



FSCO A15-005875

BETWEEN:

AHMAD FARID

Applicant

and

AVIVA CANADA INC.

Insurer

REASONS FOR DECISION

Before: Arbitrator Marcel D. Mongeon

Heard: In person at Cambridge, Ontario on October 27, 2016

Appearances: Mr. Ahmad Farid participated
Mr. Mark S. Grossman participated for Mr. Ahmad Farid
Mr. Jeffrey Pasternak participated for Aviva Canada Inc.

Issues:

The Applicant, Mr. Ahmad Farid, was injured in a motor vehicle accident on November 11, 2014 and sought accident benefits from Aviva Canada Inc. (“Aviva”), 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.

¹ *The Statutory Accident Benefits Schedule - Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

The issues in this Hearing are:

1. At the time of the accident, was the Applicant self-employed within the meaning of the *Schedule*? The parties have agreed that the amount of the Applicant's income replacement benefits will depend on my answer to this question.
2. Is either party entitled to its expenses of the Arbitration?

Result:

1. The Applicant was self-employed at the time of the accident.
2. 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 Rules 75 to 79 of the *Dispute Resolution Practice Code*.

EVIDENCE AND ANALYSIS:

The issue in this Arbitration is a simple question. The Applicant worked as a driving school instructor. At the time of his accident, was his working relationship, within the meaning of the *Schedule*, 'self-employed', or was he employed by the driving school that he worked for? The answer to the question will result in a different entitlement to income replacement benefits. The parties have otherwise agreed on all aspects of the Applicant's entitlement to such benefits but require a decision on whether or not he was self-employed or employed.

The facts are straightforward and relatively undisputed. I had the testimony of both the Applicant and the principal of the driving school as to the Applicant's working relationship.

The Applicant has been licensed as a driving school instructor since 1996. He has worked for the driving school in question since 2013. No written document or contract relating to the working relationship was presented. The owner of the driving school testified that the Applicant was an independent contractor. He was expected to pay his own vehicle expenses, and would be assigned certain students for which he would be paid on an hourly basis.

The Applicant had little control over his working hours. It was expected that the Applicant would not work for any other company as a driving instructor.

The Applicant was paid on a gross basis for the hours which he worked, and had HST added. No deductions for employment purposes were made such as income taxes, EI or CPP.

The Applicant would not be paid for statutory holidays or receive any overtime. If things were slow for the driving school, the Applicant would not work and would not be paid.

The Applicant clearly accounted for his income as a driving school instructor in his income tax returns on a self-employment or sole proprietorship basis. The bulk of the income on the Applicant's income tax return² was from "business income". A review of the Applicant's income tax return for the year in which the accident happened³ confirms the use of a Statement of Business or Professional Activities to report his income.

The *Schedule* contains a clear definition in s. 3(1), the relevant portion of which states:

"self-employed person" means a person who,

(a) engages in a trade, occupation, profession or other type of business as a sole proprietor ...

Prior to the current *Schedule*, there was not such a clear definition of self-employed person. The previous *Schedule*⁴ (prior to September 2010) used the term self-employed without a definition. As a result, cases cited to me by the Applicant such as *Allstate Insurance Company of Canada and Malik*,⁵ *Vo and Maplex General Insurance Company*⁶ and *Ligocki v. Allianz Insurance*

² Exhibit 11.

³ Exhibit 9.

⁴ O. Reg. 403/96 – *Statutory Accident Benefits Schedule – Accidents on or After November 1, 1996* [until September 2010].

⁵ FSCO P00-00007, Director's Delegate Draper, July 17, 2000.

⁶ FSCO P-002777, Director's Delegate Sachs, December 12, 1997.

*Company of Canada*⁷ had to look for factual indicia to sort out whether or not someone was self-employed. A common test used was that in the Supreme Court's decision of *671122 Ontario Ltd. v. Sagaz Industries*,⁸ also cited. Under the old Regulation, the Superintendent of FSCO had also issued Guidelines respecting self-employment status.

I find that since the addition of a definition of "self-employed", the *Schedule* no longer requires the application of any of the traditional self-employment vs. employment tests if the definition and its application to the facts are clear.

In this case, there is no dispute that the Applicant never carried on his occupation as anything but a sole proprietor. He claimed his expenses as a sole proprietor, filed his taxes as a sole proprietor, and his payments received included HST (rather than having income tax and other common employment deductions made). There is no question in my mind that he engaged in his occupation as a driving school instructor as a sole proprietor—that is clearly his status.

There was evidence presented that some aspects of the Applicant's work with the driving school might lead an uninformed third party to believe that he was an employee of the driving school. I note, for example, the evidence of the letters written for the Applicant's use with a lending institution, as well as testimony that the Applicant had little control over his total hours of work.

However, the fact is clear that the Applicant never considered himself employed. The definition in the *Schedule* is clear. It is not factual indicia that make someone self-employed—rather, it is actually engaging in an occupation as a sole proprietor that provides so.

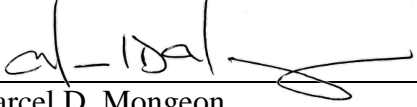
In this case, the Applicant clearly engaged in his occupation as a sole proprietor. He is self-employed. Although the self-employment tests might be useful in cases where it is not obvious, in this case, the critical fact is clear.

EXPENSES:

⁷ 100 O.R. (3d) 624, 2010 ONSC 1166.

⁸ [2001] 2 S.C.R. 983, 2001 SCC 59.

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 Rules 75 to 79 of the *Dispute Resolution Practice Code*.



Marcel D. Mongeon
Arbitrator

December 19, 2016

Date



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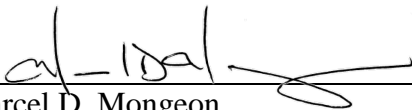
AVIVA CANADA INC.

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. The Applicant was self-employed at the time of the accident.
2. 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 Rules 75 to 79 of the *Dispute Resolution Practice Code*.



Marcel D. Mongeon
Arbitrator

December 19, 2016

Date