Appeal P16-00087

OFFICE OF THE DIRECTOR OF ARBITRATIONS

MOTOR VEHICLE ACCIDENT CLAIMS FUND

Appellant

and

ANNE BARNES

Respondent

BEFORE:	Delegate Jeffrey Rogers
REPRESENTATIVES:	Ms. Marie Sydney, solicitor for Motor Vehicle Accident Claims Fund Mr. J. Douglas Wright, solicitor for Ms. Barnes
HEARING DATE:	On the record, by written submissions completed on March 27, 2017

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990 c. I.8 as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*, and Regulation 664, R.R.O. 1990, as amended, it is ordered that:

1. The appeal is allowed. Paragraph 3 of the Arbitrator's order of November 22, 2016 is rescinded and replaced with the following: Ms. Barnes' entitlement to attendant care benefits for services provided by Ms. McColeman after January 31, 2014 is limited by the economic loss Ms. McColeman sustains in providing the services.

2. If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

April 6, 2017

Jeffrey Rogers
Director's Delegate

Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Motor Vehicle Accident Claims Fund (MVAC Fund) appeals the Arbitrator's decision of November 22, 2016 in which she found that Ms. Barnes' entitlement to attendant care expenses for services provided after January 31, 2014 is not limited by the economic loss sustained by Ms. McColeman, who provided the services.

Effective February 1, 2014, the *Schedule*[1]was amended to limit recovery for attendant care services provided by a person like Ms. McColeman to the amount of her economic loss. MVAC Fund submits that the Arbitrator erred in finding that the amendment does not apply to claims arising from accidents that occurred before the amendment. For the reasons that follow, I agree.

II. BACKGROUND

Ms. Barnes sustained a catastrophic impairment as a result of a motor vehicle accident on January 3, 2012. She applied for and received statutory accident benefits from MVAC Fund. A dispute arose regarding her entitlement to certain attendant care benefits. Ms. Barnes applied for arbitration after mediation did not resolve the dispute.

Ms. Barnes receives attendant care services from her mother, Louise McColeman. Ms. McColeman took an unpaid leave from her employment in order to care for her daughter. At the time of the accident, the *Schedule* provided that an expense for attendant care services is not incurred unless:

[1]*The Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996,* Ontario Regulation 403/96, as amended.

1. The person who provided the services did so in the course of the employment, occupation or profession in which he or she would ordinarily have been engaged, but for the accident, or

2. The person sustained an economic loss as a result of providing the services.

Ms. McColeman fits in the second category and not the first. After March 1, 2012 when Ms. McColeman began her leave, she sustained an economic loss in an unknown amount. Until the question in this appeal is resolved, Ms. Barnes refuses to provide information on the amount of the loss. Before the Arbitrator's decision, MVAC Fund paid for attendant care at the rate of $2,000 per month. Ms. Barnes claims the maximum payable of $6,000 per month.

The *Schedule* was amended, effective February 1, 2014. The amendment limits recovery for services provided by non-professional service providers like Ms. McColeman to the amount of the economic loss the service provider sustains as a result of providing the services. Before the amendment, the jurisprudence held otherwise. Under the prevailing jurisprudence, once any economic loss was established, the full prescribed cost of the services was recoverable, up to the maximum payable. For Ms. Barnes, that means entitlement to $6,000 per month, regardless of the amount of her mother's economic loss.

The questions that came before the Arbitrator was whether the amendment applies to Ms. Barnes for services provided after its effective date. The Arbitrator found that it did not.

II. ANALYSIS

On February 1, 2014, the following rule was added to s. 19 of the *Schedule* for determining the amount of attendant care benefits payable:

> Despite paragraphs 1, 2 and 3, if a person who provided attendant care services (the "attendant care provider") to or for the insured person did not do so in the course of the employment, occupation or profession in which the attendant care provider would ordinarily have been engaged for remuneration, but for the accident, the amount of the attendant care benefit payable in respect of that attendant care shall not exceed the amount of the economic loss sustained by the attendant care provider during the period while, and as a direct result of, providing the attendant care.

As noted above, this rule limits recovery for services provided by non-professional service providers to the amount of the economic loss the service provider sustains. Before the amendment, the Court of Appeal had considered the economic loss provision in *Henry v. Gore Mutual Insurance Company*.[2] The Court held that sustaining economic loss was a threshold requirement. The Court reasoned that, if the Legislature intended to limit the amount of the benefit to the amount of the economic loss, it would have said so. Therefore, once an economic loss was established, the full prescribed value of the services was recoverable.

The question in this appeal is whether the amendment of February 2014 in which the Legislature specifically limited recovery, applies to Ms. Barnes whose accident occurred before the amendment.

The *Schedule* has been amended many times since it was first introduced. The issue of applicability of amendments to earlier accidents is not new. The Arbitrator started her analysis by setting out the rules regarding temporal application of legislation, as established by the Supreme Court in *R v. Dinley*:[3]

(i) Cases in which legislation has retrospective effect must be exceptional;

(ii) Where legislative provisions affect either vested or substantive rights, retrospectivity has been found to be undesirable;

(iii) New legislation that affects substantive rights will be presumed to have only prospective effect unless it is possible to discern a clear legislative intent that it is to apply retrospectively;

(iv) New procedural legislation designed to govern only the manner in which rights are asserted or enforced does not affect the substance of those rights and is presumed to apply immediately to both pending and future cases;

(v) The key task in determining the issue lies not in labelling the provision "procedural" or "substantive", but in discerning whether they affect substantive rights; and

(vi) The fact that new legislation has an effect on the content or existence of a right is an indication that substantive rights are affected.

[2]2013 ONCA 480

[3]2012 SCC 58

MVAC Fund conceded that the amendment affected Ms. Barnes' substantive right to attendant care benefits. The Arbitrator ruled that, based upon that concession alone, the amendment could not apply to Ms. Barnes, so she did not have to also show that she had a vested right to the benefits in dispute. The Arbitrator relied on the second rule above where the Court states that **retrospectivity** is undesirable, where provisions affect **either vested or substantive rights**.

MVAC Fund did not agree that Ms. Barnes acquired a vested right to attendant care being determined without reference to the amendment. The Arbitrator ruled that she did, stating: "Ms. Barnes acquired a vested right to have her future attendant care benefits determined under the wording of subsection 19(3) of the *Schedule* as it existed prior to the amendment to the Regulation."[4] The Arbitrator relied on the decision in *Federico and State Farm Mutual Automobile Insurance Company.*[5] In that decision, Delegate Blackman held that the provision in the new *Schedule* effective September 1, 2010, which reduced entitlement to interest on overdue benefits from 2% to 1%, did not apply to the insured person. One of Delegate Blackman's reasons for this finding was that the insured person had acquired a vested right to the higher interest rate. The Arbitrator also relied on the decision of the Superior Court in *Davis, by her Litigation Guardian Lush v. Wawanesa Mutual Insurance Company*[6] which held that the amendment at issue in this case does not apply to accidents that occurred before February 1, 2014.

The Arbitrator declined to follow the logic of other appeal decisions that conflict with *Federico* and confirm the ability of the Legislature to change insurance policies from time to time under s. 268(1) of the *Insurance Act.* The Arbitrator distinguished the other decisions on the grounds that the accidents in those cases occurred after the amendments. She noted that the language of s. 268(1) is very general and she preferred *Federico* because the Delegate's decision was upheld on appeal to the Divisional Court.

[4]At page 36

[5](FSCO A08-001138, March 23, 2012); upheld on appeal (FSCO P12-00022, March 25, 2013); application for judicial review dismissed (2014), 236 A.C.W.S. (3d) 202; 2014 ONSC 109 (Div. Ct.).

[6]2015 ONSC 6624

I find that the Arbitrator erred in her analysis. First, I find that the Arbitrator erred in finding that the amendment has retrospective application. Second, I find that the Arbitrator erred in finding that Ms. Barnes acquired a vested right to determination of her entitlement, without the amendment. A proper analysis leads to the conclusion that the amendment applies to limit Ms. Barnes' entitlement to attendant care benefits for services provided by Ms. McColeman after February 1, 2014 to a maximum of the amount of the economic loss Ms. McColeman sustains as a result of providing the services.

No vested right in an unchanged SABS

Any analysis of vested rights in accident benefits must be informed by the context provided by s. 268(1) of the *Insurance Act.* It states:

> Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the *Statutory Accident Benefits Schedule* is made or amended, shall be deemed to provide for the statutory accident benefits set out in the *Schedule* and any amendments to the *Schedule*, subject to the terms, conditions, provisions, exclusions and limits set out in that *Schedule*.

As the Arbitrator noted, the language is general. But s. 268(1) cannot be discounted for that reason. The language is clear. The section establishes three principles. First, it displaces the concept of a motor vehicle liability policy as a private agreement between an insurer and its insured. The terms of the agreement are set by the legislation. Second, it makes the *Schedule* a part of every policy. Third, it makes all amendments to the *Schedule* a part of every policy, including all terms, conditions, provisions, exclusions and limits.

I note here that viewed in this context, one cannot distinguish the cases that take a different approach from *Federico* on the basis that the relevant *Schedules* specifically stated that they applied to accidents occurring after a particular date. That term served to limit the application of the amendments and not to expand it. Without that term, s. 268(1) creates the assumption that the amendments to apply to all existing policies and, by extension, to all existing claims. I will return to the cases later.

The Arbitrator applied the second rule in *Dinley* in her analysis. It states that retrospectivity is undesirable, where provisions affect **either vested or substantive rights**. The Arbitrator reasoned that, since there was no dispute that Ms. Barnes acquired a substantive right prior to the amendment, the change did not apply. The Arbitrator then ruled that Ms. Barnes acquired a vested right, in any event. Both conclusions hinge upon a determination that the amendment has retrospective impact, when applied to Ms. Barnes' entitlement to attendant care benefits after February 1, 2014. I find that it does not.

The test for deciding whether legislation is being retrospectively applied is most clearly set out in the authorities MVAC Fund referred to in its written submissions. With respect to its temporal application, legislation falls into three categories. They are: retroactive, retrospective and prospective. In *Buskirk v. Canada (Solicitor General),*[7] the Court described the categories as follows:

> Before proceeding, it is helpful to consider the distinction that Professor Ruth Sullivan draws between legislation of retroactive, retrospective and immediate application. While legislation of retroactive application operates to "change the past legal effect of a past situation" and legislation of retrospective application operates to "change the future legal effect of a past situation", legislation of immediate application operates to "change the *future* legal effect of an on-going situation" [Emphasis added]

The amendment is not retroactive. It does not "change the past legal effect of a past situation." It is retrospective if, for Ms. Barnes, it changes the "future legal effect of a past situation." The Arbitrator found that it did, because Ms. Barnes' "situation" crystallized at the time of her accident. However, that could not be accurate. Ms. Barnes had no right to attendant care after February 1, 2014, just because she had been injured in an accident before that date. Her right to attendant care was contingent upon her ongoing need, the provision of services, and her incurring an expense. Therefore, in Ms. Barnes' circumstances, the application of the amendment fits into the category of legislation that has immediate application. The amendment changes "the future legal effect of an on-going situation." That is prospective application of the amendment and not retrospective.

[7][2012] F.C.J. No. 1684, at paragraph 59

The idea that entitlement to accident benefits vests at the time of the accident, finds traction from the decision in *Federico.* The Arbitrator considered *Federico* to be persuasive and binding. The issue in *Federico* was the application of the amendments to the interest provisions in the *Schedule*, effective September 1, 2010. The question was whether the amendments applied to ongoing claims arising from accidents that occurred before September 1, 2010. The Delegate ruled that the insured person was entitled to interest at the rate payable before the amendment for two reasons. First, the language of the relevant sections of the *Schedule* meant that interest was to be paid at the old rate. Second, the rights of the insured person vested at the time of the accident, and it is presumed that the legislature did not intend to interfere with vested rights.

The Delegate's ruling on vested rights was unnecessary to the decision. It was *obiter.* Having ruled that the legislation itself prescribed interest at the old rate, there was no need to consider the issue of vested rights. The decision of the Divisional Court, upon judicial review of the Delegate's ruling, illustrates this point. The Court upheld the Delegate's decision on interpretation of the legislation, but made no mention of the issue of vested rights. The Court simply stated:

> …we find that the Tribunal reasonably interpreted sections 3(1)(1.4) of the Old Regulation and s. 2(2)2 of the New Regulation as providing that an amount that would have been paid under the Old Regulation after August 31, 2010, shall be paid under the New Regulation, but in an amount determined under the Old Regulation.[8]

The non-binding decision of the Superior Court in *Davis*, which the Arbitrator also found persuasive, turned upon acceptance of the vested rights approach of *Federico.* The Court stated:

> The legislation mandates that all contracts of insurance contain certain rights. These rights are not statutory in nature merely by virtue of being regulated. Rather, they are contractual rights that must be provided in every contract for automobile insurance in the province. **This interpretation of the rights arising under the *SABS* is supported by the Appeal Decision in *Federico v. State Farm Mutual Automobile Insurance Co.* In his conclusion, at para. 65, Lawrence Blackman dir. delegate found that the respondent had, as of the date of the accident, "tangible, concrete, vested and materialized rights to**

[8] *State Farm Automobile Insurance Co. v. Federico* 2014 ONSC 109, at paragraph 11

> **interest at 2% per month, compounded monthly", for benefits he was receiving under the *SABS*, and that this right was "not simply a potential public law right, but a crystallized private contractual right"**.[9] [emphasis added]

In *Federico,* the Delegate did not consider the effect of s. 268(1) of the *Insurance Act* and he did not consider the earlier appeal decision in *Gan Canada Insurance Company and Lehman.*[10] In *Lehman,* Mr. Lehman was injured in an accident on January 29, 1994, just after the *SABS-1994* came into force. But, contrary to the Arbitrator's belief, the issue was not whether the *SABS-1994* applied. The issue was whether an amendment to the pay-pending provisions in s. 23(8) of the *SABS-1994,* effective December 31, 1994, applied. The decision states:

> This new section does not include IRBs in the pay-pending-resolution requirement. Instead, the insurer is allowed to pay benefits based on the offer it made with respect to pre-accident earning capacity and the REC-DAC's assessment of residual earning capacity.
>
> At arbitration, GAN argued that by the time Mr. Lehman's entitlement to LECBs arose in 1996, the *SABS-1994* no longer required it to continue paying IRBs pending resolution of the dispute about LECBs. The arbitrator rejected this position. She held that GAN could not rely on the amendments because Mr. Lehman's right to benefits, including interim benefits, crystallized at the time of his accident. In the arbitrator's view, the amendments were not merely procedural and, therefore, should not be applied retroactively to "prejudicially affect Mr. Lehman's rights as they existed on the date of his accident." As a result, she ordered GAN to continue paying IRBs at $310.21 per week until October 27, 1997, the date of the arbitration decision.[11]

The issue in *Lehman* was therefore identical to the issue in this case. The Arbitrator erred in distinguishing *Lehman* on that basis.

Lehman rejects the ideas that rights to accident benefits arise from a private contractual agreement and vest at the time of the accident:

[9]At paragraph 30

[10](FSCO P97-00064, August 10, 1998), upheld upon judicial review [2000] O. J. No 4902

[11]At page 4

> Automobile insurance in Ontario is strictly regulated. While automobile insurance policies are contractual, the terms of the standard policy are set by provincial legislation. Subsection 268(1) of the *Insurance Act* provides that every automobile insurance policy includes statutory accident benefits set out in the regulation - the *SABS-1994* - **and any amendments to the regulation**":…
>
> **This provision clearly contemplates amendments to the *SABS-1994* that will affect the coverage provided in existing policies. In other words, the terms of an automobile insurance policy are not fixed for its entire duration.** For accidents after January 1, 1995, there is no question that the 1995 version of subsection 23(8) of the *SABS-1994* applies, even if the policy was issued in 1994. **The harder question, raised in this appeal, is whether the 1995 amendments can affect ongoing claims arising from accidents that occurred before January 1, 1995.**
>
> **In my opinion, the legislation creates a right to statutory accident benefits, but only those provided in the regulations - which may be amended from time to time.** [emphasis added] [12]

Upon Judicial Review, *Lehman* was upheld by the Divisional Court. Unlike *Federico,* the vesting issue was not *obiter*. Therefore, strictly speaking, the Arbitrator was bound to follow *Lehman* and not *Federico.* I am as well.

The decision of the Court of Appeal in *Beattie v. National Frontier Insurance Co.*[13] also erodes the *Federico* logic. Although the accident in *Beattie* occurred after the relevant amendment, one of the issues was whether the amended *Schedule* applied, or the one in force when Mr. Beattie entered into his contract for insurance. Recall that in finding vesting, *Federico* applied the concept of private contractual rights, stating that the right to the higher interest rate was "not simply a potential public law right, but a crystallized private contractual right". The Court in *Beattie* rejected the idea that entitlement to accident benefits is a matter of private contract:

> As I understand the position taken by Beattie's counsel, she contends that his entitlement to SABS is governed by the regulation that was in force in May 1996, when he contracted with Frontier for automobile insurance and not the regulation in force in November 1996, when he was injured in the automobile accident. It is her position that the legislation that came into force pursuant to which the 1996 regulation was enacted did not have the effect of "amending" his existing insurance policy and thereby impairing his vested right to SABS under the 1993

[12] At page 8

[13] [2003] O.J. No 4258

> regulation. She further contends that the Lieutenant Governor in Council exceeded its delegated authority by enacting a regulation that purports to apply retrospectively to vested insurance contracts.
>
> In my view, the motion judge was correct in concluding that O. Reg. 403/96 governed Beattie's contractual right to SABS. …Section 268(1) of the Insurance Act contemplates that the legislature may, from time to time, amend or change accident benefits schedules…
>
> In addition, s. 268(1) has the effect of amending every motor vehicle liability policy in force when the Statutory Accident Benefits Schedule is amended, which included Beattie's policy, to provide for the statutory benefits set out in an amended Schedule. Consequently, by virtue of s. 268(1), as O. Reg. 403/96 was in force at the time of Beattie's accident, his policy has been amended to incorporate the benefits and exclusions contained in the regulation. [14]

I find it illogical to apply the concept of vested contractual rights to a relationship in which the parties have no direct input in the terms of their relationship, and the terms may be amended from time to time without their input or consent. The *Federico* approach is inconsistent with s. 268(1) and incompatible with the history of frequent amendments to the *SABS,* both incremental and wholesale. The Arbitrator erred in applying *Federico*. I find that Ms. Barnes had no vested right to determination of her entitlement to attendant care benefits under the *Schedule* as it existed at the time of her accident. I conclude that her entitlement to those benefits, for services provided by Ms. McColeman after the amendment, is limited to a maximum of the economic loss Ms. McColeman sustains in providing the services.

IV. EXPENSES

If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

April 6, 2017

Jeffrey Rogers
Director's Delegate

Date

[14] At paragraphs 21-24