

BETWEEN:

ABUHANA QURAISHI

Applicant

and

BELAIR INSURANCE COMPANY INC.

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: William J. Renahan

Heard: By teleconference on October 16, 2002.

Appearances: Tammy Ring for Mr. Quraishi
Eric K. Grossman for Belair Insurance Company Inc.

Issues:

The Applicant, Abuhana Quraishi, was stabbed in his taxi cab on November 7, 1999. He applied for and received statutory accident benefits from Belair Insurance Company Inc. (“Belair”), payable under the *Schedule*.¹ Belair paid weekly income replacement benefits but reconsidered its position and terminated benefits on the basis that Mr. Quraishi was not covered under the policy as he was not involved in an “accident” within the meaning of the policy. The parties were unable to resolve their disputes through mediation, and Mr. Quraishi applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

¹The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended by Ontario Regulations 462/96, 505/96, 551/96, 303/98, 114/00 and 482/01.

The preliminary issue is:

1. Was Mr. Quraishi involved in an “accident” within the meaning of subsection 2(1) of the *Schedule*, and if not, did Belair waive its right to deny coverage on this basis?

Result:

1. Mr. Quraishi was not involved in an “accident” and Belair did not waive its right to deny coverage.

EVIDENCE AND ANALYSIS:

The matter proceeded by way of an agreed statement of facts. The portions dealing with the incident are as follows:

While operating his taxi on November 7, 1999, at approximately 9:30 p.m., Mr. Quraishi picked up a lone male passenger off the street, at Victoria Park Avenue and Lawrence Avenue East, Scarborough. He was told to drive to 74 Rainside Road which is two sets of traffic lights west of Victoria Park on the south side of Lawrence. Mr. Quraishi was told to turn off onto Rainside and then pull behind a vehicle that was parked on the side of the road. The vehicle was left running and the lights were on.

Upon pulling over, Mr. Quraishi asked for the fare which was a little over \$4.00, holding out his hand. Suddenly his hair was grabbed and his head was pulled backwards at which time he felt a knife to the left side of his head and the ear. The passenger demanded money, and Mr. Quraishi reported that he told him he had money and not to hurt him. The passenger proceeded to stab him multiple times. As Mr. Quraishi was wearing his seatbelt, he was restrained. He was not able to free himself from the seatbelt.

The attacker fled and Mr. Quraishi was able to call the dispatcher, and the police and ambulance were dispatched to the scene.

Mr. Quraishi suffered multiple stab wounds to the chest, abdomen, face and right hand. An ambulance took him to hospital where he underwent an urgent laparotomy during which a small section of the bowel was removed. He was hospitalized nine days.

“Accident” is defined in subsection 2(1) of the current *Schedule* in part as follows:

“accident” means an incident in which the use or operation of an automobile directly causes an impairment . . .

Mr. Quraishi argued that the stabbing was a normal and foreseeable risk of operating a taxi cab. It was not a random act such as a random drive-by shooting. He argued that his injuries could not be causally disconnected from his operation of the taxi cab and that his use and operation of the taxi cab was an effective and direct cause of his injuries. He argued that the assault and the use of the taxi cab were two direct causes of his injuries and that the definition of “accident” does not mean that the “use or operation” of the vehicle must be the sole cause of injury. He argued that finding that he was not covered amounted to creating an exclusion to coverage which is not warranted by the language of the *Schedule*.

Mr. Quraishi filed his application for arbitration on April 9, 2002. On August 9, 2002, Director’s Delegate Makepeace dealt with the definition of “accident” under the current *Schedule* in *Kumar v. Coachman Insurance Company* (P01-00026, August 9, 2002). The fact situation in *Kumar* is similar to that of Mr. Quraishi.

In *Kumar*, the rear seat passenger in Mr. Kumar’s taxi cab directed Mr. Kumar to turn and to stop the taxi cab. As Mr. Kumar was stopping the taxi cab, the passenger hit Mr. Kumar on the right side of the head with a hard object. The passenger got out of the vehicle and was later apprehended. He confessed that he had planned to rob Mr. Kumar but got scared and ran away. The Director’s Delegate reviewed the evolution of the legislation defining “accident” and the case law and found that the event that set in motion the chain of causation leading to Mr. Kumar’s impairment was an assault, not the use or operation of an automobile. She concluded that the arbitrator did not err in concluding that Mr. Kumar was not injured in an “accident,” as defined in the present *Schedule*.

Using this analysis, the events that lead to Mr. Quraishi's impairment are so similar to those in *Kumar* that for the purposes of determining whether Mr. Quraishi was involved in an "accident," the cases are indistinguishable. Accordingly, to use the words of *Kumar*, I find that the event that set in motion the chain of causation that lead to Mr. Quraishi's impairment was an assault, not the use or operation of an automobile. Therefore, the incident which caused Mr. Quraishi's impairment was not an "accident" and he is not covered under his automobile insurance policy.

Waiver:

Initially, Belair's adjuster thought that Mr. Quraishi was covered and paid income replacement benefits. Belair terminated income replacement benefits after it received an opinion from its counsel that the incident was not an "accident." Mr. Quraishi argued that Belair had waived its right to terminate benefits.

Arbitrator Evans recently reviewed the criteria for the application of the principle of waiver in *McDonald and Guarantee*²:

- A party must knowingly forego reliance upon some known right or defect: one should not be able to waive rights of which one was not fully aware or apprised.³
- the conduct purporting to be a waiver must be express and unequivocal.⁴
- What must be ascertained is a conscious intention to abandon a known right.⁵

²(FSCO A01-000399, October 31, 2001)

³*Budd and the Personal Insurance Company* (FSCO appeal P99-00032, January 8, 2001), upholding the arbitrator's decision (FSCO A98-001306, June 21, 1999)

⁴*Northern Life Assurance co. of Canada v. Reison*, [1977] 1 S.C.R. 390 at 398.

⁵*Saskatchewan River Bungalows Ltd. et al. V. Maritime Life Assurance Co.* (1994), 115 D.L.R. (4th) 478.

I heard no evidence that Belair knew that Mr. Quraishi was not entitled to benefits but paid them regardless. Accordingly, I find that Belair did not waive its right to deny benefits on the grounds that Mr. Quraishi was not involved in an “accident.”

Further, certain provisions of the *Schedule* show a legislative intention that insurers make payments promptly on the understanding that they may recover payments made in error. Section 35 of the *Schedule* requires an insurer to promptly determine whether a benefit is payable, and if it determines that it is payable, pay it within 14 days after receiving the application. Section 46 imposes an interest rate of 2 per cent per month compounded monthly on overdue payments. Section 47 provides for the recovery of payments where an insurer has paid a benefit in error. I find that Belair’s compliance with this legislative intent cannot be construed as a waiver of its right to reconsider its decision to make payments.

EXPENSES:

If the parties cannot agree on entitlement to or amount of expenses of this preliminary issue hearing they may may make written submissions to me within 30 days of the date of this decision.

William J. Renahan
Arbitrator

November 5, 2002

Date

FSCO A02-000575

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Applicant

and

BELAIR INSURANCE COMPANY INC.

Insurer

ARBITRATION ORDER

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

1. The application for arbitration is dismissed.

William J. Renahan
Arbitrator

November 5, 2002

Date