Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A13-005289

BETWEEN:

JOSEPH BEATTIE

Applicant

and

UNIFUND ASSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Arbitrator H. Michael Kelly Q.C

Heard: July 22, 2014 at ADR Chambers in Toronto, Ontario and transcripts received on August 5, 2014

Appearances: Mr. David Payne for Mr. Joseph Beattie
Ms. Sharla Bandoquillo for Unifund Assurance Company

Issues:

The Applicant, Mr. Joseph Beattie, was injured on July 8, 2010, while operating a "Genie Boom Crane" in the parking lot of a building occupied by commercial tenants. He applied for statutory accident benefits from Unifund Assurance Company ("Unifund"), the insurer of his personal vehicle, payable under the *Schedule*.[1] Unifund denied his entitlement to these benefits. The parties were unable to resolve their disputes through mediation, and Mr. Beattie 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 - Accidents on or after November 1, 1996 O Reg.462/96 s.2.*

The issues in this Preliminary hearing are:

1. Was the Genie S65 Boom Lift, at the time and place when and where Mr. Beattie was injured while operating the Genie, an "automobile" within the meaning of that term in s. 2(1) of the *Schedule*?

2. Is either party entitled to expenses of this hearing?

Result:

1. The Genie S65 Boom Lift was an "automobile" within the meaning of that term in s.2 (1) of the *Schedule* when Mr. Beattie was injured while operating it.

2. If the parties are unable to agree on the entitlement to, or quantum of the expenses of this hearing, the parties may request an appointment with me for determination of same in accordance with the *Dispute Resolution Practice Code*.

EVIDENCE

On July 8, 2010, Mr. Beattie was operating a "Genie S65 Boom Lift" (hereinafter "Genie"), at ground level, on a parking lot at 1368 Ouelette Avenue in Windsor. The Genie is a four-wheeled mobile crane, propelled by its own motor. The purpose of the Genie was to elevate Mr. Beattie to enable him to perform a maintenance function (painting or preparation for painting) with respect to the building at that address. The ground level of the parking lot collapsed into the level below, and Mr. Beattie was injured. It is common ground, between the parties, that the building at 1368 Ouelette Avenue was an office building containing commercial tenants, and that the parking lot was the private property of the building owners, at that address.

According to the evidence[2], the Genie, on July 8, 2010, was operated by Mr. Beattie, on Dufferin Place (a highway) in order to get from one side of the rear of 1368 Ouelette Avenue to the parking lot at the other side of the rear, but may have been transported to the site by a transport vehicle that morning. As well the Genie had been operated on Dufferin Place and Ouelette Avenue on

[2] Affidavit of Adam Tanel, sworn May 9, 2014: Affidavit of Richard Kreder, sworn June 11, 2014

prior occasions, in connection with services at 1368 Ouelette Avenue. A further affidavit sworn by Mr. Tanel on July 22, 2014, attested to further information supplied by Mr. Beattie to the effect that Mr. Beattie had operated the Genie on all terrains and had observed the Genie being operated on all terrains. Mr. Tanel cites page 5 of the Owner's Manual containing the following: “limit travel speed according to the condition of the ground, surface, congestion, slope”.

OVERVIEW

To be entitled to statutory accident benefits, Mr. Beattie must establish that he was involved in an "accident" as defined in s.2(1) of the *Schedule* .

S. 2. (1) of the *Schedule* defines **"accident"** as follows:

> "accident" means an incident in which the use or operation of an **automobile** (emphasis added) directly causes an impairment..."

The issue of causation (i.e. "…directly causes an impairment") was not addressed on this motion. The parties simply requested a ruling as to whether or not at the time and place of the incident, the Genie was an "automobile" within the meaning of S. 1(1) of the *Schedule.*

To establish entitlement to *SABS* benefits, Mr. Beattie must prove that at the time and place of the incident the Genie was an "automobile". Mr. Beattie asserts that, by engaging the three-step test set out by the Ontario Court of Appeal, in *Adams v. Pineland Amusements Ltd. (2007) 88 O.R. 3rd, 321, OCA,* to determine the meaning of "automobile", he can demonstrate that the Genie was, at the material time and place, an "automobile" for the purposes of s.2.(1) of the *Schedule.* As the analysis below will show, the Genie will be deemed to be an "automobile", only if Mr. Beattie can establish that, at the time and place when and where the incident took place, the Genie was (a) a motor vehicle or an off-road vehicle and (b) was legally required to be insured under a motor vehicle liability policy (either pursuant to the ***Compulsory Automobile Insurance Act*** or pursuant to the ***Off- Road Vehicles Act***).

Unifund defends on the basis that the Genie was not an "automobile" **at the time and place** when the structure collapsed, and that, consequently, the incident does not fall within the definition of "accident" set out in s.2(1) of the *Schedule* . In support of that position Unifund asserts:

(a) The Genie is not a "motor vehicle" pursuant to s. 1 of the ***Highway Traffic Act,***

(b) The parking lot is not a "highway" pursuant to s. 1 of the ***Highway Traffic Act***,

(c) At the time and place when and where the accident took place the Genie did not legally require automobile liability insurance pursuant to s. 2 of the ***Compulsory Automobile Insurance Act,*** and was therefore not an "automobile" pursuant to s.224 of the ***Insurance Act ,***

(d) The Genie is not an off-road vehicle pursuant to s. 1 of the ***Off-Road Vehicles Act*** and s. 3 of Ontario Regulation 863 to the Act.

(e) Even if the Genie were an off-road vehicle, it did not require motor vehicle liability insurance at the time and place of the accident (citing *Bouchard v. Motors Insurance Corp. [2013] O.J.1960).*

Unifund also asserts that the Genie was stationary at the time of the incident and being used, not for a transportation function, but simply as an elevated platform from which Mr. Beattie could perform his maintenance function, and consequently the Genie was not a motor vehicle at the time when the parking lot collapsed [i.e. failed the "purpose test"]. Unifund cites *F.W. Argue Ltd. v. Howe,* [1969] S.C.R. 354 and *Harvey v. Shade Bros. Distributors Ltd. [1967] B.C. J. No. 39.*

Analysis:

The Starting Point:

S. 2. (1) of the *Schedule* defines **"accident"** as follows:

> "accident" means an incident in which the use or operation of an **automobile** directly causes an impairment..."*(emphasis added)*

To establish entitlement to SABS benefits, Mr. Beattie must first prove that at the time and place of the incident the Genie was an "automobile".

To determine the meaning of "automobile" in s.2. (1), the Ontario Court of Appeal, in *Adams v. Pineland Amusements Ltd. (2007) 88 O.R. 3rd, 321, OCA,* confirmed the three-part test enunciated by Sommers J. in *Grummett v. Federation Insurance Company of Canada (1999) 46 O.R. (3d) 340,* as follows:

1. Is the vehicle an "automobile" in ordinary parlance?
2. If not, is the vehicle defined as an "automobile" in the wording of the insurance policy?
3. If not, does the vehicle fall within any **enlarged definition** of "automobile" in **any relevant statute**? *(emphasis added)*

On the evidence I find that the Genie does fail the first two tests. I now turn my mind to the third test.

Enlarged Definition of "Automobile" in any Relevant Statute:

Section 1 of the Insurance Act, RSO 1990 Chapter I.8 under the heading "Definitions" begins with the words: "*In this Act, **except where inconsistent with** the definition section in **any Part**",* and then goes on to define "automobile" as follows:

> *"automobile" includes a trolley bus and **self-propelled vehicle**, and the trailers..." (emphasis added)*

Is this definition inconsistent with the definition of "automobile" set out in Part VI of the Insurance Act? The answer is "yes". **Part VI is the operable section**. [See *Regele v. Slusarcyzk (1997), 33 O.R. (3d) 556,* followed in *Grummett et. al. v. Federation Insurance Company of Canada, 46 O.R. (3d) 340*]

Part VI of the Insurance Act is entitled "Automobile Insurance" and contains the provisions related to SABS. It specifically defines the term "automobile" for the purpose of the SABS. Under the heading "**Interpretation Part VI"** the *Act* states:

224. (1) In this Part,

"automobile" includes,:

(a) **A motor vehicle required by any *Act* to be insured** *(emphasis added)* under a motor vehicle liability policy, and

(b) A vehicle prescribed by regulation to be an automobile.

Counsel were unable to bring to my attention any regulation prescribing the Genie (or equivalent motorized crane) to be an automobile.

Therefore my initial task is to determine:

(a) whether or not the Genie is a motor vehicle, **and,**

(b) whether or not the Genie is legally required by any *Act* to be insured, while being operated on a highway, **and**

(c) whether the Genie is legally required by any *Act* to be insured while being operated on the parking lot

The *Insurance Act* does not define "motor vehicle"

Section 2 of the **Compulsory Automobile Insurance Act RSO 1990, Chapter C.25 ("CAIA")** states:

Subject to the regulations, no owner or lessee of a **motor vehicle** shall,

(a) operate the motor vehicle or,

(b) cause or permit the motor vehicle to be operated, **on a highway** unless the motor vehicle is insured under a contract of motor vehicle insurance *[emphasis added]*

Unifund therefore asserts that the combined effect of Section 224 (1) of the Insurance Act, and Section 2 of the Compulsory Automobile Insurance Act, excludes the Genie as an automobile unless, at the time the incident occurred, the Genie was a motor vehicle, **and** the parking lot was a "highway".

Was the Genie a motor vehicle that required insurance at the time and place of the incident?

The Insurance Act does not define "motor vehicle". **The Compulsory Automobile Insurance Act** contains the following definitions:

> 1(1). In this Act,
> "automobile insurance" means insurance against liability arising out of the bodily injury to or the death of a person or loss of or damage to property caused by a motor vehicle or the use or operation thereof,...;
>
> "motor vehicle" has the same meaning as in the *Highway Traffic Act* and includes trailers and accessories and equipment of a motor vehicle ;

Section 1 (1) of the Highway Traffic Act RSO 1900, Chapter H-8 defines "motor vehicle" as:

> "...an automobile, a motorcycle, a motor assisted bicycle...and **any other vehicle propelled or driven otherwise than by muscular power** *(emphasis added)***,** but does not include a streetcar or other motor vehicle running only upon rails, a power-assisted bicycle, a motorized snow vehicle, a traction engine, a farm tractor, a self-propelled implement of husbandry, or road building machine within the meaning of this Act."

and defines "vehicle" as follows:

> "vehicle" includes a motor vehicle, trailer, traction engine, farm tractor, road building machine, bicycle, and any vehicle drawn, propelled or driven by any kind of power, including muscular power, but does not include a motorized snow vehicle or a streetcar.

and defines "highway" as follows:

> "highway" includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended to be used by the general public for the passage of vehicles...:

"Husbandry" is defined by the Oxford Dictionary as "the care, cultivation, and breeding of crops and animals". I am satisfied that the Genie did not fall within the exclusion "a self-propelled implement of husbandry".

A "traction engine", according to dictionary definitions, is a vehicle designed to pull heavy loads - the Genie does not fit the definitions.

I am satisfied that in accordance with the *Highway Traffic Act* (and therefore, by reference, in accordance with the Compulsory Automobile Insurance Act) the Genie was at all material times a **motor vehicle**, as it was propelled otherwise than by muscular power, and was not excluded by the exclusions set out in s.1 (1) of the Highway Traffic Act.

However, the accident did not occur on a "highway" as defined in identical terms by the *Highway Traffic Act* and the *Off-Road Vehicles Act*. That conclusion is supported by the decisions of the Ontario Court of Appeal in *Shah v. Becamon (Becamon v. Wawanesa) 2009 ONCA 113; [2009] O.J. No. 478,* and in the cases cited in the footnote below.[3]

As the accident did not occur on a highway, the Genie was not a motor vehicle that required insurance at the time and place of the accident, pursuant to the *Compulsory Automobile Insurance Act.* Therefore, the *Compulsory Automobile Insurance Act* does not assist Mr. Beattie in his endeavour to show that the Genie is captured by the definition of "automobile" in S. 224(1) of the *Insurance Act*. The *Off-Road Vehicles Act*, however, may assist in that capture - I will address that possibility later in this decision.

Upon review of the affidavits of Adam Tanel, sworn May 9, 2014 and July 22, 2014, and the affidavit of Richard Kreder, sworn June 11, 2014, and the "Owner's Manual" for the Genie, attached as an exhibit, I have concluded that the Genie would normally be transported by a transport carrier to the locus of the intended work. However, once at the site the Genie might require access to a highway to move from one area at the site to another area at the site. I accept the uncontested evidence, proffered by Mr. Beattie, that the Genie had been operated on Dufferin

[3] Gill v Elwood [1969] O.J. No. 1294
R. v Douglas [1997] O.J. No. 3931
Lamsar v Bajaj [2008] O.J. No. 1758 (On SC)

Place on the day of the cave in, and had on previous occasions operated on both Dufferin Place and Ouelette Avenue.[4]

Clearly, while being operated on a highway, the Genie, being a motor vehicle, legally required motor vehicle liability insurance. Mr. Beattie argues that it would not make sense that the Genie would require motor vehicle liability insurance while being operated on a highway, and then moments later, when it leaves the highway, it would no longer require that insurance. He argues that the Legislature could not have contemplated, or intended, that such legal obligation would be intermittent, i.e. in force when the Genie was operating on a highway, and then, moments later when the Genie left the highway, was no longer in force.

Mr. Beattie cited the following excerpt from the Ontario Court of Appeal decision in Bapoo v. Cooperators [1997] Carswell, Ont 5101:

> The modern approach to statutory interpretation calls on courts to interpret a legislative provision in total context, The court's interpretation should comply with the legislative text, promote the legislative purpose, and produce a reasonable and just meaning.

The Ontario Court of Appeal in *Copley v. Kerr Farms Ltd. [2002] O.J. 1644* and in *Adams v. Pineland [2007] O.J. No. 4724* addressed this issue directly, and found that the vehicles in question, not being operated on a highway **at the time and place of the accident**, were not required to be insured, and consequently each was not an "automobile" under s. 224 (1) of the *Insurance Act*. The courts found that the fact that the vehicle may have been operated on a highway at other times was irrelevant. Doherty J. A. in *Copley* did express concern that the Legislature's efforts to broaden the definition of "automobile" (from the ordinary meaning of "automobile" in common parlance) in Part VI of the Insurance Act, created "interpretive difficulties". However, he did not say that the Legislature crafted clauses that, in effect, erroneously and inadvertently defeated the real intention of the Legislature. *Adams,* following *Copley* expressed no reservation. The decisions in *Copley and Adams* overturned decisions of

[4] The speed specifications set out in the Operator's Manual for the Genie indicate speeds that would only be consistent with infrequent use on a highway.

Arbitrators that attempted to interpret the law in a way that would reduce or eliminate the potential intermittence of insurance coverage.

It is the role of the Legislature to determine whether or not changes are needed. I intend to follow the decisions in *Coply* and *Adams.* I therefore find that the Genie was not captured by the definition of "automobile" in S. 224(1) of the Insurance Act.

Mr. Payne, Mr. Beattie's counsel, in his oral submissions, focussed on the application of the *Off-Road Vehicles Act*

The **Off-Road Vehicles Act, RSO 1990 c.0.4** ("ORVA") contains the following provisions:

> **Definitions:**
>
> **1.** In this Act,
> "highway" includes a common and public highway, street, avenue, parkway, driveway, square place, bridge, viaduct or trestle, any part of which is intended to be used by the general public for the passage of vehicles..:
>
> "off-road vehicle" means a vehicle propelled or driven otherwise than by muscular power or wind and designed to travel,
>
> (a) on not more than three wheels, or
> (b) on more than three wheels and being of a prescribed class of vehicle.
>
> "prescribed" means prescribed by the regulations.

Application:

> **2.** (1) This Act does not apply in respect of off-road vehicles being operated on a highway

Insurance:

15. (1) No person shall drive an off-road vehicle unless it is insured under a motor vehicle liability policy in accordance with the Insurance Act.

(9) Subsections (1), (2), and (3) do not apply where the vehicle is driven on land occupied by the owner of the vehicle.

R.R.O 1990, Regulation 863 provides:

3. For the purposes of the definition of "off-road vehicle" of the Act , the following classes of vehicles are prescribed:

1. Dune buggies.

1.1 Vehicles designed for use on all terrains, commonly known as all-terrain vehicles that have steering handlebars, and a seat that is designed to be straddled by the driver

1.2 Vehicles designed for utility applications or uses on all terrains that have four or more wheels and a seat that is not designed to be straddled by the driver.

2. Suzukis, Model Numbers [6 listed]

3. Hondas, Model Numbers [2 listed]

4. Yamahas, Model Number YFM 200N

Unifund asserts that the Genie is not an off-road vehicle as described in Regulation 863. Mr. Beattie asserts that the Genie falls within the definition 3. (1.2)

The term "utility applications" is not defined in the legislation. Counsel did not provide to me any legal decisions addressing that definition. Unifund in its "Supplementary Factum" stated that the Genie did not have a seat designed to be straddled by the driver. I believe the parties were in agreement on that. There was no evidence provided that specifically addressed whether or not the Genie had any seat at all, or if so, what type. The "Owner's Manual" contains a number of

illustrations of the operator's platform[5]. It appears that the platform does not have a seat and that the operator remains standing during the performance of the Genie. No evidence was called to particularize the type of vehicle represented by the listed Suzuki, Honda, and Yamaha models, or by the term "Dune buggies".

Unifund argued that the vehicles covered by Regulation 863 were totally, or at least primarily, sport and recreational vehicles, but no evidence was presented to support that assertion.
If it were the intention of the Legislature to restrict the application of Regulation 863 to vehicles used solely for sport or recreational uses, the Legislature would have specifically stated that. Why would the models identified in subsections 3(2), (3), and (4) above have been individually described if they already fit squarely within the definitions in 3(1), (1.1), or (1.2) above?

The definition in subsection 3(1.2) above does not suggest a recreational purpose. It says "designed for utility applications or uses on all terrains that have four or more wheels and a seat that is not designed to be straddled by the driver". Many sport and recreational vehicles are three-wheeled, and have a seat intended to be straddled by the driver.

I do not interpret subsection 3(1.2) as requiring that the vehicle have a seat. Rather, I interpret that clause as an exclusion if the vehicle has a seat that is designed to be straddled. Neither party addressed the significance, if any, if the Genie had no seat.

"Utility" is defined in Webster's dictionary as, "the capacity for being useful for some purpose". The term "utility applications" fits the normal working function of the Genie, and it is uncontested that the Genie had four wheels, and operated on all terrains. Applying the liberal standard for legislative interpretation, appropriate to the *SABS* as consumer protection legislation, to promote the legislative purpose and produce a reasonable and just result, I am satisfied that the Genie was at the material time and place, an off-road vehicle, as defined in Regulation 863. As the Genie was not operating on a highway, and as it was not owned by the owner of the parking lot, it required

[5] Exhibit A to the Affidavit of Richard Kreder, sworn June 11, 2014.

motor vehicle liability insurance, at the time that the incident occurred, as per s.15(1) of the ORVA.

The decision in *Bouchard v. Motors Insurance Corp., [2013] O.J. No. 1960* (Ontario Divisional Court) is cogent. The Court defined the issue under consideration, as follows:

> "The issue before the Director's Delegate was a pure question of law: whether an off-road motorized bike (a "pocket bike") met the definition of "automobile" under the relevant legislation. The parties were in agreement that this case turns on whether the pocket bike was required to be insured **under the *Off-Road Vehicles Act*** R.S.O. 1990, c. 0.4. If so, the applicant had coverage for SABS under a motor vehicle insurance policy. If not, there was no such coverage." *(emphasis added)*

In *Bouchard*, the Claimant was injured while operating an off-road vehicle (a pocket bike) on lands owned by the owner of the pocket bike. Pursuant to subsection 15(9) of the ORVA, the vehicle was not legally required to be insured at that time and place of the accident. Consequently, the Court found that the pocket bike was not an "automobile" pursuant to the Insurance Act, and the Claimant was denied statutory accident benefits. Having made that finding that the Court did not have to, nor did it, proceed with, the analysis under the *Compulsory Automobile Insurance Act* ("CAIA"), as clearly the pocket bike was not being operated on a highway.

Unifund, while disputing that the Genie is an off-road vehicle, stated, in its Supplementary Factum, that even if the Genie is found to be an off-road vehicle, the Genie did not require insurance pursuant to section 2 of the *Compulsory Automobile Insurance Act* at the time and circumstances of the accident, and is therefore not an "automobile". That assertion seems to be advancing an erroneous position that the CAIA is the only relevant statute to be considered in the determination of legal obligation to acquire motor vehicle liability insurance. The CAIA is not the only "relevant statute". The analysis in *Bouchard* (Divisional Court) centered entirely on the provisions of the ORVA. If the Genie required insurance under the ORVA, as I have found that it did, it would qualify as an "automobile" within s.224 (1) of the Insurance Act. In *Bouchard*, the only reason that the pocket bike was not found to be an "automobile, (notwithstanding that it may

have fit within s.3. (1.1) of Regulation 863) was the fact that it was being operated on the bike owner's property (exempting it from the legal requirement to be insured), and there was no other related statute that required it to be insured while being operated off-highway.

Was the Genie Stationary? - Does it Matter?

Unifund asserts that the Genie was stationary at the time the accident occurred and consequently was not being operated as a motor vehicle or "automobile" at the relevant time and place.

Unifund contends that, as the Genie was being used, not for a transportation function, but simply as an elevated platform from which Mr. Beattie could perform his maintenance function, the Genie was neither a motor vehicle, nor an automobile when the parking lot collapsed. In support of that position Unifund cited *F.W. Argue Ltd. v. Howe,* [1969] S.C.R. 354 and *Harvey v. Shade Bros. Distributors Ltd. [1967] B.C. J. No. 39.*

In *Argue,* the delivery of fuel oil to a customer's premises resulted in a severe fire. The operator of the fuel truck negligently allowed excess oil to enter the building and to escape through faulty connection of the apparatus connecting the fuel pump to the building's fuel tank. The excess oil accumulated on the basement floor of the premises and became ignited. The fuel truck was stationary throughout the fueling procedure. The fuel pump was attached to the truck, and was operated by the same motor as propelled the truck. The issue addressed by the Supreme Court of Canada was whether or not the damages were "occasioned by a motor vehicle". *The Highway Traffic Act,* in effect, at that time stated that any action seeking to recover damages occasioned by a motor vehicle had to be commenced within one year following the event causing the damages. The action had been commenced more than one year following the event. The Court found that the damages were not occasioned by a motor vehicle. The truck was stationary at the time the oil was spilled and was not being operated **as a motor vehicle**. Spence J, for the Court, quoted with approval the words of Dickson J. in *Peters v. North Star Oil Limited, (1965), 53 W.W.R.321, at p.334,* that involved a similar fact situation:

> "In my view the words "damages occasioned by a motor vehicle or by the operator thereof" do not embrace situations where damage is occasioned---the vehicle being stationary---by the use of auxiliary equipment attached to, but not forming an integral part of, a vehicle, and used for a purpose unrelated to the operation of the vehicle qua vehicle."

First of all, I have no evidence before me confirming the submission of Unifund's counsel that the Genie was stationary at the time the parking lot collapsed, or for what time period it was stationary immediately before the collapse. Even if the Genie were stationary at that time, that fact, if proven, would not support the position that the Genie was not functioning in its normal mode as an off-road vehicle **qua vehicle**. The Genie is propelled by its own motor, and has its own independent steering mechanism and braking system.[6] There was no auxiliary equipment attached to it. Its normal mode can involve a stop-and-start process. I believe that on the basis of the filed materials, I can reasonably conclude that in performing its normal function at the Ouellette Avenue location, the Genie will be driven to a position close to the building wall; the Genie will elevate its operator to the desired height on the side of the building; the operator will address his duties at that point while the Genie is stationary; and the operator will then operate the Genie to move to the next point on the building's wall that requires attention. During its normal operation, the Genie will be stationary at times and moving at times. Even if the Genie had not reached its anticipated position at the wall of the building, at the time that the cave-in occurred, [7] it was in the process of its normal function.

The ORVA required that the Genie be insured while being driven on the parking lot. While performing its normal function it is being "driven", notwithstanding that, in the process it will be stationary at times.

While performing its normal function, off-highway, it is required to be insured under the ORVA. I therefore find that the Genie was an "automobile" as per s. 224(1) of the Insurance Act RSO 1990 c. I-8, and therefore an "automobile" for the purposes of s. 2 (1) of the *Schedule*.

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[6] Affidavit of Adam J. Tanel sworn May 9, 2014

[7] The Affidavit of Mr. Tanel (footnote 6) suggests that the cave-in occurred within approximately 30 seconds after the Genie entered the parking lot.

EXPENSES

If the parties are unable to agree on the entitlement to, or quantum of the expenses of this hearing, the parties may request an appointment with me for determination of same in accordance with the *Dispute Resolution Practice Code.*

September 30, 2014

H. Michael Kelly Q.C
Arbitrator

Date

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A13-005289

BETWEEN:

JOSEPH BEATTIE

Applicant

and

UNIFUND ASSURANCE 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. On July 8, 2010 Mr. Beattie was injured while operating an "automobile" within the meaning of subsection 2(1) of the *The Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996 O Reg.462/96 s.2.*

2. If the parties are unable to agree on the entitlement to, or quantum of the expenses of this hearing, the parties may request an appointment with me for determination of same in accordance with the *Dispute Resolution Practice Code.*

H. Michael Kelly Q.C
Arbitrator

September 30, 2014
Date