Case Name:

Wawanesa Mutual Insurance Co. v. AXA Insurance (Canada)

Between
The Wawanesa Mutual Insurance Company, Applicant
(Appellant in Appeal), and
AXA Insurance (Canada), Respondent (Respondent in Appeal)

[2011] O.J. No. 4342

2011 ONSC 4181

Court File No. CV-10-415262

Ontario Superior Court of Justice

S.E. Greer J.

Heard: June 1, 2011.
Judgment: July 7, 2011.

(25 paras.)

Insurance law -- Automobile insurance -- Accident benefits -- Medical expenses -- Appeal by Wawanesa from arbitration award dismissed -- Wawanesa was insurer of parties injured in two automobile accidents -- AXA insured other drivers -- Wawanesa forwarded loss transfer requests to AXA for indemnification for s. 42 assessment expenses -- AXA refused payment -- Arbitrator ruled that Jevco decision provided that costs of assessments were not recoverable under loss transfer -- Wawanesa appealed, relying on post-Jevco amendments to Statutory Accident Benefits Schedule -- Arbitrator's decision correct in law -- Until amendment to Act itself, change in wording in Schedule did not make substantial change and Jevco remained good law -- Insurance Act, s. 275(1).

Appeal by the Wawanesa Mutual Insurance Company from an arbitration award in favour of the respondent, AXA Insurance (Canada). In 2010, the parties were automobile insurers who entered into an arbitration agreement to determine whether insurance assessment expenses were recoverable in loss transfer following March 2006 amendments to the Statutory Accident Benefits Schedule. The dispute related to two accidents, the Flynn accident in October 2005 and the Konopka accident in 2006. Wawanesa was Flynn's insurer and AXA represented the driver responsible for the accident. In both cases, Wawanesa forwarded loss transfer requests to AXA for indemnification for s. 42 assessments. AXA refused payment. The arbitrator concluded that s. 42 expenses for the costs of

the assessments by an insurer were not recoverable under loss transfer. In reaching her conclusion, the arbitrator ruled she was bound by the decision in Jevco Insurance v. Prudential. Wawanesa submitted that the arbitrator erred in the application of the jurisprudence to the facts in light of the changes to the applicable legislative scheme. Wawanesa sought to set aside the arbitrator's order and sought declarations that the insurer assessment expenses were recoverable under the Statutory Accident Benefits Schedule, and that AXA was responsible to indemnify Wawanesa for the payment of such expenses in connection with the two accidents.

HELD: Appeal dismissed. The arbitrator's decision was reviewable on a standard of correctness. There was no real change in the nature and scope of the new insurer examinations. The 2006 change of wording in the Schedule was not sufficient to make a substantial change in the interpretation of the Act, Schedules and Bulletins. As per Jevco, there was no connection between administrative costs, limiting benefits and the benefits paid. Jevco remained good law until the Act itself was amended. The decision of the arbitrator was correct in law.

Statutes, Regulations and Rules Cited:

Arbitration Act, S.O. 1991, c. 17,

Insurance Act, R.S.O. 1990, c. I.8, s. 42, s. 275, s. 275(1)

Statutory Accident Benefits Schedule -- Accidents, Ontario Regulation 403/96,

Counsel:

Kevin D.H. Mitchell, Counsel for the Appellant.

Linda Matthews, Counsel for the Respondent.

ENDORSEMENT

1 S.E. GREER J.:-- The Appellant, Wawanesa Mutual Insurance Company ("Wawanesa"), appeals the decision of Arbitrator, Philippa Samworth, and asks for the following relief:

1. An Order by way of appeal, pursuant to section 45 of the *Arbitration Act*, S.O. 1991, c. 17, setting aside the Award of Arbitrator Philippa Samworth ("the Arbitrator"), dated October 15, 2010.
2. An Order by way of appeal for a declaration that insurer assessment expenses are recoverable in loss transfer in light of the March 1, 2006 legislative changes to Ontario Regulation 403/96, the *Statutory Accident Benefits Schedule - Accidents on or After November 1, 1996*.
3. An Order by way of appeal for a declaration that the Respondent, Axa Insurance (Canada) ("Axa"), be found responsible to indemnify Wawanesa for the payment of insurer assessment expenses which were paid by Wawanesa on behalf of Terrance Flynn and Rosa Flynn, as a result of a motor vehicle accident which occurred on October 6, 2005, and on behalf

of Kazimierz Konopka, as a result of a motor vehicle accident which occurred on August 21, 2006.

4. Costs of the arbitration and this Appeal.

The Arbitration Award

2 The parties entered into an Arbitration Agreement in April, 2010. The issue for determination at the hearing was whether insurance assessment expenses are recoverable in loss transfer, particularly in light of the March 1, 2006 legislative changes noted above. This, says Wawanesa, is the primary issue arising out of the Arbitration. The other issues raised by Wawanesa, relating to quantum and interest, have been deferred pending the hearing of this Appeal.

3 Both parties are automobile insurers. A dispute arose between them with respect to amounts that are recoverable under loss transfer as a result of two accidents, being the Konopka accident of August 21, 2006 and the Flynn accident of October 6, 2005. Wawanesa was the Flynn's automobile insurer. Axa represented Johnstone, the driver of the commercial truck which was responsible for 100% of the accident.

4 In both cases, Wawanesa forwarded loss transfer requests to Axa for indemnification with respect to Section 42 assessments. Axa refused, in both cases, to pay them. In the Flynn accident the amount in question was $35,405.12 plus $1,312.50 for the passenger. In the Konopka accident, the amount in question was $12,702.91.

5 In her Arbitration Decision, the Arbitrator reviewed the relevant statutory provisions in question, setting out the legislative history leading up to these loss transfer provisions. She concluded that Section 42 Expenses for the cost of the assessments by an insurer are not recoverable under loss transfer. In reaching her conclusion, the Arbitrator followed and analyzed the decision of Mr. Justice Matlow in *Jevco Insurance Company v. Prudential Insurance Company* (1995), 22 O.R. (3d) 779 (O.C.J. (Gen. Div.)). In coming to the conclusion she did, the Arbitrator said on p.7 of her decision, "I do not see any way around Justice Mandel's decision and I feel I remain bound by it."

The Standard of Review

6 The parties acknowledge that the issue of whether the costs of Section 42 insurer examinations are properly recoverable under Section 275 of the *Insurance Act* is a question of law.

7 The parties, however, disagree on the standard of review of an arbitrator's decision. Wawanesa says the standard of review by arbitrators under the *Insurance Act* on questions of law is one of correctness whereas Axa says it is one of reasonableness.

8 In the recent decision *Security National Insurance Company v. Markel Insurance Company*, 2010 ONSC 5309 (S.C.J.), Mr. Justice Perell held in para. 23 that the standard of appellate review of an arbitrator's award in a priority dispute under the *Insurance Act* is correctness on questions of law and reasonableness in relation to questions of mixed fact and law. He refers to the decision of Mr. Justice Brown in *Zurich Insurance Co. v. Personal Insurance Co.*, [2009] O.J. No. 2157, 2009 CarswellOnt 2968 (O.S.C.J.), where he reached the same conclusion in paragraph 29.

9 The standard of review on this question of law is one of correctness.

Wawanesa's Position

10 Wawanesa says that the Arbitrator erred in making the following findings:

1. that insurer assessment expenses are not recoverable in loss transfer in light of the March 1, 2006 legislative changes to Ontario Regulation 403/96, the *Statutory Benefits Schedule - Accidents on or After November 1, 1996*;
2. that, absent a change to the wording of Section 275 of the *Insurance Act*, ("the Act"), insurer assessment expenses are not recoverable in loss transfer;
3. that the character and nature of insurer assessment expenses, whether mandatory or optional, makes them not recoverable in loss transfer.

In addition, Wawanesa says that the Arbitrator erred in her application of the existing case law to the facts of this case in light of the changes to the applicable legislative scheme, and that her decision is contrary to the weight of the evidence and law.

Analysis

11 The Appeal is dismissed for the reasons which follow. In this Appeal there is no evidence to weigh. The only question is one of whether the Arbitrator erred at law in coming to the conclusions she did.

12 The Arbitrator held, on p.3 of her decision, that in determining entitlement to loss transfer, one must refer to Section 275(1) of the Act which provides a scheme for loss transfer indemnity where the insurer responsible for payment of accident benefits may be entitled to indemnity or repayment by another insurer. It reads:

> S. 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, provision, 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 benefits arose.

13 She also examined and took into consideration two Bulletins issued by what was formerly known as the Ontario Insurance Commission. The first Bulletin is No. 9/92 issued on July 6, 1992. That Bulletin, she says confirms that the purpose of the loss transfer provisions is to balance the cost of no fault benefits between different classes of vehicles. The Bulletin, in a question and answer section found in it, says that reimbursement there is only made for the actual benefits paid. This Bulletin came into being when the prevailing legislation was The Ontario Motorist Protection Plan. (OMPP).

14 The Second Bulletin was issued on June 6, 1994 when the Statutory Accident Benefits Schedule had been extensively amended to what is commonly known as "Bill 164". This Bulletin says that "loss transfer" permits insurers that pay accident benefits ("the first party insurer") to be indemnified by another insurer (the "second party insurer") for all or part of the accident benefits paid to an insured person under certain circumstances. It says such transfers are available for benefits such as the cost of any assessment conducted under the *Schedule*; the costs of services provided by a case manager related to coordination of medical, rehabilitation and attendant care services; and all expenses covered by the *Schedule*.

15 The Arbitrator notes on p.4 that one of the questions which is set out in the Bulletin is "Which Statutory Accident Benefits may be the subject of a loss transfer indemnification request?" The answer includes the sentence, "Now that the new Schedule is in effect, loss transfer is now available for the following kind of benefits ...". These are noted above. The Arbitrator says that while these Bulletins are not law, they should be given considerable weight.

16 The Arbitrator then sets out the two parties' positions on p. 6 of her decision. She says that Wawanesa presents a compelling argument. Despite this finding, she says that the law has not changed. Wawanesa says that once the DAC's were eliminated, the nature of mandatory assessments changed. It argues that, as such, these expenses under Section 42 of the *Schedule* would now be recoverable in loss transfer as they are "in relation such benefits paid by it", under the Act. Wawanesa also says that when these benefits became mandatory in March 2006, they became a different class of expenses and ones that could no longer be characterized as administrative costs, overhead costs or costs similar to those incurred in surveillance or investigation.

17 The Arbitrator reviews Axa's position, which is that she is bound by the *Jevco, supra,* decision and that, absent an amendment to Section 275 of the Act, she must follow Mr. Justice Mandel's decision. She also notes that *Jevco, supra,* was followed by two other Arbitrators' similar decisions in 2005 and 2007.

18 On p.7 of her decision, the Arbitrator sets out the four relevant conclusions which are in the *Jevco* decision. The Arbitrator notes in para. 4 on p.7 of her decision that Mr. Justice Mandel does not accept that the words "in relation to" as found in Section 275(1) of the Act can be interpreted as allowing indemnification for administrative costs such as costs of assessments. In *Jevco, supra,* Mr. Justice Mandel held that there is no connection between administrative costs, limiting benefits and the benefits paid.

19 The Arbitrator also follows other arbitration decisions, notably *State Farm Mutual Automobile Insurance Company v. ING Insurance Company,* a February 16, 2005 decision of Arbitrator Craig Brown, where he said that a similar argument raised before him could not be applicable unless the law has been changed by legislation or regulation.

20 Axa says that some deference must be shown to Insurance Arbitrators' decisions, given their expertise in this area of the law. I agree with that principle, even though the standard of review is one of correctness in this case.

21 Axa says that insurer assessment expenses are not recoverable under the loss transfer provisions of the Act and that the legislative changes to the *Statutory Accident Benefits Schedule* that came into effect on March 1, 2006 have had no impact upon the principle that those expenses are not recoverable. It says that whether the assessment costs are mandatory or optional does not matter. The character and nature of those costs remains the same.

22 Wawanesa takes the position that the decision in *Jevco, supra,* is not binding, as it relates to prior legislation. It further states that the cost of assessments under prior legislation was "entirely different" in scope and application than the current insurer examinations are. In the alternative, it says that the *Jevco* decision is "incorrect" and is not a true reflection of what is recoverable under S. 275 of the Act. Axa says the change in the nature and scope of the new insurer examinations, renders them a "different class of expense" and they can no longer be characterized as an administrative cost or an overhead expense.

23 I see no real change in the nature and scope of the new insurer examinations. Some change of wording in the Schedule is not, in my view, sufficient to make the substantial change in how the Act and *Schedules* and Bulletins are to be interpreted. *Jevco, supra*, is still good law and will remain so until the legislation is changed.

24 The Appeal is therefore dismissed. The decision of the Arbitrator is correct in law.

25 If the parties cannot otherwise agree on the Costs, I will receive brief written submissions no longer than 3 pages in length plus time dockets, a Bill of Costs and any case law relied upon. Since the Appeal was dismissed by me, the Respondent shall submit its Bill of Costs first, followed 7 clear days by those of the Appellant and 7 clear days thereafter any Reply by the Respondent. All submissions shall be sent to me at Osgoode Hall.

S.E. GREER J.

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