Financial Services
Commission
of Ontario

Commission des
services financiers
de l'Ontario

Neutral Citation: 2017 ONFSCDRS 160

FSCO A13-009976

2017 ONFSCDRS 160 (CanLII)

BETWEEN:

QAMAR ABDULLAHI

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Arbitrator Barry S. Arbus, Q.C.

Heard: In person at ADR Chambers on April 26 and April 27, 2017 and by written submissions completed on May 19, 2017

Appearances: Ms. Qamar Abdullahi participated
Mr. Ryan Kirshenblatt participated for State Farm Mutual Automobile Insurance Company

Issues:

The Applicant, Ms. Qamar Abdullahi, was involved in an incident (the "incident") on March 10, 2011 that gives rise to the dispute between the parties. She applied for statutory accident benefits from State Farm Mutual Automobile Insurance Company ("State Farm"), payable under the *Schedule*.[1] The parties were unable to resolve their dispute through mediation and the Applicant,

[1] *The Statutory Accident Benefits Schedule* – Effective September 1, 2010, Ontario Regulation 34/10, as amended.

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through her representative, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

The parties requested that this Hearing be restricted to one preliminary issue and that the hearing of all other issues be postponed until determination of the preliminary issue.

The issue in this Preliminary Issue Hearing is:

1. Was the Applicant involved in an accident as defined by Section 3(1) of the *Schedule*?

Result:

1. The Applicant was not involved in an accident as defined by Section 3(1) of the *Schedule*.

EVIDENCE AND ANALYSIS:

Background

On March 10, 2011, the Applicant was driving her 1998 Acura motor vehicle southbound on Callowhill Drive near the intersection of Clement Road in Toronto. The Applicant alleges she was stopped at the stop sign where Callowhill meets Clement and was rear-ended by a 2002 Ford Explorer driven by a third party. The Applicant called 911, and a fire truck, ambulance and police officers arrived at the scene. The Applicant was subsequently taken by ambulance to the hospital for medical attention. At the time of the incident, the Applicant had two passengers with her, neither of whom appeared to have been seriously injured. Both cars were subsequently towed from the scene of the incident and examined for damage afterwards.

The Applicant's Position

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Section 3(1) of the *Schedule* reads, "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, dentures, hearing aid, prosthesis or other medical or dental device." In order to satisfy the definition of an accident, it is well-settled law that there are two tests that must be met as stated by the Court of Appeal in *Greenhalgh v. ING Halifax*.[2] First: did the incident arise out of the use or operation of an automobile (the "purpose test"), and second, did the use or operation of the automobile directly cause the impairment (the "causation test")? The Applicant argues that both tests have been met in that the incident arose out of the ordinary and well-known activities to which automobiles are put and, secondly, the impairment suffered by the Applicant resulted as a direct link of causation and that the incident in question was the direct cause of the impairment suffered by the Applicant.

To support her position, the Applicant's evidence was that she had driven the vehicle, picked up her two passengers, was rear-ended by the other car and gave evidence to substantiate her claim.

The Insurer's Position

The Insurer takes the position that an accident did not occur. The Insurer claims that the evidence itself does not support the Applicant's position. The Insurer claims that the evidence of the Applicant was not conclusive enough to discharge the onus upon her to establish that an accident, in fact, had occurred. In support of the Insurer's position, the Insurer produced two witnesses, Mr. Sam Kodsi, who is an expert in accident reconstruction, and PC Hans Schafhauser with the Toronto Police, who has 15 years' experience attending collision scenes and is familiar with the intersection in question.

The Insurer's position is that the failure of the Applicant to produce the additional witnesses to corroborate her version of the facts, together with the evidence of Mr. Kodsi and PC Schafhauser, are not enough for the Applicant to satisfy the onus to prove that the accident in fact had occurred.

[2] *Greenhalgh v. ING Halifax Insurance Co.*, 2004 CanLII 21045 (ON CA).

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Summary

It is indeed unfortunate that the Applicant was unable to produce any witnesses to corroborate her version of what transpired on the night of March 10, 2011. As was stated by David R. Draper in the *TTC and Wooten*[3] decision, "the law in Ontario is that on a claim for payment under an insurance policy, the claimant has the burden of proving that he or she fits within the scope of coverage. The situation does not change simply because the insurer challenges the facts upon which the claim is based."

Constable Schafhauser's evidence was that the damage to the Ford was inconsistent with a rear-end collision with the Acura and further, that if a rear-end collision had occurred, the cars would not still be in close proximity to each other and, in fact, the Applicant's Acura would have been propelled into the intersection on Clement Drive. Therefore, the proximity of the vehicles at the time that the emergency services appeared was inconsistent with an impact. Constable Schafhauser's evidence was that the incident was not an accident but, in fact, was a staged event. Mr. Kodsi's evidence, as an expert, was that the damage to the Ford, which was a severely dented front bumper, was not in fact caused by an impact with the Applicant's Acura but, in fact, was caused by impact with a pole-shaped object such as a lamp post or fire hydrant. Although there was paint on the Applicant's Acura, Mr. Kodsi's evidence was that it was not caused by impact with the Ford. Mr. Kodsi stated that although there was damage to the Acura, none of this damage was caused by an impact with the Ford. He further suggested that at the time of the incident, the Applicant's vehicle was likely in "Park". Mr. Kodsi's conclusion about the location of the vehicles was similar to the conclusion reached by Constable Schafhauser.

Conclusion

In conclusion, I am satisfied that the Applicant was not able to satisfy the onus placed on her that she was involved in an "accident" pursuant to section 3 of the *Schedule*.

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[3] *TTC Insurance Company Limited and Wooten*, FSCO Appeal P04-00004, November 2, 2015.

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EXPENSES:

If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may schedule an expense hearing before me in accordance with the provisions of Rules 75 to 79 of the *Dispute Resolution Practice Code*.

___________________________	June 12, 2017
Barry S. Arbus, Q.C. Arbitrator	Date

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ARBITRATION ORDER

Under section 282 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 Ontario *Regulation 664*, as amended, it is ordered that:

1. The Applicant was not involved in an accident as defined by Section 3(1) of the *Schedule*.

Barry S. Arbus, Q.C.
Arbitrator

June 12, 2017
Date

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