

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

AND IN THE MATTER OF an arbitration

BETWEEN:

ING INSURANCE COMPANY OF CANADA

Applicant

and

AXA INSURANCE COMPANY OF CANADA

Respondent

Appearances:

Michael R. Switzer for the Applicant
John S. McNeil, Q.C. for the Respondent

Before: The Honourable James B. Chadwick, Q.C.

Heard: at Ottawa this 31st day of October 2006

AWARD

[1] The facts are not in issue, as the parties have agreed to all of the relevant and important facts.

[2] On the 27th of February 2002. Laurie Burns was involved in a motor vehicle accident with Robert Lamarche near Moonbeam Ontario. Lamarche left the accident scene without reporting the accident, but later gave the information to the police. At the time of the accident Lamarche was driving a logging truck and made a sweeping turn into a secondary Road. Burns, who was following the truck, ran into the side of the vehicle. There is no issue that Lamarche was responsible for the accident. Lamarche was insured by the respondent Axa Insurance Company of Canada (AXA).

[3] Burns was in the course of his employment, and the motor vehicle he was driving was owned by his employer. The employer was insured with the applicant ING Insurance Company of Canada (ING). Burns was injured in the accident and as such his employer reported the accident to the Workplace Safety & Insurance Board.(WSIB).

[4] On March 25, 2002, Burns applied to the applicant ING for Statutory Accident Benefits (SABS). Burns elected to take accident benefits, rather than benefits available to him under the Workplace Safety Insurance Act. The election was made in accordance with section 30 and 59 of that act. He assigned his rights to benefits under the WSIA to the applicant. Section 59 provides:

59.(1) The insurer is not required to pay benefits under this Regulation in respect of any insured person who, as a result of an accident, is entitled to receive benefits under any workers' compensation law or plan. O. Reg. 403/96, s.59 (1).

(2) Subsection (1) does not apply in respect of an insured person who elects to bring an action referred to in section 30 of the *Workplace Safety and Insurance Act, 1997* so long as the election is not made primarily for the purpose of claiming benefits under this Regulation. O. Reg. 403/96, s. 59 (2); O. Reg. 281/03, s. 30 (1).

[5] On May 1, 2002 the applicant ING gave notice to the respondent AXA of a loss transfer as Lamarche was operating a heavy commercial vehicle at the time of the loss. The loss transfer request was made in accordance with section 275. (1) of the *Insurance Act*, R.S.O. 1990, c.1.8 and regulation 664. These provisions read as follows:

275.(1) The insurer responsible under subsection 268 (2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefit arose.

Regulation 664 provides:

9. (3) A second party insurer under a policy insuring a heavy commercial vehicle is obligated under section 275 of the Act to indemnify a first party insurer unless the person receiving statutory accident benefits from the first party insurer

is claiming them under a policy insuring a heavy commercial vehicle. R.R.O. 1990, Reg. 664, s.9 (3); O. Reg. 780/93, s. 1.

[6] On February 26, 2003. The applicant sent a further letter to the respondent setting out the accident benefits paid to date in the amount of \$33,783.73 and requesting indemnification.

[7] It has been suggested the respondent AXA had a duty to take over the accident benefit file. I am satisfied on the reading of section 275 (1) of the Insurance Act the only obligation resting upon a second party insurer is to pay indemnification. It does not require them to take over the administration of the claim for SABS.

[8] On September 24, 2003, the applicant ING settled Burns SAB claim for a final payment of \$16,000.00. The total amount of benefits, paid out by the applicant and recoverable by way of transfer is \$63,882.78. The respondent does not take issue with the amounts paid by the applicant to Burns. It's apparent that the applicants responded quickly to Burns's application for benefits and dealt with Burns in a fair and proper manner.

[9] Burns commenced a civil action against Lamarche and others on the 29th of August 2002. In that action, he claimed damages for personal injuries arising out of the February 27, 2002, accident. The respondents AXA defended the action and carried out an investigation and determined that Lamarche was also a schedule 1 employee at the time of the accident. As such Burns was statute barred from bringing a civil action or from collecting no fault accident benefits.

[10] The respondents AXA brought a section 31 application under the WSIA on September the 16th 2003. The purpose of the application was to determine that Robert Lamarche was a schedule 1 employee at the time of the accident and was therefore not entitled to bring a civil action. The application did not proceed as the respondents settled with Lamarche for a fraction of which of what he would be entitled to if he had been successful at trial.

[11] November the 10th, 2004, some 2 1/2 years after the applicant ING had first notified the respondents AXA of the loss transfer request they finally had a response from the respondent's

counsel. This was the first time, the respondents indicated they were contesting the loss transfer request.

[12] Up until November, the 10th, 2004, the respondent AXA never advised the applicant ING they were contesting the applicant's transfer claim on the bases in both employees were schedule 1 employees. This was notwithstanding, AXA had the necessary information to make this determination before November the 10th, 2004.

[13] I appreciate there's no contractual duty, or statutory duty, on a secondary insurer to share this information when there is a claim for indemnification.

[14] The other side of the coin is that by the time the respondent AXA had the necessary information, the applicant ING had paid out most of its SABS benefits.

[15] It is apparent if the applicant ING had carried out a more thorough investigation at the time of Burns application for SABS benefits they may have discovered Lamarche was also a schedule 1 employee. The accident happened at 3 p.m. on a workday. Lamarche was driving a tractor-trailer loaded with logs. These facts should have triggered a further inquiry.

[16] As indicated earlier, the applicant ING carried out their duties in a fair responsible manner. If they had refused no-fault benefits to Burns, Burns would've had recourse under the provisions of the Insurance Act or the Workers Safety Insurance Act.

[17] I am satisfied upon the evidence before me that both Burns and Lamarche are schedule 1 employees at the time of the accident on February the 27th, 2002. As such I am also satisfied that Burns would have to apply for benefits under the provisions of the Workers Safety Insurance Act, and therefore would not be entitled to no-fault benefits under the provisions of his employer's motor vehicle policy with the applicant ING. In addition, Burns would not be entitled to maintain a civil action for personal injuries suffered by him, against Lamarche.

[18] Notwithstanding my findings the question is whether the applicant ING is entitled to indemnification from the respondent AXA. There is no issue that the applicant ING paid the SABS to Burns under the mistaken belief that Lamarche was not a schedule 1 employee.

[19] Cameron J. in *Re. Jevco Insurance Co. v. Canadian Home Insurance* 36 O.R. (3d) 249 had occasion to consider section 275 Insurance Act, R.S.O. 1990. This was an appeal from an arbitration decision. The no-fault insurer, Jevco overpaid the plaintiff, weekly no-fault benefits. Jevco attempted to recover the overpayment from the tort insurer Canadian Home Insurance. The arbitrator found there was an overpayment by Jevco, but they could not recover the amount of the overpayment from Canadian Home Insurance.

[20] Cameron J. considered the wording of section 275 of the Insurance Act, and states:

The reference to "such benefits" refers to those prescribed. The words in s. 275 do not impose on the tortfeasor's insurer a liability to indemnify greater than that contemplated in the Act. If the no-fault insurer, through negligence, misinterpretation of the evidence or the law, or sheer kindness, pays more than the prescribed amount of no-fault benefits to its insured, it is responsible for recovering the overpayment from its insured. It cannot look to s. 275.

The words of the section must be read with regard to the purpose and scheme of the Act.

The ... policy of the statutory scheme is that all insured persons shall be entitled to certain benefits which become payable promptly after an accident regardless of who is at fault but they shall be deducted from any damages which may be awarded in a tort action.

(*Marshall v. Heliotis* (1993), 16 O.R. (3d) 637 at p. 640, [1994] I.L.R. 1-3023 (Gen.Div.))

In *Orchover v. Wright* (1996), 28 O.R. (3d) 263 at p. 270, 23 M.V.R. (3d) 201 (Gen.Div.), where the plaintiff released her no-fault insurer on a basis detrimental to her, citing *Coderre v. Lambert* (1993), 14 O.R. (3d) 453, 103 D.L.R. (4th) 289 (C.A.)

... the case reflects the intent of the legislature in passing s. 267, namely that the tortfeasor, rather than the plaintiff, is to benefit from the availability of other insurance. If the plaintiff had made an improvident settlement with its own no-fault insurer, that fact should not be visited on the tortfeasor, thereby curtailing his rights pursuant to s. 267 of the Insurance Act.

[21] Although this case was dealing with the relationship between a no-fault insurer and a tort insurer the same principle would apply in relation to a no-fault insurer in an application for transfer or indemnification. The secondary insurer is a reinsurer.

[22] This may appear to be a harsh and inequitable result, especially where the applicant is acting in good faith. However, the courts have been very careful in restricting claims against reinsurers.

[23] In *Assicurazioni Generali Spa v. CGU International Insurance* [2004] EWCA CIV.429 Lord Justice Tuckey states at paragraph.8:

8. The judge started by reminding himself of what Lord Mustill said in *Hill v. Mercantile and General Reinsurance Co. Plc* [1996] 1 WLR 1239 at page 1251:

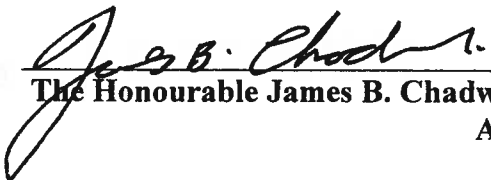
There are only two rules, and both obvious. First, that the reinsurer cannot be held liable unless the loss falls within the cover of the policy reinsured and with the cover created by the reinsurance. Second, that the parties are free to agree on ways of proving whether these requirements are satisfied.

[24] In conclusion, Burns had no right to SABS benefits under the provision of his employer's insurance policy with ING. His only a right would be a claim under the WSIA. As such there is no right of indemnification, under section 275 Insurance Act against the respondent, AXA. The application is dismissed.

[25] In view of the conduct of the respondent AXA I normally would not make an order of cost in their favour. However, paragraph 21 of the arbitration agreement provides "the successful party shall be awarded costs of the arbitration..." Twenty days after the date of this award I will receive written submissions from Mr. McNeil setting forth his claim for costs. Mr. Switzer will have a further twenty days, from the receipt of Mr. McNeil's submissions, to

respond. Mr. McNeil will have 5 days from the receipt of Mr. Switzer's submissions to reply, if he so wishes.

Dated at Ottawa this 10th of November 2006.


The Honourable James B. Chadwick, Q.C.
Arbitrator

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