



Neutral Citation: 2008 ONFSCDRS 12

FSCO A05-001972

BETWEEN:

PIRATHEEP PONNAMPALAM

Applicant

and

RBC GENERAL INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Elizabeth Nastasi

Heard: October 29, 2007

Appearances: Steven Sieger for Mr. Ponnampalam
Neil Colville-Reeves for RBC General Insurance Company

Issues:

The Applicant, Piratheep Ponnampalam, alleged that he was injured in a motor vehicle accident on April 16, 2003. He applied for and received statutory accident benefits from RBC General Insurance Company ("RBC"), payable under the *Schedule*.¹ RBC terminated various accident benefits on the basis that he had not been involved in an accident on April 16, 2003. The parties were unable to resolve their disputes through mediation, and Mr. Ponnampalam applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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

The preliminary issues are:

1. Was Mr. Ponnampalam involved in an accident as defined in section 2(1) of the *Schedule*?
2. Is RBC entitled under section 47 of the *Schedule* to a repayment of benefits paid to Mr. Ponnampalam?

Result:

1. Mr. Ponnampalam was not involved in an accident on April 16, 2003.
2. RBC is entitled to pursue a repayment of benefits paid to Mr. Ponnampalam.

EVIDENCE AND ANALYSIS:

Overview:

In order to be entitled to the benefits available under the statutory accident benefits scheme, insured persons must first establish that they were involved in an accident within the meaning of the *Schedule*. Subsection 2(1) of the schedule provides:

“accident” means an incident in which the use or operation of an automobile directly causes an impairment or directly causes damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device.

RBC submits that Mr. Ponnampalam did not sustain impairments as a result of being in an accident and as such is precluded from proceeding to arbitration in respect of his accident benefits claims. Further, in RBC’s Amended Response by Insurer to an Application for Arbitration, RBC alleges that Mr. Ponnampalam has wilfully misrepresented material facts with respect to his application for benefits and on this basis it seeks a repayment of all benefits paid to him pursuant to section 47 of the *Schedule*.

Mr. Ponnampalam contends that he was involved in an accident on April 16, 2003 and as a result sustained injuries. As such, he argues that he is entitled to proceed to arbitration with respect to his claims. Mr. Ponnampalam seeks to pursue his claims for income replacement and housekeeping benefits, expenses and interest.

There is no dispute that there was an accident on April 16, 2003. The question before me is whether Mr. Ponnampalam was a passenger involved in that accident. This was a difficult case which turned primarily on the credibility of the witnesses. I heard testimony from the Applicant, his sister who was the driver of the vehicle and their mother, as well as the driver and 2 of the 3 passengers in the other vehicle involved in the accident. I also reviewed documentary evidence with respect to various medical assessments that the Applicant underwent.² The Insurer cross-examined the Applicant in respect of various statements that he made to the medical assessors.

The Applicant has the burden to establish, on the balance of probabilities, that he was involved in an accident as defined by subsection 2(1) of the *Schedule*. I find that he did not meet this burden. I was not convinced, on the balance of probabilities, that Mr. Ponnampalam was a passenger involved in the accident of April 16, 2003. There were inconsistencies between Mr. Ponnampalam's testimony and the statements that he gave to various medical assessors. The evidence of the Applicant's mother in respect of which car came to pick her up on the day of the accident was also contrary to the Applicant's version of the events on that same day. Further, the driver and the passengers in the other vehicle all testified that the only person they saw in the car on the day of the accident was Ms. Ponnampalam – the Applicant's sister.

Evidence of Mr. Ponnampalam

According to Mr. Ponnampalam, on April 16, 2003 at approximately 2:30 pm he and his sister were on their way to pick up their mother from work. His sister was driving the vehicle and he was in the front passenger seat. He described the road conditions as clear that day. While slowing down at an intersection they were hit from behind. Mr. Ponnampalam said that he got out of the car, made sure that his sister was all right and told her to stay in the car as she was "crying and very upset." Mr. Ponnampalam testified that he recalled seeing 2 or 3 people in the other

² Exhibit #2

vehicle. He noted that none of the occupants in the other car spoke English but he was able to exchange the necessary insurance information with the other driver, Mr. Wong.

Mr. Ponnampalam testified that after the accident their car was still drivable. He said that he called his mother to tell her they would be late and then went to the nearest Collision Reporting Centre (CRC). After he and his sister filled out an accident report³, they picked up their mother between 4:00 and 5:00 pm that day. Mr. Ponnampalam testified that he thought RBC may have sent a tow truck to his house that night or the next day to pick up the car in order to repair it.

Mr. Ponnampalam testified that he did not attend at his family doctor after the accident. Instead, one week after the accident, he went to Finch Birchmount Injury Management Clinic as a walk-in patient. He testified that he went to this clinic on the advice of a friend. His evidence was that the clinic staff advised that he should “probably see a doctor” and told him there was one down the street from the clinic. Mr. Ponnampalam went to see this doctor, Dr. Edmund K.W. Lo, that same day, April 23, 2003. Mr. Ponnampalam’s evidence was that his family doctor, Dr. Lu, was located in Markham which was not a convenient location.

On his Application for Accident Benefits, Mr. Ponnampalam listed Dr. Lo as “family doctor.” When questioned about why he listed a doctor he had only just met as his family doctor he replied that Dr. Lo is “a” family doctor and he had seen him two times by the time he had filled out the Application. Further, he testified he had not been with his family doctor, Dr. Lu, for very long and as such was considering changing to Dr. Lo. Mr. Ponnampalam testified that he never told his family doctor about the accident although he did go back to see him several times after the accident. It was Dr. Lo who completed the disability certificate on April 25, 2003. This disability certificate noted Mr. Ponnampalam’s impairment as “pain and stiffness over neck and lower back and frequent headaches.”⁴

I find the fact that Mr. Ponnampalam chose to go to a rehabilitation clinic prior to even seeing a doctor and then on the clinic’s recommendation went to a new doctor, casts doubt on his claim that he was in an accident. Further, the fact that he did not go to his family doctor after the

³ Exhibit #1.

⁴ Exhibit #2, Tab 1.

accident or even tell his doctor about the accident when he did see him also adds to the unlikelihood of his version of events.

There were several inconsistencies between the documentary evidence and Mr. Ponnampalam's testimony that he was not able to adequately explain in cross examination. The evidence is as follows:

- In an Orthopaedic Assessment conducted by Dr. R. Zarnett, orthopaedic surgeon, on June 19, 2003, Dr. Zarnett notes that "The vehicle was towed to the Reporting Centre and he was picked up and driven home." Mr. Ponnampalam's explanation of this was that the assessor may have confused this with the fact the vehicle was towed by RBC from his house that evening.⁵ I did not find this explanation believable especially considering this statement to Dr. Zarnett was made only two months after the accident.
- Dr. Zarnett's June 19, 2003 report also notes that on the day following the accident the Applicant saw Dr. Lu and that he had seen Dr. Lu on a few occasions before the accident but that he did not have a regular family doctor.⁶ This statement contradicts Mr. Ponnampalam's testimony that he had not seen his family doctor immediately after the accident.
- During an In-Home Assessment conducted by Karen Joudrey, occupational therapist, on July 13, 2003, Ms. Joudrey notes that "... a family member (cousin) was called to the scene and drove the client's sister's vehicle from the collision scene."⁷ Mr. Ponnampalam had no explanation for this statement other than to indicate that it was not correct and that he did not recall saying it. I did not find this explanation believable especially considering this statement to Ms. Joudrey was made only three months after the accident.

⁵ Exhibit #2, Tab 15.

⁶ Exhibit #2, Tab 15.

⁷ Exhibit #2, Tab 17.

- During a Psychiatry Assessment conducted by Dr. S.W. Joseph Wong on June 27, 2006, Dr. Wong notes that "... [Mr. Ponnampalam] went to see his family doctor, who referred him to therapy, where he attended for about six months."⁸ This statement contradicts Mr. Ponnampalam's testimony that he had not seen his family doctor immediately after the accident and that it was a friend who referred him to the Rehab clinic.

I find the inconsistencies between Mr. Ponnampalam's testimony and his previous statements made to the medical assessors cast serious doubt on the events that occurred on the day of the accident. I find that Mr. Ponnampalam's inability to adequately explain these problems in the evidence add to the unreliability of his claim that he was involved in an accident.

Evidence of Ms. Suborna Ponnampalam

Ms. Suborna Ponnampalam's evidence with respect to the events of April 16, 2003 was consistent with her brother's. She testified that she and her brother were both in the car on the day of the accident on their way to pick up their mother from work. She said that she did not speak to anyone in the other car. This is contrary to the testimony of the driver and passengers of the other car who all testified that Ms. Ponnampalam was the only occupant of the car at the time of the accident and that it was with Ms. Ponnampalam that the insurance documents were exchanged.

Evidence of Mrs. Srirapatnakumari Ponnampalam

Mrs. Srirapatnakumari Ponnampalam, the Applicant's mother, testified with the assistance of a Tamil interpreter. During her testimony, Mrs. Ponnampalam stated that, contrary to her son's evidence, her children did not pick her up from work in the vehicle that was involved in the accident, a silver Honda Civic, but rather, they arrived in her second car, a red Honda Civic. When questioned about the whereabouts of the car that had been in an accident she replied: "I am not sure – maybe the Insurer had taken it."

⁸ Exhibit #2, Tab 18.

During cross-examination when Mrs. Ponnampalam was again asked to clarify her statement about the car that picked her up on the day of the accident, despite having been unwavering and clear on direct examination, she said she did not remember as it was a long time ago but she thought it was the red car that came to pick her up. She said that she did not recall which car was in the driveway that night and at no time saw the damage to the car. Mrs. Ponnampalam testified that she only saw the car again after the repairs were complete.

Mrs. Ponnampalam's evidence contradicts the Applicant's testimony that he drove the car that had been in the accident to pick up his mother from work. The fact that Mrs. Ponnampalam did not recall ever seeing the damage to the car confirms the likelihood that the car in the accident did not pick her up as I find it highly unlikely that she would not have examined her vehicle after her children had just been in an accident.

Evidence of Mr. Wong, Ms. J. Lao and Ms. F. Lao

I heard testimony from Mr. Yu Yee Wong, his wife, Shao Juan Lao, ("Ms. J. Lao") and her sister, Shao Fang Lao, ("Ms. F. Lao"). There was one other person in the vehicle at the time of the accident who was a friend of Ms. F. Lao who did not testify. The most significant discrepancy in their evidence from that of Mr. Ponnampalam and his sister is that they all agreed that there was only one person in the car that day and that was Ms. Ponnampalam. None of them recalled seeing Mr. Ponnampalam in the car at the time of the accident.

The testimony of Mr. Wong, Ms. J. Lao and Ms. F. Lao was all consistent. They testified that on the day of the accident they were returning from dim sum at Ruby Restaurant and on their way to a Buddhist Temple. They indicated that the road conditions were slightly wet as it had been drizzling earlier in the day. As traffic congested at an intersection they hit the car in front of them. Mr. Wong and his two passengers all testified that after the impact they got out of the car and checked the front and back of the car they hit to see if the driver of the other car was all right. Further, they all testified that they all had the opportunity to look inside the other car to make sure there was no one hurt but they only saw Ms. Ponnampalam. They did not see anyone else in the car at the time of the accident.

Mr. Wong and his two passengers all testified that after the impact they got out of the car and the other driver, Ms. Ponnampalam, got out of her car. They all testified that they saw her make a cell phone call upon getting out of her car. As neither Mr. Wong nor his passengers could speak any English they were not able to communicate with Ms. Ponnampalam. Mr. Wong and his passengers testified that Ms. J. Lao and Ms. Ponnampalam were the ones that exchanged the license and insurance information. This is contrary to the evidence of both Mr. Ponnampalam and his sister.

Mr. Wong and his two passengers all testified that approximately 15-30 minutes after the accident they saw a man in about his 20's or 30's approach Ms. Ponnampalam coming from the direction of the mall by foot – they were not sure how he got to the scene. They were also not certain whether this person was Mr. Ponnampalam or someone else.

Mr. Wong testified that the damage to the cars was very minor and as such they did not need any assistance to leave the scene of the accident. They waited for an English speaking friend, Gigi, to arrive. After the accident, Mr. Wong dropped off his third passenger at home and proceeded to go to a police station in Markham. They were advised that the proper place to report the accident would be at the CRC at Birchmount and Lawrence – this was the same reporting centre that Mr. Ponnampalam testified he had attended.

Mr. Wong estimated that it would have been somewhere between 5:00 pm or 6:00 pm by the time they got to the correct reporting station. They were all sure that it was not yet dark out by the time they got to the reporting station. Ms. J. Lao testified that she thought she saw the driver of the other vehicle, Ms. Ponnampalam, entering the CRC as they were leaving. None of the witnesses could be certain about the exact time that they were in the CRC. I accepted this to be the result of time passing and incomplete memory on the part of all the witnesses.

The Applicant argued that the testimony of Mr. Wong and his passengers should not be accepted. He contends that their evidence sounded rehearsed and manufactured – I disagree. In an attempt to discredit Mr. Wong and his passengers and cast doubt on whether they had in fact reported the accident to the CRC, Applicant's counsel questioned them extensively on the timing of the events. The Applicant's position is that Mr. Wong did not attend in person at a CRC and had not

provided RBC with a copy of the report in the related tort matter. Mr. Wong maintained that he did provide a copy of the report to his own insurer at the time of the accident as he was required to do so in order to have the damage to his car repaired.

The Applicant argued that Mr. Wong's motivation for attending at the hearing and giving the evidence that he did was to prevent the tort claim against him from being successful. The only plaintiff in that claim is Mr. Ponnampalam so that if he is found not to have been in the car at the time of the accident, the claim may effectively "go away." I do not accept that avoiding a tort claim was a motivation for three separate individuals to provide false evidence under oath – especially since two of them are not parties to the claim. To accept that the avoidance of financial loss is a motivation for an individual to give false evidence under oath would allow me to consider that Mr. Ponnampalam was also motivated to give false testimony in order to avoid the potential repayment of benefits to the Insurer. I did not find that these potential motivations to lie as compelling as the other factors before me in finding that Mr. Ponnampalam was not involved in an accident.

The various statements found in the assessments when considered in light of all of the evidence create doubt about the veracity of the events and the version presented by Mr. Ponnampalam. The contradictory evidence of Mr. Ponnampalam's mother and the consistent evidence of Mr. Wong and the two passengers in his vehicle add to the unreliability of the claim. As such, I find that Mr. Ponnampalam was not involved in an accident on April 16, 2003.

REPAYMENT:

RBC's claim for repayment was listed as an issue in their amended Response, however I did not hear any specific evidence regarding the details of the amounts paid to Mr. Ponnampalam or RBC's claim for repayment. The parties had agreed to deal with this issue once the preliminary issue was decided.

RBC is entitled to pursue its claims against Mr. Ponnampalam pursuant to section 47 of the *Schedule* for a repayment of the benefits paid. In order to do so, RBC should contact the case administrator to set up a resumed pre-hearing. RBC shall advise the Applicant and the

Commission of its intention to do so within 30 days of this decision. I will remain seized of this matter.

EXPENSES:

The parties did not address the issue of expenses incurred in relation to this hearing. I encourage the parties to attempt to settle the matter. If they are unable to resolve the issue of expenses, either party may make an appointment for me to determine the matter in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Elizabeth Nastasi
Arbitrator

January 25, 2008

Date



Neutral Citation: 2008 ONFSCDRS 12

FSCO A05-001972

BETWEEN:

PIRATHEEP PONNAMPALAM

Applicant

and

RBC GENERAL INSURANCE COMPANY

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Mr. Ponnampalam was not involved in an accident pursuant to section 2(1) of the *Schedule*.
2. RBC is entitled to pursue its claims against Mr. Ponnampalam for a repayment of benefits paid. It shall advise the Applicant and the Commission of its intention to do so within 30 days of this decision. I will remain seized of this matter.

Elizabeth Nastasi
Arbitrator

January 25, 2008

Date