

IN THE MATTER OF THE INSURANCE ACT, R.S.O. 1990, c. I. 8, and REGULATION 664, s. 9

AND IN THE MATTER OF THE ARBITRATION ACT, S.O. 1991, c. 17;

AND IN THE MATTER of an Arbitration between:

ROYAL AND SUNALLIANCE INSURANCE COMPANY

Applicant

- and -

AVIVA INSURANCE COMPANY OF CANADA

Respondent

DECISION

COUNSEL:

Stanley C. Tessis for the Applicant

Harry P. Brown for the Respondent

ISSUE:

1. Is Aviva entitled to maintain a claim for loss transfer against Royal in this matter?

DECISION:

1. Aviva is entitled to maintain the claim for loss transfer against Royal.

HEARING:

This arbitration was held on November 16, 2005. No witnesses were called and the matter proceeded on the basis of documentary evidence and agreed facts. Written submissions were subsequently provided by the parties.

FACTS AND ANALYSIS:

This arbitration arises out of an accident which occurred on December 16, 2000. On that date, Mr. Timothy Wry was struck two motor vehicles, one driven by a Vina Menon, and the other by Jean Jenkins. At the time of the accident Mr. Wry was a pedestrian, employed as a gas station attendant at a Congo

gas station. He was attempting to assist the driver of a Congo transport truck back the truck out of the gas bar when he was hit by the above-mentioned drivers. At the time of the accident the Congo truck was stopped in the gas bar and was not involved in the collision.

At the time of the accident, Barry Norman, the driver of the Congo transport truck and Mr. Wry were both Schedule 1 workers under the Workers Safety and Insurance Act ("WSIA") and were acting in the course of their employment.

As a result of the injuries sustained in the accident Mr. Wry applied to Aviva, the insurer of Mr. Wry's father for accident benefits. Aviva paid the benefits and because of the involvement of the transport truck, claimed loss transfer indemnity from Royal, the insurer of the truck.

Royal has taken the position that Aviva is precluded from pursuing loss transfer in this matter. It takes the position that Mr. Wry's right of action is statute barred pursuant to section 28 (1) of the Worker's Safety and Insurance Act ("WSIA") as against Congo transport and its driver, Barry Norman and therefore there can be no loss transfer.

This matter has therefore proceeded by way of a preliminary hearing in order to determine this one issue.

The potentially applicable legislation from Royal's point of view are section 28(1) 29(1) and 30(14) of the WSIA and section 59 of the Statutory Accident Benefits Schedule. Those sections state as follows:

Section 28 (1) A worker employed by a Schedule 1, employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease; 1. Any Schedule 1 employee,

2. a director, executive officer or worker employed by any Schedule 1 employer

Section 29 (1) This section applies in the following circumstances:

in an action by or on behalf of a worker employed by a Schedule 1 employer or a survivor of such a worker, a Schedule 1 employer or director, executive officer or another worker employed by a Schedule 1 employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.

In an action by or on behalf of a worker employed by a Schedule 2 employer or a survivor of such a worker, the worker's Schedule 2 employer or a director, executive officer, or another worker employed by the employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.

(2)The employer, director, executive officer or other workers not liable to pay damages to the worker or his or her survivors or contribute to or indemnify another person who is liable to pay such damages.

(3) The Court shall determine what portion of the loss or damages was caused by the fault or negligence of the employer, director, executive officer or other worker and shall do so whether or not he, she or it is a party to the accident.

(4) No damages, contribution or indemnity for the amount determined under subsection (3) to be caused by a person described in that subsection is recoverable in an action.

Section 30 (14) The following rules apply if the worker or survivor elect to commence the action instead of claiming benefits under the insurance plan;

the worker or survivor is entitled to receive benefits under the insurance plan to the extent that, in a judgement in the action, the worker or survivor is awarded less than the amount described in paragraph 3. if the worker or survivor settles the action and the Board approves the settlement before it is made, the worker or survivor is entitled to receive benefits under the insurance plan to the extent that the amount of the settlement is less than the amount described in paragraph 3. for the purposes for paragraphs 1 and 2, the amount is the cost to the Board of the benefits that would have been provided under the plan to the worker or survivor, if the worker or survivor had elected to claim benefits under the plan instead of commencing the action.

Section 59 (1) The insurer is not required to pay benefits under this Regulation in respect of any insured person who, as a result of the accident, is entitled to receive benefits under any worker's compensation law or plan.

(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.

(5) Despite subsection (1), if there is a dispute about whether subsection (1) applies to a person, the insurer shall pay full benefits to the person under this Regulation pending resolution of the dispute if,

The person makes an assignment to the insurer of any benefits under any workers' compensation law or plan to which he or she is or may become entitled as a result of the accident; and

The administrator or Board responsible for the administration of the workers' compensation law or plan approves the assignment.

Counsel for Royal argued that while Mr. Wry may elect to bring an action against the owners and operators of the two vehicles that struck him, driven by Menon and Jenkins, he cannot sue the insureds of Royal, Barry Norman and Cango Transport Inc., as he has no right of action against them pursuant to section 28 of the WSIA. Counsel goes on to argue that despite the fact that Norman and Cango Transport Inc. are not parties to the action commenced by Wry against Menon and Jenkins, the Court hearing the action is to determine the fault or negligence, if any, of Norman and Cango Transport Inc. pursuant to section 29 (3) of the WSIA. It further argues that pursuant to section 29 (2) and (4) of the

WSIA, despite any findings of liability on Norman or Cango Transport Inc., there is no obligation on Norman, Cango or their insurers to pay damages to Wry for their negligence.

Counsel for Royal then argues that pursuant to section 29 (3) the damages that Wry is entitled to receive from Menon and Jenkins would be reduced, but pursuant to section 30 (14) of the WSIA

Wry would be entitled to receive benefits from the WSIB for the difference between damages awarded by the Court and the benefits he would have received under the WSIA. Thus, counsel for Royal concludes, when Mr. Wry makes his application for payment of benefits under section 39 (14) of WSIA, for the difference between his court judgment and the benefits he would have received, any amount that he would be entitled to receive under WSIA would be paid by Aviva pursuant to the assignment obtained pursuant to section 59 (5) of the SABS. Accordingly, it is Royal's position that to the extent that there is any fault or negligence on the part of Norman or Cango Transport Inc. then Wry will "be entitled to receive benefits under any worker's compensation law or plan" and pursuant to section 59 (1) of the Statutory Accident Benefits Schedule, he ought not be entitled to accident benefits and therefore should be no entitlement to loss transfer pursuant to section 275 of the Insurance Act.

In support of their position, Royal cites the case of *ING Halifax vs. Royal SunAlliance Insurance Company*, 204 Can LII 18786 (Ont. S.C.), a decision of Judge Ellen McDonald, dated May 19, 2004, saying that it stands for the proposition that no loss transfer is available to an insurer who pays statutory accident benefits to an insured if its insured is "entitled to receive benefits under a worker's compensation law or plan".

With the greatest of respect, I do not believe that the *ING vs. Royal SunAlliance Insurance Company* decision is totally applicable to our case. In that case, Royal did not receive an assignment from the insured party of any entitlement he might have had for benefits arising out of the accident as contemplated by section 59 (5) of the Statutory Accident Benefits Schedule. Furthermore, it would appear that in that case the adjuster simply failed to realize there was a WSIB entitlement which the court found that she could have reasonably been aware of.

Our case is somewhat different. Here there was a WSIB assignment and it was approved by the Board.

The facts of our case fit in the parameters of section 59 (5) of the Statutory Accident Benefits Schedule. There is nothing in the decision of *ING Halifax vs. Royal* that absolutely precludes loss transfer in the appropriate WSIB situation.

In its initial submissions counsel for Royal suggested that section 5 (1) of Regulation 668/90 (the fault determination rules) could be read in such a way as to preclude loss transfer in WSIA cases.

Without going into detail with regard to that argument, I am of the view that such an interpretation would be incorrect. When interpreting the meaning of the phrase "the degree of fault of the insured shall be determined in accordance with the ordinary rules of law" as found in section 5 (1) of Regulation 668/90, this is intended to refer to the degree of responsibility for the accident itself (see *Jevco Insurance Company vs. York Fire and Casualty Company* [1996 O.J. 646]. In my view, if the legislature was going to take away the cause of action it would do so clearly and not through a questionable interpretation of section 5 (1) of the Regulation.

In the present case, the provisions of section 59 (5) have been complied with and accordingly Aviva may maintain the claim for loss transfer against Royal. This is, of course, subject to any finding of liability as required by the Regulation.

In the event that the parties cannot agree as to the issue of costs I may be spoken to.

Dated this __ day of June, 2006 in the City of Toronto, Province of Ontario.

M. Guy Jones
Arbitrator