. Lenssen completed her GED, which was Certas' own plan, if it had not dropped the ball in reviewing its own file.

[67] Certas submits that the Arbitrator erred by second-guessing Certas' decisions based on assumption and speculation without regard to the medical evidence concerning Ms. Lenssen's health that would justify the continuation of her income replacement benefits. There was no second-guessing and once again this submission is without merit.

[68] The Arbitrator did not ignore any evidence. She agreed that Certas was correct in not immediately stopping Ms. Lenssen's income replacement benefits after the reports in 2015 that indicated that she was capable of returning to the workplace. However, she correctly noted Certas' failure to follow its own plan to re-examine the continuation of benefits after Ms. Lenssen completed her GED.

[69] Although the Arbitrator used the metaphor of dropping the ball, she identified the fumbles and misapprehensions in the adjustment file notes of: September 16, 2016, September 2017, January 2018, July 30, 2018, November 20, 2018, February 19, 2019, April 22, 2019, September 18, 2019, March 20, 2019, and April 30, 2020.

[70] Certas submitted that without evidence, the Arbitrator assumed that Ms. Lenssen would

have been able to return to work within a year of completing her GED and that within a year of completing her GED, Ms. Lenssen would not satisfy the test for a continuation of her income replacement benefits. The Arbitrator made no such assumptions. Rather, she concluded that based on its own adjustment plans, it would have been reasonable for Certas to discontinue the benefits approximately a year after she completed her GED, which it did not do because it was inept and dilatory in reviewing Ms. Lenssen's file.

[71] Similarly, the Arbitrator did not exceed her jurisdiction by determining that Ms. Jenssen would not have been entitled to income replacement benefits after one year from the completion of her GED. The jurisdiction to determine SABs is with the *License Appeal Tribunal* pursuant to s. 280 of the *Insurance Act*, but it was within the scope of the arbitration agreement to determine whether Certas grossly mismanaged the adjustment of Ms. Lenssen's SAB claims, which the evidence shows that it did.

[72] The Arbitrator was aware that the onus was on Intact to justify its refusal to indemnify Certas and that it was a heavy onus to establish gross mismanagement. She carefully reviewed all the evidence before her and the copious written submissions of both parties. I am not persuaded that she exceeded her jurisdiction or made any error of law or of fact or of mixed fact and law.

E. Conclusion

[73] For the above reasons, Certas' appeal is dismissed with costs fixed at $7,500, all inclusive, as agreed by the parties.

Perell, J.

Released: February 22, 2024

CITATION: Certas Home and Auto Insurance v. Intact Insurance, 2024 ONSC 1122
COURT FILE NO.: CV-22-686957-0000
DATE: 20240222

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF section 275 of the *Insurance Act,* R.S.O. 1990, c. I.8, as amended,

AND IN THE MATTER OF the *Arbitration Act, 1991,* S.O. 1991, c. 17, as amended,

AND IN THE MATTER OF a claim for accident benefits by Sarah Lenssen from injuries sustained in a vehicle accident which occurred on August 30, 2010.

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

CERTAS HOME AND AUTO INSURANCE COMPANY

Applicant

- and -

INTACT INSURANCE COMPANY

Respondent

REASONS FOR DECISION

PERELL, J.

Released: February 22, 2024