Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A14-002487

BETWEEN:

WAYNE PEARSON

Applicant

and

ACE INA INSURANCE

Insurer

DECISION ON A PRELIMINARY ISSUE

Before:	Arbitrator Marshall Schnapp
Heard:	In person at ADR Chambers on May 27, 2016 and by written submissions completed June 17, 2016
Appearances:	Mr. Mick Sloniowski participated for Mr. Wayne Pearson Mr. Jason Frost participated for ACE INA Insurance

Issues:

The Applicant, Mr. Wayne Pearson, was injured in a motor vehicle accident on October 26, 2011 and sought accident benefits from ACE INA Insurance Company ("ACE"), payable under the *Schedule*.[1] The parties were unable to resolve their disputes through mediation, and Mr. Pearson, 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 Preliminary Issue Hearing are:

1. Whether Mr. Pearson's election out of the WSIB scheme was made primarily for the purpose of claiming accident benefits?
2. Whether Mr. Pearson's claim for accident benefits is barred pursuant to section 61 of the *Schedule*?

Result:

1. Mr. Pearson's election out of the WSIB scheme was valid being that it was not made primarily for the purpose of obtaining statutory accident benefits.
2. Mr. Pearson's claim for accident benefits is not barred pursuant to s. 61 of the *Schedule*.

EVIDENCE AND ANALYSIS:

Background

The following facts were contained in the Agreed Statement of Facts provided by the parties. Mr. Pearson was involved in a motor vehicle accident in North Carolina on October 26, 2011. At the time of the accident he was in the course of his employment as a long haul truck driver and thus was entitled to make a WSIB claim.

Mr. Pearson alleges that a car cut in front of his truck, causing him to swerve to the right to avoid a collision which resulted in his truck going off the roadway; his trailer flipped over, striking a guard rail. As a result of the accident, Mr. Pearson sustained injuries to his neck and back.

Mr. Pearson was covered under WSIB insurance and initially made a claim for WSIB benefits with the submission of a WSIB Worker's Report of Injury/Disease (Form 6) on November 16, 2011. He retained Preszler Law Firm on November 18, 2011. He then submitted an Application for Accident Benefits (OCF-1), dated November 21, 2011, to ACE on November 22, 2011. Mr. Pearson executed a WSIB Election Form on November 26, 2011, in which he opted out of the

WSIB scheme and the form was sent to WSIB on December 5, 2011. Mr. Pearson issued a statement of claim in a tort action on October 24, 2013 in Ontario and named ACE as a defendant in its capacity as the Uninsured/Identified Insurer.

Mr. Pearson's Testimony

Mr. Pearson was the only person to provide testimony at the Preliminary Issue Hearing. He provided his evidence in a straight-forward manner, had a strong recollection of the facts, and came across as credible.

Mr. Pearson testified that at the time of the accident he was an independent owner-operator of the tractor trailer he was driving. He explained that under the contract he was working on at that time, he was required to pay WSIB premiums.

According to Mr. Pearson, at the time of the accident he was driving southbound on the highway, when a smaller car started to move to the right, crowding his vehicle. The car moved into his blind spot and Mr. Pearson hit his breaks and slowed down. Mr. Pearson explained that he, still unable to see the vehicle, ended up driving off the paved road to avoid a collision which resulted in his truck going through the guard rail and turning over. He was trapped in the vehicle and fuel leaked into it and was covering him. The engine was still running and he was concerned that the truck would catch on fire. The fire department attended at the scene of the accident and Mr. Pearson was removed from the truck by the fire department using the Jaws of Life to cut into the truck so he could exit.

After the accident, Mr. Pearson explained he was very rattled as he believed he had almost died and his truck was gone. He recalls speaking with the police, but does not remember if he told them about the other driver. He testified at that time his adrenaline was very high, there was diesel all over the place and the situation was very chaotic.

Shortly thereafter at the scene of the accident, Ms. Patricia Lynch, an insurance adjuster attended and spoke with Mr. Pearson. They talked for twenty minutes and he explained what happened.

Mr. Pearson advised Ms. Lynch that he forgot to tell the police about the other driver and asked her if he should go back and tell them. According to Mr. Pearson, she told him he did not have to as it would be in her report.

He also advised that he was not convicted of any offence as a result of the accident. He has been unable to return to work as a long haul truck driver due to the injuries sustained in the accident. As well, he does not have the funds to purchase a new truck.

When Mr. Pearson returned to Canada, he discussed the incident with the company he had been contracted to drive for and they advised him he had to contact WSIB and that WSIB was his only course of action. He applied for WSIB in mid-November as he believed it was his only option. According to Mr. Pearson, he was not advised that he may elect out of WSIB.

Mr. Pearson recalls that around mid-November he was getting worried about his ability to return to work, that his condition was getting worse, and that he had no money. He decided to seek legal advice and retained a lawyer. When asked why he retained a lawyer, Mr. Pearson explained that as he had lost everything a result of no fault of his own, he wanted the guy responsible to pay for his losses and truck and to make him whole again. At the time he retained the lawyer, Mr. Pearson did not know the identity of the at-fault driver.

Mr. Pearson testified that he was advised by the lawyer he was speaking with that if he wanted to sue the at-fault driver, he must opt out of WSIB, and that is how he can sue to have his truck and medical bills paid by the at-fault driver. Mr. Pearson believes he opted out of WSIB at the end of November 2011 after meeting and retaining legal counsel. He also then applied for accident benefits as he understood he could obtain accident benefits if he was suing the at-fault driver.

Mr. Pearson also recalls being contacted by WSIB after he retained counsel. He directed them to speak to his lawyer to obtain the information they wanted.

During his cross-examination, Mr. Pearson testified that he was still sharp and not fatigued at the time of the accident. Mr. Pearson also agreed that the police report only mentioned one vehicle,

being the tractor trailer he was driving; however, he had not seen the police report prior to being questioned at the Hearing. Again, Mr. Pearson testified that he was not sure why he did not tell the police about the other vehicle and explained that he was still in shock because of the accident when he spoke to the police. Mr. Pearson also advised that he had a better recall of the discussion with the insurance adjuster after the accident than with the police, as that occurred a bit later in time from him being removed from his truck.

When asked about an email from Mr. Martin, his employer at the time of the accident, dated November 15, 2011, which noted that the "accident was preventable….privileges rescinded…". Mr. Pearson commented that the email did not state he was at fault and it meant he could no longer drive for his employer.

Mr. Pearson also testified that on November 21, 2011, his lawyer did not advise him of the consequences of the motor vehicle accident taking place in North Carolina. He also agrees that the notice letter for the tort action was sent on December 23, 2011 to ACE. Mr. Pearson testified that he provided instructions for the tort claim because he wanted to be able to sue somebody and make them pay. At the end of his cross-examination, Mr. Pearson stated that he was "not 1% at fault for the accident", and testified the other driver in his view was 100% at fault.

ACE's Position

According to the Insurer, even though it is technically the moving party, it is the Applicant who has the evidentiary onus of proving that his claim for accident benefits falls within the exception to s. 61 of the *Schedule*.

It is ACE's position that the election out of the WSIB scheme was made primarily for the purpose of claiming accident benefits, and accordingly, s. 61 of the *Schedule* bars the claim for accident benefits. Section 61 reads as follows:

> 61 (1) The insurer is not required to pay benefits under this Regulation in respect of any insured person who, as a result of an accident, is entitled to receive benefits

> under the *Workplace Safety and Insurance Act*, 1997 or any workers' compensation law or plan.
>
> (2) Subsection (1) does not apply in respect of an insured person who elects to bring an action referred to in section 30 of the *Workplace Safety and Insurance Act*, 1997 if the election is not made primarily for the purposes of claiming benefits under this Regulation.[2]

Both parties agree that the Applicant's tort action is governed by the laws of North Carolina.

ACE is relying on an expert legal opinion by Matthew Georgitis of the North Carolina law firm Wilson Helms & Cartledge LLP, dated September 25, 2015.[3] The two most important elements of the opinion for the purposes of this matter are the following:

- North Carolina is a "1%" state, meaning that if the plaintiff is at least 1% at fault or contributorily negligent for the motor vehicle accident, a tort action is barred;
- The accident report found that the Applicant was contributorily negligent for the accident due to his inattention – accordingly, the Applicant's tort claim is barred under North Carolina law.

ACE submits and relies upon the evidence of Mr. Georgitis, which states the Applicant's tort action is barred under North Carolina law. Given the Applicant's admission that North Carolina law applies to the tort action, there is no merit to the tort action and it is the submission of ACE that the tort action was commenced in response to the WSIB defence to the claim for accident benefits under the *Schedule*.

According to ACE, it is Mr. Pearson who must prove that the tort action was *bona fide* and was not commenced in response to the application of the WSIB exclusion clause.

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[2] Section 61 of the *Schedule*.

[3] Exhibit 4, Tab B4 of the Insurer's Production Brief.

ACE relies on the FSCO appeal decision of *Sumal and American Home Assurance Company*,[4] where Director's Delegate Blackman found that where an insured person attempts to avoid the application of the s. 61 WSIB exclusion clause to their claim for accident benefits by commencing a tort action, a trier of fact is to consider the timing and merit of the tort action to determine whether it was commenced primarily for the purpose of claiming accident benefits, contrary to s. 61(2) of the *Schedule*.

ACE submits that in the present case, Mr. Pearson does not have a valid tort action and the chronology shows that the tort notice letter was a direct "knee-jerk" reaction to the WSIB defence to the accident benefits claim. As well, ACE relies on Mr. Pearson's own advice to WSIB in November 2011, when he advised that he did not know whether a tort action would be pursued.

Thus, according to ACE, it should be plain and obvious that the election on November 21, 2011 was made primarily for the purpose of claiming accident benefits. The Applicant's claim for accident benefits is barred pursuant to s. 61 of the *Schedule*, as the Applicant does not have a *bona fide* tort action and, according to ACE, the tort action was commenced primarily for the purposes of claiming accident benefits.

ACE also provided closing submissions after Mr. Pearson provided his evidence on May 27, 2016. According to ACE, Mr. Pearson's own testimony shows he was the at-fault party. He fell asleep or otherwise lost attention behind the wheel, and drove into the ditch at a curve in the Interstate. Mr. Pearson has not pursued a *bona fide* tort claim. At the time the Applicant issued his tort notice letter, both the Applicant and his lawyer knew there had been no collision with an unidentified vehicle.

The Insurer relies on the findings of Director's Delegate Makepeace in *Mahadeo*, confirmed by Director's Delegate Blackman in *Sumal*:

[4] *Sumal and American Home Assurance Company* (FSCO Appeal P07-00029, June 25, 2008), at pp. 10-12.

> a claimant's action or inaction, before and after making the election, provides important evidence of his purpose in making the election. Delay in bringing an action or failure to prosecute it are likely to undermine a claimant's accident benefits claim.[5]

ACE also submits that because Mr. Pearson's OCF-1 was signed the same day as the WSIB election form, this confirms the WSIB election was made primarily for the purpose of claiming accident benefits, particularly Income Replacement Benefits. ACE submits that the facts in this case are squarely on point with the *Mahjourian and TD Home and Auto Insurance Company*[6] decision, where Ms. Mahjourian was injured in a single motor vehicle accident that appeared to be largely her fault.

ACE also submits that Mr. Pearson's own testimony during the Preliminary Issue Hearing supports them in that, according to ACE, the Applicant's credibility was severely challenged, he was combative, he refused to admit facts that impaired his position, he elaborated on answers that supported his position, and also he refused to agree to simple confirming questions about his prior Examination Under Oath evidence.

Specifically, ACE relies on the fact that the Applicant had a strong recall of the conversation with a roadside adjuster who met with him shortly after the police officer (facts which he believed supported his claims), wherein he allegedly stated that he "forgot" to tell the police officer about the vehicle that had just forced him off the road. As well, ACE submits that the Applicant's testimony that the roadside adjuster told him (paraphrasing, as the transcript from the Hearing is not available) "not to worry, the police officer will receive a copy of my report" with the notes about the other driver is completely implausible.

ACE also submits that the Applicant withheld documents relevant to the advice from his counsel regarding the pursuit of a tort claim. And given the evidentiary onus, the Applicant should have

[5] *Ibid.*, at p. 12.
[6] *Mahjourian and TD Home and Auto Insurance Company* (FSCO A08-001115, August 6, 2009).

waived solicitor-client privilege over the status reports and opinion letters that he says were provided to him to establish his instructions.

ACE is also relying on *Bus and State Farm Mutual Automobile Insurance Company*,[7] where the Arbitrator found that the failure to produce available evidence leads to a negative inference that the evidence would not have supported that party's position. In this case, ACE asks me to draw adverse inferences from the evidence not introduced by the Applicant at the Preliminary Issue Hearing, specifically status reports and opinion letters from his counsel, and find that the Applicant elected out of the WSIB scheme to claim accident benefits.

ACE is not asking this tribunal to find that the tort action is barred, but rather that the probability that the tort action is barred goes to the reasons and intent for commencing the tort action.

As well, ACE also submits that while the Applicant's evidence at the Preliminary Issue Hearing was that he wanted to recover damages from the person who caused him to go off the road, even if that evidence is true, it is not determinative. In *Sumal*, Director's Delegate Blackman confirms: "the crucial determination is not whether an intention exists to bring a tort action, but whether that is the primary purpose of an insured person electing not to proceed with a WSIB claim."[8] Thus the determination that needs to be made is whether the primary purpose of the WSIB election on November 21, 2011 was to commence a tort action.

ACE submits it is undisputed that on November 21, 2011, the Applicant: 1) elected out of the WSIB scheme for the explicitly stated purposes of claiming accident benefits; 2) commenced his claim for accident benefits; 3) advised the WSIB claims adjuster that it would be up to his lawyer to confirm whether he would sue the at fault party; and 4) had not instructed his lawyer to issue a tort statement of claim. To ACE, all four of the above facts show that the primary purpose of the WSIB election on November 21, 2011 was to claim accident benefits, and thus the claim is barred pursuant to s. 61 of the *Schedule*.

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[7] *Bus and State Farm Mutual Automobile Insurance Company* (FSCO A14-001321, May 24, 2016).
[8] *Sumal and American Home Assurance Company* (FSCO Appeal, P07-00029, June 25, 2008), at p. 10.

Mr. Pearson's Position

According to the Applicant, upon an overall review of the circumstances at the time his election was made, it should be determined that he elected out of WSIB in order to pursue a tort action.

The Applicant argues that the Insurer's interpretation of the facts of this matter relies on hindsight rather than the sequence of events at the time Mr. Pearson made his election out of the WSIB scheme.

As well, the Applicant submits that the North Carolina accident report, the DMV-349, is not evidence as to the facts of the motor vehicle accident, the Applicant has never been convicted of any traffic offence in relation to the accident, and there has been no legal finding of fault to date.

According to Mr. Pearson, the issue to be determined is not the challenges surrounding the tort claim, but rather to determine whether or not it was his intention in electing out of WSIB scheme – acting on the basis of the information available at the time – to do so primarily for the purpose of claiming accident benefits.

Mr. Pearson also argues that the opinion evidence adduced by the insurance adjuster based on the Police Report (DMV-349) and the opinion letter of a lawyer in North Carolina are being improperly tendered as evidence, and should not be given any weight in the adjudication of the issues in dispute.

Mr. Pearson points to the following chronology to support his position"

1) On November 15, 2011, following the accident, Mr. Pearson's supervisor at Fastrax Transportation advised him by email that "WSIB should look after your medical claims due to the accident."

2) Mr. Pearson then submitted a Worker's Report Injury/Disease (Form 6) on November 16, 2011[9] on the belief he was obligated to pursue WSIB benefits.
3) On November 18, 2011, the Applicant then retained legal counsel in order to pursue an action in tort and claim for statutory accident benefits as documented by the redacted Retainer Agreement between Mr. Pearson and Preszler Law Firm.[10]
4) By December 5, 2011, Mr. Pearson had elected to commence an action in tort pursuant to s. 30 of the *Workplace Safety and Insurance Act* ("*WSIA*"), and he had notified the Board of his decision made on November 26, 2011.[11]

Mr. Pearson also relies on the fact that once the election is made out of WSIB, a person is not entitled to commence a tort action unless they have applied for statutory accident benefits. In order to maintain compliance with the *WSIA*, Mr. Pearson applied for statutory accident benefits prior to commencing an action in tort.

The Applicant also highlights that no Income Replacement Benefits are payable under the *Schedule* until such time as an election is made, and the Applicant submits that the longer an insured person waits to elect to sue, the more they stand to lose in Income Replacement Benefits.

Mr. Pearson submits he elected to commence an action in tort pursuant to s. 30 of the *WSIA*, and he notified the Board on December 5, 2011 of his election, dated November 21, 2011.

Mr. Pearson also submits that his counsel commenced its liability investigations promptly after being retained, and by November 23, 2011 had made contact by telephone and letter with the Raonoke Rapids Highway Patrol of the State of North Carolina, in order to obtain the records in relation to the accident.[12] In compliance with s. 258(3)(b) of the *Insurance Act*, which requires a plaintiff to serve notice of the intention to commence an action on the defendants within 120 days

[9] Applicant's Production Brief, Affidavit of Mark Freeman, Tab G.
[10] Applicant's Production Brief, Affidavit of Mark Freeman, Tab G.
[11] Applicant's Production Brief, Affidavit of Mark Freeman, Tab G.
[12] Applicant's Production Brief, Affidavit of Mark Freeman, Tab K & L.

after the incident, a notice of intention was provided to ACE and Economical Insurance on December 23, 2011, in their capacities as Uninsured/Unidentified and OCF-44 Insurers.[13]

Mr. Pearson maintains that despite the fact that the determination of fault driver has not been ascertained, on December 5, 2011, at the time of Mr. Pearson's election under s. 30 of the *WSIA*, it was within his contemplation that the at-fault driver would be identified.

Multiple attempts were made by Mr. Pearson's counsel to ascertain the identity of the at-fault driver from November 23, 2011 to October 22, 2013 and beyond, including the exchange of 17 distinct communications by telephone and letter email.[14]

The statement of claim was issued on October 23, 2013, examination for discoveries took place on February 19, 2015 and November 5, 2015, and undertakings continue to be completed. Mr. Pearson submits that the tort action is advancing in the usual course.

The Applicant admits that under North Carolina law, the statutory provisions require there to be a collision with the unidentified vehicle, and the absence of contact is a bar to a tort action. The Applicant submits that the "no contact" bar applies to unidentified vehicles only, and if the other driver is identified and has insurance, then this rule will have no application to the tort claim.

The Law

The Applicant does not dispute the Insurer's submission that he has the evidentiary onus of proving his claim for statutory accident benefits which falls within an exception to s. 61 of the *Schedule*.

The Applicant submits that the jurisprudence indicates that the relevant analysis is on the phrase "not made primarily for the purpose of claiming benefits under the *SABS*." According to the

[13] Applicant's Production Brief, Affidavit of Mark Freeman, Tab P.
[14] Applicant's Production Brief, Affidavit of Mark Freeman, Tabs K, L, and S.

Applicant, the test for determining the applicability of the exception turns on "the circumstances at a particular point of time",[15] namely the time the Applicant makes the election. The Applicant also relies on Director's Delegate Makepeace's summary of the jurisprudence in *Mahadeo*, which approved of *Gerbu* and emphasized the importance of assessing the purpose of the election at the time of the election.[16] As stated by Director's Delegate Draper in *Gerbu*, "the issue is the insured person's reason for making the election", and he rejected the position that if an insured person's court action has no chances of success, the election cannot be *bona fide*.[17]

The Applicant also argues that the circumstances in this matter are distinguishable from those in *Mahjourian*, where the chronology of the claim demonstrated it was made primarily for the purpose of claiming accident benefits.

The Applicant also provided additional written submissions following his testimony. He submits that his oral testimony indicates that he wanted to be made whole from loses he sustained due to the other driver, and that his lawyer made and continues to make meaningful efforts to pursue the tort action.

The Applicant also submits that his evidence has not been impeached on any element of his testimony on the facts of the case, and he provided his evidence in a forthright manner and was credible.

Mr. Pearson also submits that the FSCO decisions cited by ACE are each distinguishable on the facts and evidence of this case. In particular, with respect to the *Mahjourian* decision. In that case, the Applicant never formally elected to commence a court action, her WSIB file showed she never completed the required election forms, and she commenced her tort action after the expiry of the limitation period.

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[15] *Gebru and Coseco Insurance Co./HB Group/Direct Protect*, (FSCO A00-000709, September 11, 2001), at pp. 5-6.

[16] *Mahadeo*, *supra*, at pp. 4-5.

[17] *Gebru*, *supra*, at p. 4 and 6.

Findings

Both parties are in agreement on the law and the standard that is to be applied. What separates their positions is how they view the facts of the case, and how those facts should be interpreted.

The question is whether the Applicant's election out of the WSIB scheme was made primarily for the purpose of claiming accident benefits, and therefore is barred pursuant to s. 61(2) of the *Schedule*.

Both parties agree that the leading case is *Sumal*, a FSCO Appeal decision, which outlines that where an insured person attempts to avoid the application of the s. 61 WSIB exclusion clause to their claim for accident benefits by commencing a tort action, a trier of fact is to consider the timing and merit of the tort action to determine whether it was commenced primarily for the purpose of claiming accident benefits, contrary to section s. 61(2) of the *Schedule*.[18]

I also note that my analysis shall be also be guided by Director's Delegate Makepeace's summary of the jurisprudence discussed above, which emphasized the importance of assessing the purpose of the election at the time of the election.[19] I also note that Director's Delegate Draper in *Gerbu* found that the strength of the court action is a factor to be considered in evaluating the insured person's motivation in electing to proceed in court.[20]

After reviewing the evidence before me, including Mr. Pearson's testimony, and submissions from counsel, I find that on a balance of probabilities, Mr. Pearson elected out of WSIB in order to pursue a tort action.

There are a number of factors that lead me to this conclusion. Most importantly and persuasive was Mr. Pearson's own testimony. I found that he provided his evidence in a straight forward and honest manner and was a very credible witness. There are numerous examples from his testimony

[18] *Sumal*, *supra*, at pp. 10-12.
[19] *Mahadeo*, *supra*, at pp. 4-5.
[20] *Gerbu*, *supra*, at p. 4 and 6.

that have persuaded me that the purpose of his election at the time of the election was to pursue a tort claim. Specifically, when Mr. Pearson was providing testimony on why he decided to speak to a lawyer, he testified that he was speaking with his wife about how he was worried about returning to work, his condition was getting worse, and he had no money. When asked specifically why he retained a lawyer, his answer was that he lost everything through no fault of his own and he wanted that guy to pay for his losses and truck. It is important to note that the only way for Mr. Pearson to be compensated for his truck was through a tort action.

Mr. Pearson also confirmed at the time he retained counsel, he did not know the identity of the other driver who he believed was at-fault for the accident. He provided evidence that it was his understanding that his lawyers would make efforts to investigate and ascertain the identity of the other driver. I note that the evidence provided by the Applicant, which includes 17 distinct communications by telephone, letter and email, shows multiple attempts were made by Mr. Pearson's counsel to ascertain the identity of the at-fault driver.

His testimony was also that he understood that he needed to apply for accident benefits before he could pursue a tort action.

I also note that under cross-examination, Mr. Pearson strenuously denied being even 1% at fault for the accident and claimed the other driver was 100% at fault.

I also note that the redacted Retainer Agreement also supports Mr. Pearson's evidence that he retained counsel to purse a tort claim.

With respect to the Insurer's arguments in this case, I do not find them persuasive. ACE would have me find that Mr. Pearson knew he was at fault for this accident, and that his tort action was commenced primarily for the purposes of claiming accident benefits. I find that neither Mr. Pearson's testimony nor the evidence before me lead me to make such findings. Neither the police report nor the legal opinion from North Carolina assist me in finding that Mr. Pearson knew he was at-fault for the accident at the time he made his election, or that his primary purpose in electing out of WSIB was not to pursue a claim for statutory accident benefits.

ACE submitted that the evidence shows Mr. Pearson did not diligently pursue his tort claim which supports a finding that the primary purpose for the election was to pursue accident benefits. From my review of the evidence, though, I find that Mr. Pearson pursued his tort case in the normal course. Counsel for Mr. Pearson provided a chronology of all the steps taken to date, including starting to obtain information and investigating the identity of the "at -fault" driver within days of being retained.

I also agree with Mr. Pearson that the facts surrounding this case are distinguishable from those in the *Mahjourian* decision, a case that ACE is relying on. In that case, the Insured never formally elected to commence a court action, her WSIB file showed she never completed the required election forms, and she commenced her tort action after the expiry of the limitation period. In the case before me, Mr. Pearson made the proper elections and has prosecuted his tort action in the normal course.

EXPENSES:

Given his success in this matter, I exercise my discretion to award Mr. Pearson his expenses incurred in this Preliminary Issue Hearing. However, since this was not directly addressed in submissions, the parties may provide brief written submissions as to costs, if they are unable to come to an agreement as to the issue of expenses within the next 30 days.

	September 26, 2016
Marshall Schnapp Arbitrator	Date

Financial Services Commission of Ontario

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Ontario

FSCO A14-002487

BETWEEN:

WAYNE PEARSON

Applicant

and

ACE INA INSURANCE COMPANY

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. Mr. Pearson's election out of the WSIB scheme was valid being that it was not made primarily for the purpose of obtaining statutory accident benefits.
2. Mr. Pearson's claim for accident benefits is not barred pursuant to s. 61 of the *Schedule*.

Marshall Schnapp
Arbitrator

September 26, 2016
Date