

BETWEEN:

ILYAS YASSIN RAGHE

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Susan Sapin

Heard: November 1, 2 and 5, 1999, at the Offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Martin Jacobs and Ravi Nadarajah for Mr. Raghe
David Zarek for State Farm Mutual Automobile Insurance Company

Issue:

The Applicant, Ilyas Yassin Raghe, claims that he was struck and injured on July 15, 1998 by a motor vehicle driven by Basil Robinson and insured by State Farm Mutual Automobile Insurance Company (“State Farm”). Mr. Robinson maintains the incident took place on July 16. State Farm disputes the date and cause of the injuries and refused to pay statutory accident benefits under the *Schedule*.¹ After mediation failed, Mr. Raghe 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 and 303/98.

The preliminary issue is:

Did Mr. Raghe sustain an impairment as a result of an accident with a motor vehicle driven by Basil Robinson on July 15, 1998?

Result:

Mr. Raghe sustained an impairment as a result of an incident with a motor vehicle driven by Basil Robinson on July 15, 1998.

EVIDENCE AND ANALYSIS:

Scope of this preliminary issue hearing

Mr. Raghe claims entitlement to income replacement, medical and other benefits provided by sections 4, 14 and 22 of the *Schedule*.² To be entitled to any of these benefits, Mr. Raghe must meet a two-fold test. He must first establish, on a balance of probabilities, that he sustained an impairment as a result of an accident. He must then prove that he meets the qualifications for each type of benefit.

The parties have asked me to determine only whether Mr. Raghe meets the first part of the test, by way of a preliminary issue hearing.

Subsection 2(1) of the *Schedule* defines an accident as “an incident in which the use or operation of an automobile directly causes an impairment...” Impairment is defined as “a loss or abnormality of a psychological, physiological or anatomical structure or function.”

²As outlined in the pre-hearing letter dated September 21, 1999.

The only question to be answered, therefore, is whether Mr. Raghe sustained an impairment in an incident with Mr. Robinson's car, and the only issue to be determined is causation. I have not been asked to determine, nor have I been provided with sufficient evidence to determine, actual entitlement to any particular benefit. Consequently, a finding that Mr. Raghe suffered an impairment, of any kind, in an incident with Mr. Robinson's car, permits Mr. Raghe to proceed to a hearing on entitlement to the benefits he is claiming. A finding that he did not suffer an impairment as a result of an incident with Mr. Robinson's car puts an end to his case.

Mr. Raghe's claim that he was injured by Mr. Robinson's car rests entirely on his own testimony, which the Insurer argued was not credible. Although he speaks English imperfectly and with an accent, Mr. Raghe's English is more than adequate for him to participate in a full and fair hearing of this preliminary issue. He stated that he did not require an interpreter. The Insurer relied on some of Mr. Raghe's linguistic shortcomings to impugn his credibility, but I find its allegations on that ground to be without merit as Mr. Raghe's meaning was always clear from the context on all crucial points.

In the alternative, the Insurer argued that the evidence presented by Mr. Raghe does not establish, on a balance of probabilities, that the injuries he sustained on July 15, 1998 were caused by Mr. Robinson's car.

Mr. Raghe's evidence

Mr. Raghe is 25 years old. He completed high school in Somalia before coming to Canada in 1996, and had just completed upgrading to Ontario Grade 11 in June 1998, a month before the encounter with Mr. Robinson. For eight months prior to the accident he worked 5 p.m. to midnight as the sole night cleaner for Manoucher Foods, a bakery on Clayson Road in Toronto,

and attended classes during the day. When these ended in June he took a second job as a sewing machine operator on the midnight (12 a.m. to 7 a.m.) shift at nearby Versatech Industries. He normally went directly from one job to the other. Mr. Raghe did not return to either job after July 15, 1998.

Mr. Raghe testified that he was struck by Mr. Robinson's car on Wednesday, July 15, 1998, around 4:10 p.m., as he was on his way to work at Manoucher Foods. He got off the eastbound Wilson Avenue bus by the rear doors when it stopped at Clayson Road, walked to the rear of the bus and started to cross Wilson Avenue from south to north, against the red light and about 15 feet from the intersection. He chose not to wait for a green light or cross at the lights at the corner because he was in a hurry to get to work. He liked to start at Manoucher Foods before 5 p.m. in order to finish early enough to be able to start the midnight shift at Versatech. He was hit from the left by Mr. Robinson's eastbound car. He stated that it ran over his right leg³ and scratched his left middle finger. He fell backwards, got up, and ran the rest of the way across the street. He then sat down, took off his shoe and checked his foot. He said he was unable to stand. He then wrote down Mr. Robinson's license plate number as Mr. Robinson was stopped at the red light on Wilson Avenue, signalling to make a left turn onto Clayson.

Mr. Raghe said that he then walked to the corner of Clayson Road, intending to walk the 15 minutes north to his job, but sat down again due to pain, and again took off his shoe to check his foot. Meanwhile, Mr. Robinson turned left onto Clayson Road, parked his car and crossed over to Mr. Raghe. Mr. Raghe says Mr. Robinson started to shout at him. Mr. Raghe responded, "I don't have a problem, leave me alone."

³This is an example of Mr. Raghe's imperfect English. Although he continually referred to his injured body part as his "leg," it was perfectly clear from the context that what he meant was his foot.

Mr. Raghe stated that he told Mr. Robinson he did not have a problem because he wanted Mr. Robinson to stop shouting at him, not because he wasn't injured. He put his shoe back on and asked Mr. Robinson for a ride to work, as he was thinking only of getting to work and did not want to walk 15 minutes if he could get a ride. He states that he limped across Clayson Road after Mr. Robinson, got into the car, and Mr. Robinson drove him to work. On the way, by sheer coincidence, Mr. Robinson happened to see Patricia Paris, a friend of his, who waved him down. He stopped to give her a ride.

Mr. Raghe was adamant that Mr. Robinson never gave him either his first or last name, or any insurance information, and never asked him if he wanted to see a doctor, call the police or go to the hospital.

Ms. Linda Gruszewski testified for the Insurer. She is the office and human resources manager for Manoucher Foods. Ms. Teresa Bayani, the bookkeeper, also testified. Ms. Gruszewski stated that Henny Eitman, the owner's wife, called her at work on her cell phone from the bottom of Clayson Road just after 4 p.m. on Wednesday, July 15, because she had seen Mr. Raghe limping badly, and was concerned. She thought Mr. Raghe was seriously hurt. She asked Ms. Gruszewski to check up on him, which she did, together with Ms. Bayani.

Both women testified that when Mr. Raghe arrived at work, they noticed scrapes on his left hand but neither noticed any limp. He told them he had hurt himself getting off a TTC bus. He admits he lied, and says he did so because he was confused and in shock, and was afraid he would be sent home or lose his job. He agreed on cross-examination that his lie made no sense, as his fear would be the same regardless of how he was injured.

Both women testified that Mr. Raghe seemed fine to them at the time (i.e. not in any apparent state of shock), that they believed his TTC story and that they were very surprised to find out

later that he was claiming to have been hit by a car. In fact, Ms. Gruszewski was sufficiently concerned on the 15th to call the TTC herself to complain on Mr. Raghe's behalf, even though Mr. Raghe was "quite persistent" that she not do so. Both women were very definite that Mr. Raghe tried very hard to minimize the incident.

Ms. Henny Eitman, the only person to see Mr. Raghe limping at the corner of Wilson Avenue and Clayson Road just after 4 p.m. on July 15, and who might have been able to corroborate his encounter with Mr. Robinson or the extent of his injuries at that time, was not called as a witness.

Mr. Raghe testified that after the women left, his foot began to swell and was too painful to stand on. He could not work and left a note for Ms. Gruszewski, stating that his foot was sore and he was going home. She confirmed that she found his note the next morning, the bakery had not been cleaned, and that it was the last day he worked there.

I find that the testimony of Ms. Gruszewski and Ms. Bayani supports Mr. Raghe's story to the extent that he was involved in an incident of some kind that resulted in injury to his left hand and a leg or foot around 4 p.m. on July 15, just before he got to work.

A friend drove Mr. Raghe home. Later that evening he took a cab to the Humber River Regional Hospital emergency department.

Hospital records

Hospital records confirm Mr. Raghe was treated there on July 15, 1998 at 8:42 p.m. for injuries to his left hand and right foot, but cannot independently establish what caused them.

The hospital emergency nursing assessment records that Mr. Raghe told the nurse that a car ran over his right foot, and that it was swollen and too painful to weight bear. Ice, rest, elevation, Tylenol and day use of a tensor bandage were prescribed. The finger was dressed. Mr. Raghe was given crutches and an appointment card to see Dr. J. Kwok, an orthopaedic surgeon in the fracture clinic, the next morning, July 16, at 8:45 a.m.

Dr. Kwok saw Mr. Raghe the next morning, and reported that he told him he was hit by a car the day before, but that he was “uncertain if the tire of the vehicle run [sic] over his right foot.” Circulation was normal, there was no neurological or vascular problem, the Achilles tendon was intact, and “x-rays *surprisingly* did not show any fracture.” (My emphasis.) Dr. Kwok applied a “Tubigrip,” a sock-like bandage, advised Mr. Raghe to ice the foot and authorized a week off work from his cleaning job. There was no mention of Mr. Raghe’s job as a sewing machine operator. As noted above, Mr. Raghe never returned to either job.

A week later, Dr. Kwok reported that Mr. Raghe was “better,” although there was still some pain and swelling on the dorsum of the foot, that Mr. Raghe could bear full weight and discontinue the crutches, and that he should stay off work four more weeks. He noted that Mr. Raghe was “attending physiotherapy treatments now apparently at the recommendation of his lawyer.”

This evidence contradicts Mr. Raghe’s opinion that he needed crutches for two months or more. Yassin Raghe, Mr. Raghe’s father, said his son used the crutches for a month and a half.

The testimony of Yassin Raghe, and Ali Mohammed Hassan, Mr. Raghe’s friend, was of little assistance in determining either the date of the accident or the cause of Mr. Raghe’s injuries. Neither witness presented a plausible reason to explain how he was able to remember the date so long after the event.

Mr. Robinson's version

Basil Robinson is 47 years old. He has an elementary education and has worked as a material handler for the same manufacturer for the past 21 years. He maintained that the accident occurred just after 4 p.m. on Thursday, July 16, 1998. He claimed to remember the date because he was on his way to get his car radio fixed.⁴ He stated he was stopped in the left turning lane on Wilson Avenue, waiting for the flashing green light to turn left onto Clayson Road. There was a car in front of him. Traffic was busy. As he started to turn, he saw Mr. Raghe "come out of nowhere" on his right. Mr. Robinson said Mr. Raghe grabbed his windshield wiper and got onto the hood of his car, holding on by the wiper. He did not say how Mr. Raghe got off the hood of his car.

His account of the accident as it appears in a police report dated July 23, 1998 tells the story somewhat differently:

...I got the flashing green and I started to turn. Then I saw this guy walking across Wilson and I guess he didn't see me and I didn't see him until it was too late. And I hit him. But I don't think he was supposed to cross because I had the flashing green. But anyway I stopped to help him. I asked him if he needed me to take him somewhere, maybe to a doctor or the hospital but he said no he just wanted to go to work. And that's it...But I don't understand it. He said he didn't need any help. He told me he would be OK. And now I hear he's hurt.

Mr. Robinson agreed this account was accurate except for the statement "And I hit him." He adamantly denied hitting Mr. Raghe, but agreed reluctantly on cross-examination that he could have hit him and may have run over his foot.

⁴As it turns out, he did not get it fixed that day after all. He stated he was so flustered by his encounter with Mr. Raghe that he turned around and went home instead.

He admits shouting at Mr. Raghe. He says that Mr. Raghe begged him not to call the police and that he didn't call them himself because he thought Mr. Raghe might be an illegal immigrant, and he did not want to cause him any trouble. He drove him to work and stated that he never noticed any limp at all.

Patricia Paris testified for the Insurer. When she got into Mr. Robinson's car, Mr. Robinson said, "This crazy guy jumped in front of my car!" She asked Mr. Raghe if he was okay and did he want to go to the hospital or see a doctor and he said he just wanted to go to work. Once there, Mr. Raghe got out of the car and she saw him go towards the back door. She said he was not limping and did not appear to her to be hurt "in any manner." Her only reason for remembering the day as Thursday, July 16, was that it was a payday. Ms. Paris was clearly wrong in her confident assertion that Mr. Raghe was not injured "in any manner" and I have difficulty accepting that she could be so certain of her facts fourteen months after the accident. I do not rely on her evidence.

The police investigation

Constable Roy Sorgo testified that he was sent to Mr. Raghe's home at 7:06 a.m. on Friday, July 17 to investigate a motor vehicle accident. Referring to notes made at the time, Constable Sorgo stated that Mr. Raghe told him he had been hit by a car on Wednesday, July 15 and that the driver told him his name was Basil. Constable Sorgo took the license plate number, obtained from it the name of the vehicle's owner, who turned out to be Pleasant Robinson, Mr. Robinson's wife, and spoke to her on the phone. He could not remember if he actually spoke to Mr. Robinson. He referred to his conversation as being with "the Robinsons." He stated that "they" insisted the incident took place on Thursday the 16th. He explained that he recorded the 16th on the accident report rather than the 15th because "the Robinsons" seemed credible to him, they had no reason to lie about the date, there was no dispute about the location or time of day of the accident, and

he thought it unusual that Mr. Raghe would wait two days to report a motor vehicle accident.⁵ It bothered him that Mr. Raghe did not call the police when the incident occurred so that a proper investigation could be done. He recalled a bandage on Mr. Raghe's foot and recorded the injuries as "minor," and was not aware that Mr. Raghe had been to the hospital emergency department.

Constable Sorgo saw no need to investigate further and wanted to complete his report within the seven days required. The July 23, 1998 report does not state when he spoke to "the Robinsons," but it does include a purported first person account of the incident by Mr. Robinson, excerpted above, in Constable Sorgo's handwriting, even though Mr. Robinson testified that he never spoke to him. I do not rely on Constable Sorgo's evidence to establish the date of Mr. Raghe's encounter with Mr. Robinson. His investigation was cursory, he was not at the scene, he did not have all the facts, and his judgment was based in part on unfounded assumptions.

Analysis and conclusion

As the evidence of Mr. Raghe, Mr. Robinson and several of the witnesses contains too many gaps and inconsistencies to be reliable, I prefer to rely on the objective evidence presented to determine both the date of the accident and whether Mr. Raghe sustained an impairment as a result.

The only reliable, objective evidence that places Mr. Raghe at the corner of Wilson Avenue and Clayson Road just after 4 p.m. on Wednesday, July 15, 1998, is that of Ms. Gruszewski and Ms. Bayani, who have no interest in the outcome of the proceedings, no reason not to tell the truth and who gave their evidence in a straightforward manner, without hesitation. I accept their evidence.

⁵Mr. Raghe testified that his father drove him to the police station to report the motor vehicle accident on the afternoon of July 16, and he was given a phone number and told a police officer would be sent to his home. His father corroborated this testimony.

I find that the hospital records establish that Mr. Raghe's injury to his right foot on July 15 was such that it would make it very unlikely that he would be crossing Wilson Avenue the very next day, at least not without crutches. The Insurer raised this as a possibility, on the theory that Mr. Raghe's injuries were less serious than he claimed. However, there is no evidence to support this. Nothing suggests that the hospital records were not completed by experienced medical personnel or that they are otherwise unreliable, and I find that they were clear that Mr. Raghe was not able to bear weight on his right foot and that he needed crutches to walk.

Apart from Mr. Raghe, who spent the evening of July 15, 1998 in a hospital emergency department, and Ms. Gruszewski and Ms. Bayani, whose records show his last day worked, I find that none of the other witnesses who testified, including Mr. Robinson, gave a plausible reason for remembering whether an incident that occurred almost a year and a half prior to the hearing occurred on Wednesday July 15 or Thursday July 16, 1998.

I also reject the Insurer's argument that Mr. Robinson had no reason to lie about the date of the accident. Mr. Robinson struck a pedestrian while driving his wife's car and never reported this fact to the police. We do not know if he even told his wife about the incident prior to Constable Sorgo calling her at home. The police report states, and Mr. Robinson testified, that he stopped to help Mr. Raghe and offered to take him to a doctor or the hospital. Mr. Raghe denies this. If Mr. Robinson did in fact make these offers, I find that he did so because he knew he had hit Mr. Raghe and was concerned he might be hurt. If he did not make these offers, I find that he told Constable Sorgo that he did so because, again, he knew he had hit Mr. Raghe and he did not report the incident either to the police or to his insurer at the time, as he should have, because he was frightened of the consequences.

Mr. Robinson interpreted Mr. Raghe's assertion that he had "no problem" to mean he was not hurt, and appears to have genuinely believed, or, more likely, hoped, that Mr. Raghe was in fact not injured. I find Mr. Robinson had every reason to minimize his involvement, especially after he

found out Mr. Raghe was claiming to be hurt and had called the police, and I do not rely on his evidence with respect to the date of the incident. I find that Mr. Robinson's behaviour and statements at the time of the accident, if not his recollection, as recorded in the police report, indicates that it was more probable than not that Mr. Raghe was injured in the encounter. I find this to be confirmed by Mr. Robinson's testimony on cross-examination.

Mr. Robinson gave a lively demonstration of his theory that Mr. Raghe jumped onto the hood of his car and hung on by the windshield wiper in order to avoid being hit as he dodged rush hour traffic. I accept this as Mr. Robinson's genuine impression of what occurred. He perceived the incident to be an unintended accident, and not, as the Insurer suggests, an accident "staged" by Mr. Raghe on July 16 so that he could claim benefits for (non-compensable) injuries actually sustained the day before in some other manner.

For these reasons I find that it is more likely than not that Mr. Robinson's vehicle struck Mr. Raghe on Wednesday, July 15, 1998, rather than Thursday, July 16, 1998.

I believe Mr. Raghe that he did not want to call the police on the afternoon of July 15, and that he refused to go to the hospital or see a doctor, because he was intent on getting to work. The testimony of Mr. Robinson, Ms. Paris, Ms. Gruszewski and Ms. Bayani confirms that Mr. Raghe insisted he was fine and that he tried to minimize the incident because all he wanted to do was to get to work. I accept Mr. Raghe's explanation that he lied to Ms. Gruszewski and Ms. Bayani about falling as he got off the bus as a misguided attempt to alleviate their concern and make the incident seem less than it was, and because he was confused and in shock and wanted to be left alone. I find it reasonable that Mr. Raghe might want to be left alone.

However, it is unfortunate that Mr. Raghe lied so convincingly to Ms. Gruszewski about what happened to him, as neither I nor the Insurer can now be entirely certain if Mr. Raghe is telling the truth, and have reason to be cautious when presented with his inconsistent evidence.

There are also several unexplained inconsistencies in Mr. Raghe's testimony. For example, Mr. Raghe was adamant that Mr. Robinson never told him his name, yet Constable Sorgo recorded in his notes that Mr. Raghe told him that the driver's name was Basil. Mr. Raghe testified that his brother phoned Mr. Robinson before Mr. Raghe reported the accident to the police, which could only have been the 16th, but did not explain how he came to have Mr. Robinson's phone number. His brother did not testify. Mr. Raghe refused to acknowledge, on cross-examination, that Wilson Avenue would be busy at rush hour. The hospital records and his father's testimony indicate he needed to use crutches for a shorter time than he claimed. He insisted his claim was not a financial one, but to "prove reality." These inconsistencies cause me to question Mr. Raghe's testimony where it is not corroborated by independent evidence.

Medical opinion on causation

At some point Mr. Raghe underwent a disability assessment at a Designated Assessment Centre (DAC). The Insurer subsequently wrote to the DAC in February 1999 requesting a medical opinion about the most likely cause of the foot injury. The DAC was unable to provide one:

Please be advised that the injury described in the claimant's foot, including the positive bone scan that was obtained as part of the DAC assessment, is not specific to a foot being run over by a tire. The symptoms as well as the physical findings and bone scan findings could have been sustained in many other manners, including falls, jumping from a height, falling from a height or any other mechanism that imposes abnormal forces on the bones and joint capsules (synovium) of the forefoot...Unfortunately, in a case such as this where there is dispute as to the date and actual cause of the injuries, the DAC assessment is of little help in settling the dispute...Comments on causality can only be made in reference to historical or documentary evidence, and where these are in conflict, consistency between the alleged kinematics, biomechanics and features of the injury are examined. These were consistent with the claimant's story. They would be *equally consistent* with

jamming one's foot in the course of falling off the bottom step while exiting a bus.
[emphasis added]⁶

The fact that the DAC was unable to determine the precise medical cause of injury is not determinative. What must be determined is causation within the meaning of the *Schedule*, a legal question of which medical causation is only a part. Having considered the evidence as a whole, I find that, on a balance of probabilities, Mr. Raghe has presented sufficient independent evidence to establish that he sustained an impairment as a result of an incident involving a motor vehicle driven by Basil Robinson on Wednesday, July 15, 1998, as defined by the *Schedule*. Mr. Raghe is therefore entitled to proceed to a hearing to determine whether he is entitled to the particular benefits he is claiming.

EXPENSES:

I exercise my discretion to award Mr. Raghe his expenses in this preliminary issue hearing.

Susan Sapin
Arbitrator

January 21, 2000

Date

⁶Letter dated March 1, 1999

FSCO A99-000593

BETWEEN:

ILYAS YASSIN RAGHE

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 amended, it is ordered that:

1. Mr. Raghe is entitled to proceed to a hearing to deal with his entitlement to benefits under the *Schedule*.
2. State Farm shall pay Mr. Raghe his expenses of the preliminary issue hearing.

Susan Sapin
Arbitrator

January 21, 2000

Date