Financial Services
Commission
of Ontario

Commission des
services financiers
de l'Ontario

FSCO A15-004857

BETWEEN:

(WASIM) MUHAMMAD RAJA

Applicant

and

ARCH INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Arbitrator Jeff Musson

Heard: In person at Hamilton, Ontario on February 28, 2017

Appearances: Ms. Mary Grosso for Mr. (Wasim) Muhammad Raja
Ms. Kadey Schultz for Arch Insurance Company

Issues:

The Applicant, Mr. (Wasim) Muhammad Raja, was injured in an incident on May 29, 2012 and sought accident benefits from Arch Insurance Company ("Arch"), payable under the *Schedule*.[1] The parties were unable to resolve their disputes through mediation, and Mr. Raja, through his representative, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

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

The issues in this Preliminary Issue Hearing are:

1. Was the Applicant involved in an "accident" as defined in Section 3(1) of the *Schedule*?
2. Is either party entitled to their expenses in respect of the Preliminary Issue Hearing?

Result:

1. The Applicant was not involved in an accident as defined by Section 3(1) of the *Schedule*.
2. If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

EVIDENCE AND ANALYSIS:

BACKGROUND

The following was an Agreed Statement of Facts submitted by both Applicant's and Insurer's counsel. The Applicant is employed as a taxicab driver in the City of Hamilton. At approximately 10:00 a.m. on May 29, 2012, the Applicant picked up a paying female passenger and her child. The Applicant was instructed by his passenger to pick up the child's father ("JH") at another location and then proceed to drive everyone to the McMaster University Medical Centre ("MUMC").

Once the Applicant arrived at MUMC's main entrance, he put the taxi in park, while leaving the engine running. He got out of the vehicle to remove the child's stroller from the trunk of the taxi. All three passengers disembarked from the vehicle at this time. The Applicant was paid the fare owing and he proceeded to get back in the taxi.[2] As the Applicant was getting ready to drive away from the MUMC, another vehicle was blocking him. As a result, the Applicant proceeded to reverse slowly and in doing so, he inadvertently bumped the female

[2] Exhibit 3, Factum of the Applicant, pg. 2.

passenger who he had just dropped off at the MUMC. The Applicant heard someone yell stop. He proceeded to put his taxi in park and exited the vehicle to see if anyone was injured. As the Applicant was walking to the back of his taxi, JH punched the Applicant in the face rendering him unconscious. The Applicant was admitted to the MUMC's emergency ward. He was subsequently admitted to Hamilton General Hospital for observation, and a CT scan was performed.

In his statement to the police on November 14, 2012, the Applicant stated that he was admitted to the hospital as a result of a physical assault. JH ultimately plead guilty to assault causing bodily harm, and was sentenced to three months in jail.

The Applicant applied for accident benefits from Arch and submitted an OCF-1 on November 8, 2012. Arch, however, opines that the incident is not an "accident" as defined in Section 3.1 of the *Schedule*.

THE ISSUE IN DISPUTE

The only issue put forward at this Preliminary Issue Hearing is to determine if this incident on May 29, 2012 qualifies as an accident under Section 3(1) of the *Schedule*. Both parties agree that the "two-part test" should be applied in order to determine this issue in dispute.

Part one of the two-part test is the "Purpose Test". Did the incident arise out of the use or operation of a vehicle in the ordinary and well-known activities to which vehicles are put? Part two of the two-part test is the "Causation Test". Was the use or operation of an automobile a direct cause of the Applicant's injuries?

Applicant's Position

The Applicant submits that he has been able to satisfy in the affirmative both questions of the two-part test, thereby allowing the incident of May 29, 2012 to be defined as an accident under Section 3.1 of the *Schedule*.

In terms of the Purpose Test, the Applicant is of the opinion that since he disembarked from the taxi to check on the condition of his recently dropped-off passengers, this is an ordinary activity related to the use or operation of a vehicle. The Applicant further believes that his injuries were sustained from an uninterrupted sequence of events that occurred as a result of the use or operation of a vehicle, in this case the picking up and dropping off of passengers as a taxi driver.

The Applicant relies on the Court of Appeal's decision in *Economical v. Caughy*,[3] which set out the Supreme Court of Canada's test from *Amos v. Insurance Corporation of British Columbia*.[4] The Court of Appeal agreed with the lower court's decision, and the motorcycle was the dominant feature that caused Mr. Caughy's severe spinal cord injuries. Mr. Raja submits that using the same test, his use of the taxi is the dominant feature of his accident.

In terms of the Causation Test, the Applicant believes that the activity of dropping off passengers, and the short amount of time between the disembarking of his passengers and the incident are all evidence that favours him passing the Causation Test. The assault also took place in close proximity to the taxi.

The Causation Test has three subtests. The first subtest is the "but for" test. Mr. Raja submits that but for the operation of the taxi, the Applicant would not have been present with JH, who assaulted him. The second subtest is to determine whether there was a sufficient intervening act to negate the nexus between the operation of the taxi and the incident. The Applicant submits that the assault was immediately after his taxi hit JH's companion. There were no intervening lapses of time. The third subtest is used to determine if the use and operation of the taxi was the "dominant feature". The Applicant submits that his operation of the taxi was the reason for this incident, and therefore the dominant feature.

Insurer's Position

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[3] *Economical Mutual Insurance Company v. Caughy*, 2016 ONCA 226.
[4] *Amos v. Insurance Corporation of British Columbia*, 1995, 127 D.L.R. (4th) 618.

The Insurer states that the incident on May 29, 2012 does not satisfy the two-part test. It submitted evidence that the Purpose Test is only satisfied if the use or operation of a motor vehicle is the "direct cause" of the injuries. It argues the Applicant's injuries were not caused by the operation of the vehicle. The injuries were caused by JH's assault on the Applicant. Further, the Insurer submits that even if the Applicant meets the Purpose Test, the Applicant fails to meet the Causation Test.

The Insurer states that in *Downer v. Personal Insurance Company of Canada*,[5] the Court of Appeal affirmed that a modified, stricter causation test is to be applied when determining if a person is entitled to statutory accident benefits. The Insurer has a difference of opinion respecting the application of the three subtests to the Applicant's incident.

The first subtest, the "but for" test, is a useful screening process for a section 3(1) determination, per the decisions of *Greenhalgh v. ING Halifax Insurance Company*[6] and *Downer*.[7] In essence, the question is "but for" the Applicant driving the taxi and picking up these passengers, this incident would not have occurred. The second subtest asks if there was a sufficient intervening act that negates the nexus between the operation of the taxi and the incident itself. The Insurer is of the opinion that the assault was an intervening act. The Insurer submits that an assailant's criminal act breaks the chain of causation between the use or operation of the vehicle and the injuries suffered by the injured person. It submitted the case of *Waters and Royal & SunAlliance Insurance Company of Canada*,[8] where Arbitrator Novick stated that "it is fair to say that criminal assaults constitute intervening and independent acts that break the chain of events or causation." The assault was an intervening factor which broke the chain of causation. Therefore, the Applicant would not be entitled to claim this incident as an accident as defined under the *Schedule*. The Insurer also argued that the Applicant's use or operation of the vehicle as a taxi ended once he was paid for his transportation services and exited/walked around to the side of the taxi. The third subtest asks if the use and operation of

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[5] *Downer v. Personal Insurance Company of Canada*, 2012 ONCA 302.
[6] *Greenhalgh v. ING Halifax Insurance Company*, 2004 Carswell ONT 3426.
[7] *Supra*, note 5.
[8] *Waters and Royal & SunAlliance Insurance Company of Canada*, FSCO A00-001143.

the taxi was the "dominant feature" of the incident. The Insurer submits that the assault was the dominant feature of the incident, and not the operation of the taxi by the Applicant. The taxi provided the opportunity and location for the assault, but was not the dominant feature.

Ultimately, the Insurer submits that the Applicant does not pass the two-part test, and as a result, the incident of May 29, 2012 is not an "accident" as defined by the *Schedule*.

ANALYSIS

The Two-Part Test

It has been determined through jurisprudence that the ordinary use of a vehicle extends beyond the act of driving. Multiple cases submitted by both parties spoke to activities that constitute ordinary, well known uses of a vehicle. Only a handful of specific cases provide good guidance as it relates to the case before me.

Both parties agree on a number of facts, but disagree as to interpretation of existing case law, and specifically how the Applicant's case relates to the definition of an "accident" under Section 3.1 of the *Schedule*.

The Applicant submits that his case is distinguishable from *Greenhalgh* because in *Greenhalgh,* there were several intervening acts that lead to the Court of Appeal's decision that the plaintiff's injuries from frostbite amputation were not considered an "accident". Here, the Applicant states that there was no intervening act. I am of the opinion based on the evidence in the case that the Applicant is incorrect in stating that there was no intervening act. The criminal act of which JH was convicted, and which caused the injuries sustained by the Applicant, was the intervening act. Therefore, *Greenhalgh* should apply to this case.

I am also of the opinion that the completion of the trip, and specifically the payment of cab fare, was an additional intervening act, and as such, *Greenhalgh* should apply. In essence, payment for services rendered was completed and thus a contract for transportation services in

exchange for financial compensation was completed. This is important because if the assault occurred before the contract for transportation services was completed, the Applicant's argument that the assault was as a result of an ordinary use of a taxi would have considerably more weight. The facts show that this incident occurred after completion of the transaction.

Both the Applicant and the Insurer submitted the case of *Kumar and Coachman Insurance Company.*[9] The assault in *Kumar* addressed an attempted robbery, not an issue about the fare or the operation of the taxi. It should be noted that it was JH who assaulted the Applicant, but he was not the person who the Applicant hit when reversing the taxi. Therefore, I find little guidance in *Kumar* that would support the Applicant's position; in fact, I find that *Kumar* supports the Insurer's position.

In *Samad and North Waterloo Farmers Mutual Insurance Company*,[10] the accident centred on Mr. Samad picking up passengers and a subsequent argument taking place, whereupon one of the passengers punched Mr. Samad in the face. In addition, when the passengers exited the taxi, they left the door open at which time Mr. Samad disembarked from the taxi to close the door. As he was closing the door, he was attacked again by one of the passengers. In *Samad*, the trip was in progress when the assault occurred. Arbitrator Arbus decided that the Applicant in that case satisfied the purpose test and met the three subtests of the causation test, thereby confirming that the incident was an "accident". But in the case before me, the trip was completed and paid for, which in my opinion, constitutes an intervening act that was not present in *Samad,* because the assault on Mr. Samad took place before the completion of the trip.

CONCLUSION

Dr. Sellens, who was the attending physician, reported that the Applicant's injuries included bruising to the brain, a broken jaw, and lacerations to the lip and brow area of the face,

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[9] *Kumar and Coachman Insurance Company*, 2002 Carswell ONT 5592, FSCO Appeal P01-00026.
[10] *Samad and North Waterloo Farmers Mutual Insurance Company*, FSCO A13-012038.

requiring sutures.[11] But as severe as these injuries are, the evidence presented demonstrates that the assault which took place does not pass the two-part test. This test has been established to assist in determining if an "accident" has occurred under the *Schedule*. Analyzing the totality of the evidence presented, I believe the Applicant's incident on May 29, 2012 is not an accident as defined under Section 3.1 of the *Schedule*.

EXPENSES:

The parties made no submissions on expenses. If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code.*

Jeff Musson
Arbitrator

April 17, 2017
Date

[11] Exhibit 2, Applicant's Book of Authorities, Tab 2, pg. 5.

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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*.
2. If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Jeff Musson
Arbitrator

April 17, 2017
Date