



FSCO A08-002596

BETWEEN:

ASHKAN AZIMI

Applicant

and

ECONOMICAL MUTUAL INSURANCE COMPANY

Insurer

REASONS FOR DECISION ON A PRELIMINARY ISSUE¹

Before: Jessica Kowalski

Heard: January 25 and 26, 2010, in London, Ontario,
and January 29, 2010 by telephone conference

Appearances: Sarah Deol, Student-At-Law, for Mr. Azimi
Nicholaus de Koning solicitor for Economical Mutual Insurance
Company

Issues:

The Applicant, Ashkan Azimi, claimed he was injured in a motor vehicle accident on January 29, 2008. He applied for statutory accident benefits from Economical Mutual Insurance Company ("Economical"), pursuant to the *Schedule*.² Economical denied Mr. Azimi's claims for benefits. The parties were unable to resolve their disputes through mediation and Mr. Azimi applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

¹For the order dated March 25, 2010.

²*The Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

As a preliminary issue, Economical raised the following question:

1. Was Mr. Azimi injured as a result of an “accident” as defined in subsection 2(1) of the *Schedule*?

Result:

1. No. Mr. Azimi failed to prove, on a balance of probabilities, that he was involved in an accident, as defined in subsection 2(1) of the *Schedule*, on January 29, 2008.
The application for arbitration is dismissed.

EVIDENCE AND ANALYSIS

Burden of Proof

Economical argues that an accident did not occur, or that, if it did occur, it was intentional. At the start of the hearing the parties addressed the question of who bears the onus of proving whether an accident occurred. Notwithstanding that Economical has raised this question as a preliminary issue, to be decided before Mr. Azimi’s claims for accident benefits are decided, Mr. Azimi still bears the burden of proving his claim. From the appeal decision in *TTC Insurance Company Limited and Wootton*, “[t]his is the law in Ontario. 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.”³ In other words, the burden does not shift to Economical to prove that there was no accident, and it remains up to Mr. Azimi to bring forward credible evidence in support of his claim.

³*TTC Insurance Company Limited and Wootton* (FSCO P04-00004, November 2, 2004).

MR. AZIMI'S EVIDENCE

Mr. Azimi

Mr. Azimi testified that, on January 29, 2008, he was the seat belted driver of a 2001 Honda Civic, carrying a front seat belted passenger, Mr. Ehsan Sharifi, and Mr. Sharifi's girlfriend in the passenger side back seat. His account is that, after turning from Finch Avenue onto Wilfred Avenue in Toronto, he was travelling southbound at approximately 50-60 km/hour. After he turned, he accelerated to 55-60 km/hour, and was driving at between 50-60 km/hour when he allegedly broadsided a 1999 Volkswagen Jetta ("VW") in the intersection of Wilfred and Holmes Avenues.

His evidence was that he t-boned the driver's side of the VW and the driver's passenger side behind it with the front end of his Honda. Mr. Azimi testified that he did not fully apply his brakes; he only touched and released the brake pedal because the road was wet. He testified that when he hit the VW, the VW slid sideways southbound in the direction in which Mr. Azimi's Honda was travelling. He testified that Mr. Sharifi's girlfriend called 911 and that all six occupants of both cars were taken to Scarborough Grace Hospital by EMS bus.

Mr. Azimi was discharged from hospital some six to seven hours after he was admitted, after normal x-rays and with a prescription for Tylenol 2 or 3. He testified that he went to see a Dr. Alam at a walk-in clinic two days later, on January 31, 2008.

Mr. Shehryar Hamid

Mr. Shehryar Hamid was the front seat passenger of the VW. He testified that, apart from not remembering much of what he did that day, he had been waiting at a bus stop to go to the mall when the VW's driver approached him and offered him a ride. His evidence was that the slow moving VW had just accelerated from a full stop at a stop sign when the Honda "rammed" it. He described the alleged impact as medium and testified that the driver's side doors were smashed in so that emergency responders had to cut the doors open to extricate the VW's

driver's side occupants. Mr. Hamid did not testify as to the condition of the driver's side of the VW before the alleged collision, but said that he did not recall that it was damaged.

Mr. Hamid also said that he did not recall how he got out of the VW, but that someone took him out. He testified that he was neither bruised nor hurt and that the Honda "didn't have any damage on it" after the alleged impact.

Mr. Zygmunt Gorski

Mr. Azimi retained Mr. Zygmunt Gorski to prepare a report regarding the alleged accident in response to Economical's engineer's report that alleged that a collision between these two cars did not take place as described. Mr. Gorski, who specializes in accident reconstruction, saw the Honda some 18 months after the alleged accident, before he prepared his report. He never inspected the VW.

Mr. Gorski testified that he had difficulty forming his own conclusions because of what he called a lack of evidence. He also testified that a front-to-side impact where there was no movement to either car would be very unusual.

In December 2009, Mr. Gorski conducted simulation tests to determine how a collision might have occurred, to study whether an impact like the one reported could result in the vehicles' rest positions as noted and to provide information about the type of damage and collision severity that could be expected. His simulations began with generic data in an effort to simulate the final resting positions of the two vehicles (specifically, that they did not move at all in a southerly direction on impact). Even in a simulation using inputs for a stopped VW struck by the moving Honda (similar to the situation as recorded by Constable Moretti, the investigating police officer, and Mr. Kods, the engineer hired by Economical), Mr. Gorski's model resulted in both cars being pushed in a southerly direction about three to four metres.

Mr. Gorski testified that the final perpendicular rest positions of the two vehicles was uncommon and led to concern. He also suggested that the events surrounding the removal of the occupants of the two vehicles were unusual. He expressed some concern with the lack of debris, but noted that the collision as alleged would not be expected to generate much debris. Mr. Gorski also noted in his report that the fractured signal and wiper arms inside the Honda were unusual and that such damage is rare from occupant contact.

On cross-examination, Mr. Gorski admitted that his report was more of a critique of Mr. Kodosi's report than an analysis of the actual accident. Again, Mr. Gorski had difficulty forming his own conclusions because he did not have the evidence he would have needed to do so: he did not actually see the VW, and felt that Mr. Kodosi's report did not provide sufficient evidence to make his own conclusions that he could support. Mr. Gorski's own report dated December 17, 2009 concludes with the comment that "... we cannot say whether this collision actually took place or was staged."

ECONOMICAL'S EVIDENCE

Constable Mark Moretti

Constable Moretti, the investigating officer, testified that he found no evidence of contact between these two cars. He found no evidence of damage to the Honda consistent with an accident involving a vehicle moving at a moderately high speed broadsiding another vehicle at an intersection. His accident report shows that he measured the alleged area of impact to be in the intersection 1.4 metres east of the west curb line and 3 metres north of the south curb line. Although there was drizzle that evening, which would explain the lack of skid marks, Constable Moretti testified that he found few other indicia of an accident. The dust and dirt on the Honda's front bumper were not displaced, there was no debris and the cars were resting in a perpendicular position. Constable Moretti saw no evidence that the Honda, reportedly moving at 50-60 km/hour, had pushed the VW at all.

Based on his experience investigating what he testified was between 21 and 30 traffic collisions per week, the cars should have rotated and the Honda's front end should have been damaged in an accident like the one reported. Based on his visual assessment, the damage on the VW did not match the width of the Honda, and to him it appeared that a larger car had hit the VW. He also testified that the dirt on the VW, even at the alleged point of impact, had not moved and that the damage on the VW looked old. Constable Moretti testified that, when a car is t-boned, it usually rotates or moves and loses some debris. Likewise, dirt on the car is smudged or comes off completely.

On the inside of the Honda, Constable Moretti testified that he saw that the wiper and signal levers were broken. Constable Moretti also testified that Mr. Azimi was not wearing his seat belt, that the seat belt was unspooled and did not roll back to its original position. According to Constable Moretti, that kind of damage to the seat belt would be caused by a very serious collision. He testified that he could not find any rub marks to indicate that Mr. Azimi's seat belt was on when the cars allegedly collided. According to Constable Moretti, the seat belt was likely broken in a previous incident.

Constable Moretti testified that because of the complaints of injuries, he asked firefighters at the scene to assist and called for an ambulance bus to take all occupants from both cars to hospital.

Finally, Constable Moretti testified that the evidence at the scene and the mechanism of the reported injuries did not support an accident as described. At his direction, both cars were removed to an impound lot, where police services could photograph them.

Mr. Sam Kodsi

Economical retained Mr. Sam Kodsi, a professional engineer specializing in accident reconstruction, to investigate the alleged accident. Mr. Kodsi wrote in his report that the damage sustained by the VW was not consistent with the reported sequence of events or with contact with the Honda. According to Mr. Kodsi's report, if the collision had occurred as reported, he would have expected to see some deformation on the front of the Honda where it would have

contacted the driver's side of the VW, including damage to the front bumper cover, assembly and frame members as well as other components. He also wrote that if the collision had occurred as reported, he would have expected to see more crush deformation on the driver's side of the VW.

Economical provided Mr. Kodsi with a damage appraisal prepared after the alleged accident and photographs dated February 27, 2008. After he inspected the Honda (on March 10, 2008), Mr. Kodsi noted that there was substantial damage that had occurred prior to the reported collision, including damage to the undercarriage, floor pan and lower cross member. This was not consistent with a collision between the VW and the Honda as reported. He also observed damage to the Honda that had occurred at or en route to the impound lot (including a puncture to the radiator when a forklift attempted to move the car). Mr. Kodsi concluded that the VW and Honda did not collide as reported and that the damage he observed to both vehicles did not occur from a collision between them.

The damage Mr. Kodsi observed to the Honda when he inspected it in March 2008 was consistent with the damage estimate prepared for Economical on February 8, 2008. It was Mr. Kodsi's opinion, however, that the majority of damage that he saw to both cars appeared to be damage that occurred before and after the reported collision, and, with respect to the Honda at least, the damage was consistent with that reported in a prior collision.

With respect to the VW's driver's side, Mr. Kodsi measured a 12 centimetre indent, reducing to about 4.8 centimetres at the rear driver's side passenger door. According to his observations, there was no forward or rear-ward component of shifting to the VW's metal, which would be expected in the collision as reported. The metal was shifted side to side, with no longitudinal scratches or scuffs or paint transfers that would be typical of a moving vehicle. It was Mr. Kodsi's testimony that the VW would have been stationary or rolling at walking speed when it had been struck, but that it had not been struck by Mr. Azimi's Honda.

Based on his own simulations, Mr. Kodsi concluded that if the VW and Honda had collided as alleged, the Honda would have to have been travelling at only 15 km/hour – substantially less than had been reported by any of the witnesses. In every scenario that Mr. Kodsi input into his simulations, like Mr. Gorski after him, there would be some rotation to the vehicles at the alleged point of impact. It was Mr. Kodsi's opinion that the Honda would have experienced some 15 centimetres of crush, while the VW would have experienced up to double what it did, some 22-27 centimetres, if the cars had actually collided as reported.

ANALYSIS

There are inconsistencies between the physical evidence and Mr. Azimi's and Mr. Hamid's testimony. I do not find Mr. Azimi's evidence about the condition of his car credible because of the inconsistencies between it and the Honda's Vehicle Claim History Subsearch, Mr. Kodsi's evidence and the evidence supporting a prior claim. Mr. Azimi testified that the Honda was in mint condition when he bought it. Meanwhile, Mr. Kodsi observed damage to the undercarriage that was consistent with a collision before Mr. Azimi became owner. It contained an airbag for a later Honda Civic model. Some of the damage Mr. Kodsi observed was already corroded on the undercarriage.

The Honda's claim history subsearch disclosed that the Honda had been involved in at least two prior accidents and had been labelled as salvage some three months before Mr. Azimi purchased it. At the time it was designated as a salvage vehicle, it was registered to Shaw Auto Recyclers, who sold the car to an individual from whom Mr. Azimi then purchased it. Mr. Azimi became the Honda's registered owner on January 23, 2008, just six days before the alleged accident. Meanwhile, the VW had been insured days before the alleged accident (on January 18, 2008). And that insurance policy was for only 30 days.

The vehicles' final resting place is also curious. The location of the cars as the witnesses observed and where the cars should have been after a collision as described were inconsistent. Constable Moretti testified that when he arrived at the scene the front end of the Honda was some 90 centimetres from the side of the VW. Mr. Azimi testified that a first responder (either

fire or ambulance) had moved the Honda some four to five feet away from the VW to get around the car and access its occupants. Constable Moretti attended and measured the accident scene and I prefer his evidence as a third party. By contrast, Mr. Azimi testified that there was chaos right after the cars stopped, that he was in shock and vomiting bile, while his rear passenger was screaming and vomiting, so that when a firefighter asked Mr. Azimi if he could shift the car into neutral to push it back, I have no evidence what Mr. Azimi did actually see.

Constable Moretti testified that the cars were perpendicular to each other, notwithstanding that an impact like the one described would have seen the higher speed Honda push or rotate the slower VW. According to Mr. Kodsi, whose account I preferred as an expert witness, if one vehicle had struck the other in an intersection, there would be some induced rotations, with the Honda rotating counter-clockwise at some angle. The VW would also have spun somewhat, as each car experienced a speed change on impact. In every scenario Mr. Kodsi input, there would be rotation of the vehicles. In this alleged collision, there was none. Even Mr. Gorski testified that there should be rotation in an accident as reported.

According to Mr. Kodsi, one would see a marking from the license plate from the striking vehicle to the struck vehicle. In this case, there was no such marking. In fact, the Honda's license plate was bent upward and outward. Further, Mr. Kodsi observed that there was no matching of heights, scratches or scuff marks that would be typical if the two cars collided. I find that the cars would not have rested as they did, with no rotation, had they actually collided as described.

The testimonial evidence presents a scenario of a moderate speed impact where Mr. Azimi could not or did not apply the brakes and broadsided a very slow-moving vehicle. Mr. Hamid's account was that the Honda had "rammed" the moving VW, suggesting that the Honda was moving at at least a moderate speed, consistent with Mr. Azimi's claims throughout. With the VW being what effectively stopped the Honda, the lack of physical evidence supporting the impact is curious. With zero damage to its front bumper, the Honda is alleged to have struck the VW sufficiently hard to create a crush deformation or indent that was at its deepest 12 centimetres, and on average 4.8 centimetres under the VW's driver's side doors.

Mr. Kodsi concluded that if the cars had collided as reported, the Honda would have to have been travelling at only 15 km/hour – substantially less than any of the witnesses reported. I found Mr. Kodsi's evidence compelling on three main points: first, that had a collision occurred as reported, the cars would have rotated in the intersection; second, that crush to the Honda would be expected; and finally, the crush to the VW would have been double than that measured.

With respect to the injuries at the scene, both Mr. Azimi's and Mr. Hamid's accounts suggest chaos. Constable Moretti testified that occupants complained they were immobilized from the impact. Mr. Hamid testified that emergency personnel used the "jaws of life" to remove the VW's driver and rear seat passenger. Mr. Azimi testified that he had to be removed from his car, that he was vomiting before emergency personnel arrived and that Mr. Sharifi's girlfriend in the back seat was vomiting and screaming that she could not move. Based on their complaints of injuries at the scene, Constable Moretti testified that he requested an ambulance bus and asked for the fire department to remove the VW's driver's side rear passenger. The ambulance crew braced and boarded the occupants based on their reported injuries. I am not persuaded that injuries alleged by Mr. Azimi and Mr. Hamid and reported to Constable Moretti at the scene were consistent with the accident as described, and in which there was no damage to the striking car.

I also find Mr. Azimi's medical evidence conflicted. Mr. Azimi testified that he went to see a physician at a walk-in clinic on January 31, 2008. In a Statutory Declaration that he signed on April 10, 2008, he says he went to two walk-in clinics about one month after the incident for his injuries. Mr. Azimi's first documented visit to Dr. Alam at a walk-in clinic was not until April 13, 2008. Meanwhile, he testified that he had to make monthly visits to a physician following the alleged accident and to submit a doctor's note each time to his employer as part of his short-term disability claim. Because of the discrepancies between Mr. Azimi's testimony and his OHIP summary and his failure to produce notes he says existed to corroborate those visits, I did not find Mr. Azimi's evidence to be persuasive.

Finally, I gave Mr. Gorski's evidence little weight. He did not see the Honda until July 20, 2009, some 18 months after the alleged accident, and he never saw the VW. By his own admission, Mr. Gorski's report was directed more at methodological problems he saw in Mr. Kodsi's report than at forming his own conclusions, which he testified was difficult because of the lack of evidence he needed. His report relied on hypotheses and his simulations were based on generic inputs in an attempt to explain the cars' final resting positions.

What Mr. Gorski did confirm was that one would expect the VW to have moved after an impact and rotated, even if only moderately. Because of the lack of any rotation or movement, even Mr. Gorski expressed concern about the mechanism of the alleged accident. In the end, Mr. Gorski wrote (in his report's conclusion) that "there are still unanswered questions about how events unfolded leaving us to the opinion that we cannot say whether this collision actually took place or was staged."

I agree with Economical that I do not have to find that Mr. Azimi engaged in a fraud in order to find that he was not involved in an "accident" as defined by subsection 2(1) of the *Schedule*. While I certainly have insufficient evidence to find fraud on the part of Mr. Azimi, I am not satisfied that an "accident" occurred as Mr. Azimi has alleged.

EXPENSES:

The parties made no submissions with respect to expenses. I recommend that the parties resolve the issue of expenses between themselves. In the event that they are unable to do so, they may bring the matter before me in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

Jessica Kowalski
Arbitrator

June 7, 2010
Date

Financial Services
Commission
of Ontario

Commission des
services financiers
de l'Ontario



FSCO A08-002596

BETWEEN:

ASHKAN AZIMI

Applicant

and

ECONOMICAL MUTUAL 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. Azimi failed to prove, on a balance of probabilities, that he was involved in an accident, as defined in section 2(1) of the *Schedule*, on January 29, 2008. The application for arbitration is dismissed.

Jessica Kowalski
Arbitrator

March 25, 2010
Date