



FSCO

BETWEEN:

██████████

Applicant

and

AVIVA CANADA INC.

Insurer

REASONS FOR DECISION

Before: Arbitrator Alan G. Smith

Heard: In person at Burlington, Ontario on May 7, 2015

Appearances: Mr. Luke Hamer for Mr. ██████████
Mr. Kevin Griffiths for Aviva Canada Inc.

Issues:

The Applicant, Mr. ██████████ alleges he was injured in a motor vehicle accident (the “accident”) on June 27, 2012 and he sought accident benefits from Aviva Canada Inc. (“Aviva”), payable under the *Schedule*.¹ The parties were unable to resolve their disputes through mediation, and Mr. ██████████ through his representative, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*² as amended.

¹ The *Statutory Accident Benefits Schedule – Accidents on or after September 1, 2010*, Ontario Regulation 34/10, as amended.

² R.S.O. 1990, c.I.8, as amended.

[REDACTED]

The issue in this Preliminary Issue Hearing is:

1. Was Mr. [REDACTED] involved in an incident on June 27, 2012, in which the use or operation of an automobile directly caused an impairment to him pursuant to s. 3(1) of the *Schedule*?

Result:

1. Mr. [REDACTED] was involved in an incident on June 27, 2012, in which the use or operation of an automobile directly caused an impairment to him pursuant to s. 3(1) of the *Schedule*.

EVIDENCE AND ANALYSIS:

Background

The following facts are not in dispute:

The Applicant, [REDACTED] was in his 49th year in the early summer of 2012. He had lived on Chrisdon Road in Burlington, Ontario for a number of years. During the warm weather months, he rode his bicycle for exercise on the residential streets in his neighbourhood on an average of 3 times a week. This was a pattern he had followed during his entire adult life. He had not been involved in a bicycle accident since his childhood.

In the late morning of June 27, 2012, he left his residence on his bicycle and proceeded towards the intersection of Cleaver Avenue and Upper Middle Road. He was unimpaired by drugs or alcohol or any other factor at the time. The weather was unremarkable. As he approached the intersection of Cleaver Avenue and Upper Middle Road, he does not recall the state of the traffic signals facing him. He did not hear any vehicles approaching him. He admits he looked to his left before turning. Without stopping, Mr. [REDACTED] turned the corner from Cleaver Avenue onto Upper Middle Road westbound. Upper Middle Road is a heavily travelled thoroughfare with a speed limit of 60 kilometers per hour. There are 2 lanes of traffic in each direction and a narrow bicycle lane on each curbside. Having rounded the corner onto Upper Middle Road, for reasons

[REDACTED]

that are in dispute, the Applicant fell from his bicycle and landed on the grass next to the bicycle lane just west of the intersection. The Applicant was subsequently diagnosed with a subdural hematoma which necessitated a full craniotomy. Not realizing the possible importance of preserving the bicycle for future examination, the Applicant discarded it as garbage shortly after the fall.

The Applicant's Account of the Fall

During testimony Mr. [REDACTED] stated that:

...it was hard to explain but when I was coming around the corner I just all of a sudden, I felt something hit me....The next thing I knew I was on the grass...when I...hit the ground I was kind of stunned and I was facing absolutely the wrong direction. I glanced up and all I remember seeing is a flash of white going by...

The Applicant further testified that the impact of whatever hit him:

... was enough to knock me basically off my bike... whatever hit me, the force it hit me... wasn't a light hit. It... knocked me onto the ground. It wasn't just a shove, it had to be something big and a flash of white and it looked a fair size... another bike, I don't think would've hit me that hard at all...

In cross-examination, the Applicant admitted that at an Examination Under Oath, he had been asked to describe what he remembered before falling to the ground, to which he had replied, "I remember a small-like bump or whatever and then [I] hit the ground...". The Applicant also admitted that at the Examination Under Oath, he only stated he was "pretty sure" it was a car that had toppled him from the bicycle.

Also during cross-examination, Mr. [REDACTED] denied that going over an imperfection in the road or running over a stone or piece of garbage could have caused him to fall. He stated, "I've ridden a bike long enough, I would not have flown off by hitting a rut in the road".



The Damage to the Bicycle

Mr. [REDACTED] testified that after toppling off the bicycle, he lay on the grass for short period of time and then stood up. On examining the bicycle, he noticed that the front wheel was substantially bent. It was clear to the Applicant that it could not be ridden. The wheel was in fact so damaged that it would not turn within the forks of the bicycle. That damage necessitated the Applicant having to lift the front of the bicycle off the ground while walking it back to his residence. Mr. [REDACTED] was unclear as to what extent, if any, the rear wheel of the bicycle was damaged. He also testified that he did not notice any foreign paint on the bicycle.

Mr. [REDACTED] a long-time friend of the Applicant, testified that he visited Mr. [REDACTED]’s residence in the early afternoon of June 27, 2012. He stated that upon examining Mr. [REDACTED]’s bicycle, “... the thing I remember was that the front rim as bent....it was bent enough that you couldn’t drive the bike”.

The Applicant’s wife, Ms. [REDACTED] also testified with regard to the damage to the bicycle she noticed on the evening of June 27, 2012:

...I decided I was going to put it [the bicycle] into the garage which I have to go around the front where the big door is. That’s when I discovered that it was very difficult to move...I had to pretty much drag it. The wheels didn’t, they weren’t flowing. They weren’t moving freely... both wheels.

How was the Bicycle Damaged?

Mr. Jason Young, a collision reconstruction expert, testified on behalf of the Applicant. Mr. Young stated that he had completed 900–1000 accident reconstructions over the course of his career. Approximately 80 to 100 involved bicycles. Mr. Young gave the following testimony with regard the etiology of the damage to Mr. [REDACTED]’s bicycle:

[REDACTED]

...there is a marked difference between a bicycle that rides into a curb and topples versus a bicycle that is impacted by a car. The extent of damage that occurs on a bicycle increases significantly with the speed of a vehicle impact. For a curb impact, that means a bicycle riding into a sidewalk curb which is a substantial size, concrete curb, a bicycle would not have wheel warping, it would not have the described extent of damage that was on his bicycle. Where as in motor vehicle collisions when the vehicle impacts the back of the bicycle or rides, drives over the wheels, one or both wheels, there is significant noticeable permanent damage to the wheels in terms of warping, bending, to the extent that the wheel can no longer roll in the forks, because there's interference between this bending and the wheel and the forks. Forks are sort...of the sides that comes down from the top of the bicycle that contain them.

When asked to elaborate on the significance of Mr. [REDACTED]'s bicycle wheels not being able to move freely between the forks of the bicycle, Mr. Young stated:

That's really the critical information that the whole opinion is depending on. A bicycle that impacts a curb at riding speeds would not have that damage, does not have that damage. Bicycles are designed to take those types of impacts and they do take those type of impacts. This bicycle in particular, being a mountain bike, is a little more rugged than, you know, a ten-speeder or eighteen-speeder. Bicycles in general are designed to be able to take curb impact without permanent bending of the wheel.

Due to the nature and extent of the reported damage to Mr. [REDACTED]'s bicycle, Mr. Young also ruled out the fall having been caused by the impact of another bicycle or by striking an imperfection in the roadway.

Mr. Young summarized his conclusions as follows:

Based on the described damage to the wheels the scenarios that we're looking at are either a rear impact from a... vehicle or an impact from a vehicle and then driving over the wheels.... So, bicycle gets hit, falls over and stays on the road and the vehicle continues

[REDACTED]

and rides over one or both of those wheels. Because there was described damage to both wheels in the best information that I've been provided with, that would indicate to me that a vehicle did ride over the wheels of this bicycle because in a rear impact you only see damage to the back wheel and not generally to the front wheel. There's no reason that the front wheel would take any damage.

In cross-examination, Mr. Young was asked whether, if a car had run over the bicycle, there would have been an expectation of multiple broken wheel spokes and tire deflation. Mr. Young opined that both aspects of damage were not necessarily expected to result from being run over by an automobile.

Mr. Young also indicated that in a bicycle like Mr. [REDACTED]'s, the forks are quite close to the sidewalls of the tires. There is roughly a one inch space on both sides. Therefore, to make the wheel immobile, there would necessarily have to be at least a one inch bending of the wheel rim. When asked, "Is there any other scenario, other than a motor vehicle impact, which could have caused that sort of bending in this case, given the surrounding events of the incident?" Mr. Young answered, "No, there's no other scenario that caused that bending force, that twisting bending force on that wheel". Mr. Young also ruled out the possibility that the impact of Mr. [REDACTED]'s body caused the damage to the wheels.

Finally I asked Mr. Young to only consider the damage to the front wheel rim of the bicycle, in other words, to disregard any information with respect to the damage to any other part of the bicycle. He answered:

Then there's only two scenarios. One is that the bicycle falls over for some unknown reason. The rider goes onto the shoulder for some unknown reason and the front wheel is run over. That's one scenario. Second scenario: that the back is touched or hit by a car with not a lot of closing speed such that there's no damage to the back....The rider is thrown off in the same location and the bicycle topples and the front wheel is run over. So those are the two possibilities according to that hypothetical.



Analysis

I find that the testimony from the Applicant, Ms. [REDACTED] and Mr. [REDACTED] regarding the condition of the bicycle after the incident, is consistent with regard to the damage to the front wheel rim of Mr. [REDACTED]'s bicycle. That testimony is unrefuted and I adopt it as providing an accurate description of the damage to the front wheel. I find the evidence regarding the damage to other parts of the bicycle is less clear and therefore will not rely on it in this decision.

In oral submissions, counsel for Aviva agreed that, pursuant to Mr. Young's uncontested accident reconstruction analysis discussed above, there can only be two possible scenarios vis-à-vis the fall Mr. [REDACTED] suffered on June 27, 2012, i.e., either a car hit Mr. [REDACTED] and knocked him off his bicycle or for some unknown reason, the Applicant fell off the bike and then a car ran over the front wheel. Counsel for Aviva also confirmed that he hadn't presented me with another viable or plausible reason for Mr. [REDACTED]'s fall other than being struck by an automobile.

Nevertheless, counsel for Aviva argued that the Applicant had failed in his onus of proof. He argues that Mr. [REDACTED]'s testimony with regard to the events surrounding the fall is vague and unreliable, for example, that the Applicant agreed that he would have looked to his left before making the turn onto Upper Middle Road, but he remembers neither seeing nor hearing another vehicle approaching him. I agree that Mr. [REDACTED]'s recollection of events (except with regard to the resulting damage to the front of the bicycle) should be given little weight. Nonetheless, I am still left only with the two scenarios elucidated in the expert testimony of Mr. Young. If the one possibility is correct, that is, that an automobile caused Mr. [REDACTED] to topple off the bicycle, then there is no doubt that the Applicant has met his evidential onus. Obviously it is the other explanation, that it was some "unknown factor" with no evidential foundation which caused the fall, which is more problematic.

In closing submissions, counsel for Aviva stated:

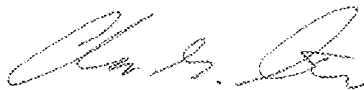
I have no other explanation as to why he fell other than he fell. Some people fall without there being a reason. Does there have to be... every single reason behind a fall? People make mistakes, lose their balance. It did occur during a turn, a curve in the road.

However, it is common ground that Mr. [REDACTED] was a very experienced bicyclist with no history of accidents. It is also agreed that he was not impaired by alcohol or drugs or any other factor at the time of the incident. He was not suffering from any medical condition which would explain the fall. There is no evidence of him striking an object in the roadway which would have toppled him from the bicycle.

In my view, the evidence of the damage to the bicycle's front wheel rim is determinative to this preliminary issue. The undisputed expert testimony of Mr. Young was that the damage to the front wheel could only have been caused by being run over by an automobile. Thus, coupled with the above testimony, it is very clear to me that an automobile "hit and run" incident occurred. There is no doubt a car was in the intersection contemporaneously with Mr. [REDACTED] toppling off the bicycle. Given that finding, and having no other plausible or logical explanation for the fall proffered in evidence, for example, that the Applicant skidded on road debris or spontaneously lost control of his bicycle, I conclude that on a balance of probabilities, the Applicant's fall off the bicycle on June 27, 2012 was caused by being struck by an automobile.

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 the *Dispute Resolution Practice Code*.



Alan G. Smith
Arbitrator

July 3, 2015

Date



FSCO [REDACTED]

BETWEEN:

[REDACTED]

Applicant

and

AVIVA CANADA 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 Applicant, Mr. [REDACTED] is declared to have been involved in an incident on June 27, 2012, in which the use or operation of an automobile directly caused an impairment to him pursuant to s. 3(1) of the *Schedule*.

Alan G. Smith
Arbitrator

July 3, 2015

Date