Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A14-006819

BETWEEN:

MOHAMMAD QURESHI

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before: Arbitrator Marcel D. Mongeon

Heard: In person at ADR Chambers on November 21 and 22, 2016

Appearances: Mr. Mohammad Qureshi participated
Mr. Ryan Naimark and Ms. Anastasia Sukalsky participated for Mr. Mohammad Qureshi
Mr. Talaal Bond participated for State Farm Mutual Automobile Insurance Company

Issues:

The Applicant, Mr. Mohammad Qureshi, was injured in a motor vehicle accident on October 2, 2013 and sought accident benefits from State Farm Mutual Automobile Insurance Company ("State Farm"), payable under the *Schedule*.[1] The parties were unable to resolve their disputes through mediation, and the Applicant, 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 Hearing are:

1. What, if any, is the amount of the Income Replacement Benefit ("IRB") that the Applicant is entitled to?
2. Is the Applicant entitled to be paid a Special Award on the basis that the Insurer unreasonably withheld or delayed payments to the Applicant?
3. Is the Applicant entitled to interest for the overdue payment of benefits?
4. Is either party entitled to its expenses of the Arbitration Hearing?

Result:

1. An IRB based on a gross weekly employment income of $461.54 is payable to the Applicant.
2. A Special Award is not payable to the Applicant.
3. The Applicant is entitled to interest on any overdue benefits at the rate of 1% per month.
4. If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may, within 30 days of this decision, 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:

This case revolves around a simple question: what proof of employment income is an Applicant required to provide?

Facts

I find the following facts:

The Applicant was employed by an individual named Hassan who went by the name Marcus. His business was called Fire Experts. A Business Names Report,[2] filed on May 27, 2013, confirms a business name registration to Aamir Hassam Alam *sic.* of Fire Experts at a specific address and unit at Prince of Wales Boulevard, Mississauga,[3] as a sole proprietorship.

The Applicant's employment began on July 23, 2013. It continued until the date of his accident on October 2, 2013.

The Applicant's duties for his employer were related to fire safety inspections and the recharging of fire extinguishers that had passed their in-service deadline. The Applicant noted that the Prince of Wales Boulevard address was a condominium building that the employer lived at with his girlfriend. The Applicant also put photographs into evidence,[4] which he says show his places of work, some colleagues and some of the duties he fulfilled for his employer.

The Applicant's expectation of payment was described by him as $500.00 per week, which was paid as $2,000.00 per month. As between these two choices, I find as a fact that the Applicant's expectation was $2,000.00 per month, or $24,000.00 per year. Section 4(1) of the *Schedule* in defining "gross weekly employment income" would then mean the Applicant's payment expectation was $24,000.00 divided by 52 or $461.54 per week.

The first payment from the employer of $2,000.00 was expected on August 23, 2013. However, the employer failed to make the payment. The Applicant testified that he believed that the employer was stalling the payment.

The Applicant was also getting some pressure at home. The Applicant's parents wondered if the Applicant had a real job or if he was just leaving the house every day to 'hang out' with some friends. To assuage his parents on this concern, the Applicant requested his employer to provide him with some proof of his employment. On September 6, 2013, the employer provided the

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[2] Exhibit 26.
[3] The full address is redacted for privacy concerns.
[4] Exhibit 7.

Applicant with time sheets for his work to date.[5] These time sheets show appropriate dates tied into the revenues that the Applicant was generating further tied in with invoice numbers.

The Applicant testified that on September 6, 2013, the employer said that the Applicant would be paid on September 26, 2013. On September 26, 2013, the employer provided the Applicant with two cheques, each for $2,000.00. Cheque 000009, dated 2013-09-23, and Cheque 000008, dated 2013-08-23, are in evidence.[6] The Applicant also testified that the employer told the Applicant not to cash the cheques as there was an insufficient balance.

The Applicant considered cashing the cheques in spite of the advice. However, he determined if the cheques were dishonored, the Applicant's own bank would likely charge him significant fees as a result. Accordingly, the Applicant decided not to immediately cash the cheques but to wait until the employer advised him that funds were available.

The Applicant continued to work for the employer including the morning of the accident, October 2, 2013.

The Applicant's testimony of that day is that they had had a good morning with a lot of sales. The boss, Marcus, a co-worker and the Applicant went to lunch. On exiting the place where they had lunch, the Applicant recalls that the employer was driving, a co-worker was in the front passenger seat and the Applicant was in the rear seat.

The driver made a left turn across a streetcar line. As they were part of the way through the turn, the Applicant testified to seeing a streetcar bearing down on the car and, particularly directed at him. The streetcar hit the automobile on the back left quadrant of the vehicle and seriously injured the Applicant. He incurred spinal fractures sitting in the back seat. The driver and passenger in the front seat were uninjured.

[5] Exhibit 5.
[6] Exhibit 6.

The Applicant provided testimony about what next happened that is at odds with the official Police Report.[7] The Applicant testified that the employer – who was driving – sped away a short distance and then called someone. Shortly thereafter, the employer's girlfriend came to the scene of the accident. From that point on, the girlfriend represented that she had been the driver through the accident. This is what the official Police Report states.

The Applicant was seriously injured in the accident and was transported to a hospital for medical attention. His employment was effectively terminated by his inability to work due to the injuries he sustained.

The Applicant testified that he tried to contact the employer on a number of occasions to obtain payment for his work. In addition, two pages of texts were submitted into evidence[8] as proof of his efforts to collect payment for his work from the employer.

The Applicant acknowledges never having received payment for his work.

Despite never having received payment for his work and, in preparation for this Hearing, on October 17, 2016, the Applicant requested Canada Revenue Agency to amend his income for the 2013 income tax year by declaring an additional $4,000.00 in income.[9] No other actions were taken by the Applicant to be paid his employment income. He testified that he believes his former employer has left the jurisdiction for the east coast. He did not specify a timeframe for this departure.

The Applicant sought payment of an IRB for both pre- and post-104 week periods.

In support of the payment of the IRB, an OCF-2 was obtained from the employer and submitted to the Insurer.[10] The Insurer also conducted other investigations to satisfy itself of the Applicant's

[7] Exhibit 8.
[8] Exhibit 27.
[9] Exhibit 4.
[10] Exhibit 10.

employment status and income. The Insurer's investigations in this regard until February 26, 2014 can be found in its redacted log notes filed in evidence.[11]

Concessions and Position of the Insurer

The Insurer has conceded many aspects of the Applicant's claim for an IRB.

Prior to the Hearing, the Insurer had conceded that the Applicant met the medical tests for the IRB for both the pre- and post-104 week periods to this Arbitration Hearing.

The Insurer has also conceded that the Applicant did have employment as described.

However, not conceded and at the heart of the Insurer's case was that the Applicant had not yet provided reasonable proof of his income that would allow the Insurer to calculate the appropriate quantum. The Insurer has pointed to two possible scenarios. These are: 1) that the Applicant has not provided it with sufficient information to establish that he was working at the time of the accident; or 2) that he was employed for at least 26 of the 52 weeks before the accident (s. 5(1)1 of the *Schedule*).

With respect to working at the time of the accident, the Insurer submits that the last proof of remuneration was dated September 23, 2013, or about a week and a half prior to the accident. If the Applicant wishes to claim the benefit on the basis that he was working at the time of the accident (October 2, 2013), he needed to produce additional documentation to show his being paid up to and including this date.

The second scenario is that if the Applicant is not able to prove he was working at the time of the accident, then he had to produce additional documentation to show his having worked in 26 of the 52 weeks preceding the accident. I acknowledge that such proof has not been received.

Analysis

[11] Exhibit 13.

The Insurer asked for T4s (which would establish income), Records of Employment (which include detailed information about income per week prior to termination of employment) and the employment file (which could usually be expected to have detailed information about days and hours worked as well as remuneration paid).

The Applicant has testified that he has provided the Insurer with everything that he was given by his employer. He was never provided with T4s, Records of Employment or employment files by his employer and, therefore, he cannot produce these.

The Insurer's representative on cross-examination admitted that the Applicant could not produce something which he did not have.

I am asked to draw an adverse inference because the Applicant did not call the former employer to testify. Such an inference could lead me to conclude that the Applicant was not working at the time of the accident and, therefore, the Insurer had not been provided with sufficient information as to the Applicant's income for 26 of the 52 weeks preceding the accident.

I understand the Rule as it is usually cited[12] to be the following:

> In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant ... fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party.

In his testimony, the Applicant made it clear that his relationship with his former employer ended badly. I have the text messages allegedly between the two parties which suggest that the employer had failed to pay the Applicant. The Applicant has also provided a hearsay view that he had heard that the employer had moved to the east coast.

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[12] Sopinka and Lederman *The Law of Evidence in Canada, 2nd Ed.* (Toronto: Butterworths & Company (Canada) Limited, 1999), paragraph 6.321

Another answer to the adverse inference rule is available when the party provides a reasonable explanation for the failure to call the witness or when the evidence that would be tendered by such a witness does not add anything to the evidence already presented.

In this case, I am of the view that I have been provided a reasonable explanation of why the employer was not called. I believe the Applicant's testimony that the relationship ended badly. I also believe that the text messages put into evidence represent the tone of the relationship between the parties. I accept them for evidence of this tone. It should be clear that I am not accepting the text messages as accurate messages between two stated parties: I have had insufficient evidence tendered about their origin.

I accept that the Applicant would have difficulty in locating the former employer and that, even if summonsed, it is unlikely that he would have given any clearer evidence to support the Applicant's case than the Applicant himself has given.

I think that it is also reasonable for me to conclude that even if summonsed, the employer would be hostile to the Applicant and would not provide any additional evidence to that already available through the uncashed cheques and the OCF-2.

In deciding what efforts the Applicant should have made to contact the employer, I note what the Insurer had done to contact the employer to verify the details of the Applicant's employment. On October 24, 2013, within a few days of the initiation of the claim, the Insurer's representative left a phone message for the employer at the number she had. She never heard back from him. Only one phone message was left.

On December 27, 2013, the Insurer's representative ordered and received a name search on Fire Experts, the name of the business the Applicant worked for. The information confirmed that the business existed. An additional log note on the same day shows the Insurer recorded: "Reviewed results of corporate search; contact listed on OCF-2 is business owner; Business originally registered 05/27/13, name changed and registered 08/21/13; 02 states insured employed 08/03/13; appears reasonable insured was recently employed at a new business, no online presence of

company to date; still awaiting paystubs to verify IRB; however do not feel a mobile task necessary."

In this case, it is also suggested that the Applicant could have called his co-worker. The purpose of such testimony would have been to corroborate the Applicant's testimony as to employment. By not calling the co-worker, the argument suggests that such corroboration might not have been available and I should draw such an inference because the Applicant did not call the co-worker. I am not prepared to do this. I do not find that the co-worker would have added anything that the Applicant could not have said himself.

On the evidence presented, I am of the opinion that the Applicant has made out employment with a business named Fire Experts. I rely on the time sheets, the uncashed cheques, the text messages, the Applicant's testimony, the Insurer's investigations and the business names registration, to come to the reasonable conclusion that the Applicant was working on the date of the accident, that his expected income was $2,000.00 per month, and that his employer had not paid him this income up to and including the day of the accident.

It is true that, as suggested by the Insurer, the evidence provided does not include items that are frequently found in accident benefits claims such as employment files, T4s, unambiguous OCF-2s, pay stubs and the like. However, after reviewing the *Schedule*, I cannot find any provision that suggests exactly what evidence an Insurer has to have to establish employment and income.

On a balance of probabilities, the Applicant has made his case for employment at the time of the accident and having commenced on August 23, 2013 at the rate of $461.54 per week.

I finally comment about the amendment of the Applicant's income tax return shortly before this Hearing. I acknowledge that the arbitral decisions available on employment income make it clear that if an Applicant is seeking to avoid the payment of income taxes on his income that such income is not included in calculating IRBs.

In this case, I was able to come to the conclusion that the Applicant's employment and his income were made out on a preponderance of the evidence provided. The amendment of the income tax return did not enter into this consideration at all. However, I make no comments on the advisability of such an amendment if there is an indication that there was an intention on the part of an Applicant to avoid the proper declaration of income.

Special Award

In this case, the Applicant seeks a Special Award on the basis that the Insurer was unreasonable in its actions when asking the Applicant about confirmations from his employer. I do not find that the Insurer's actions were unreasonable.

In this case, I note that other than the application to his Insurer, the Applicant has not taken advantage of any system to help him obtain the employment income that I have now determined should be owed. Until my decision, I believe that the Insurer was correct to wait to determine if IRBs were payable or not. I note that my own decision is not enforceable against the employer but only deals with the rights between the Applicant and the Insured.

In these circumstances, I am of the opinion that it was reasonable for the Insurer to wait for my determination. Therefore, no Special Award is payable.

Interest

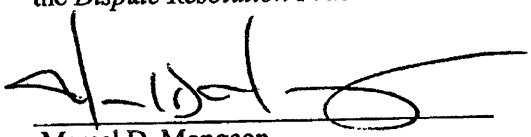
Even though I am not making a Special Award in this case, to the extent IRBs should have been paid to the Applicant at some point in time in the past, such IRBs shall accrue interest in accordance with s. 51 of the *Schedule* at 1% per month compounding. Interest shall be calculated at this rate from the date on which the IRB was payable until it is actually paid to the Applicant.

For certainty, I note that the Insurer had paid the Applicant an IRB for a period of time on the basis of a gross weekly employment income of $500.00. Such payments are in excess of what I

have now ordered. The balance in the Insurer's favour from such overpayments shall be included in the interest calculation as a credit to the Insurer's benefit.

EXPENSES:

I note that generally one criterion on expenses provides that the party who prevails should be entitled to its expenses. However, the parties have asked me to defer the issues of expenses to allow them to canvass an agreement on same. 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 within 30 days of this decision for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.



Marcel D. Mongeon
Arbitrator

February 6, 2017
Date

Financial Services Commission of Ontario

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BETWEEN:

MOHAMMAD QURESHI

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

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. An Income Replacement Benefit based on a gross weekly employment income of $461.54 is payable to the Applicant.
2. A Special Award is not payable to the Applicant.
3. The Applicant is entitled to interest on any overdue benefits at the rate of 1% per month.
4. If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may, within 30 days of this decision, request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Marcel D. Mongeon
Arbitrator

February 6, 2017
Date