Financial Services Commission of Ontario

Ontario

Commission des services financiers de l'Ontario

Appeal P15-00016
P15-00015
P15-00017

OFFICE OF THE DIRECTOR OF ARBITRATIONS

GHARRIB AZAD, AREN BEDROS and SEPAN VAYRANOSH

Appellants

and

NORDIC INSURANCE COMPANY OF CANADA

Respondent

BEFORE:	David Evans
REPRESENTATIVES:	Tuyen (Joseph) Nguyen for Gharrib Azad, Aren Bedros, and Sepan Vayranosh Andrew McKague for Nordic Insurance Company of Canada
HEARING DATE:	On the record, by submissions received by August 2015

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. The Arbitrator's order of January 19, 2015 is confirmed and this appeal is dismissed.

2. Nordic Insurance Company of Canada is entitled to its expenses of this appeal. It may provide its claim for the quantum of expenses within 30 days of this decision.

David Evans
Director's Delegate

September 15, 2015
Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

The Appellants, Gharrib Azad, Aren Bedros, and Sepan Vayranosh, appeal the order of Arbitrator Marvin J. Huberman dated January 19, 2015, in which he found that they were not involved in an "accident" as defined in s. 2(1) of the *SABS–1996.*[1] Accordingly, he ordered that their applications be dismissed, with expenses payable to Nordic Insurance Company of Canada.[2]

As with the arbitration hearing, this appeal is joint. It is on the record because, after filing their Notices of Appeal, the appellants failed to file any written submissions as required by the Rules. When I did not receive their submissions, I warned the Appellants that I was prepared to determine the matter on the record, pursuant to s. 283(4) of the *Insurance Act*. Having still received no submissions, I am proceeding on the record based on the submissions in their *Notices of Appeal*[3] and the submissions provided by Nordic. I also note that Rule 58.1 specifically provides that "The Director [or his Delegate] may proceed with an appeal even though a party fails to file any document required by these Rules."

II. BACKGROUND

The Appellants claimed that they were injured in a motor vehicle accident on February 8, 2010. They applied for statutory accident benefits from the Insurer, Nordic. Nordic denied their claims on the basis that they were not injured in an accident as defined in the *SABS*.

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[1] *The Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996,* Ontario Regulation 403/96, as amended.

[2] Subsequently, in a decision dated August 5, 2015, he found that they were jointly and severally liable to pay Nordic's arbitration expenses of $16,481.12.

[3] The Notices gave no grounds for appeal other than disagreement with the Arbitrator's findings, so I requested submissions before I acknowledged the appeal.

Section 2(1) of the *SABS-1996* defines "accident" as "an incident in which the use or operation of an automobile directly causes an impairment…" Furthermore, s. 48(1) of the *SABS* permits an insurer to terminate payment of a benefit where "an insured person has wilfully misrepresented material facts with respect to an application for a benefit…"

The accident allegedly happened when the 1999 Chrysler Intrepid driven by Gharrib Azad was stopped. Mr. Azad's wife, Sepan Vayranosh, and his daughter, Aren Bedros, were passengers, along with his sister, Alice Azad. The Appellants testified about how the accident happened and that they did not know who struck their Intrepid.

The Appellants relied on the police report, which stated that the Intrepid was struck by a 1997 Pontiac Grand Am, driven by Mr. Ara Dekran, insured by The Personal Insurance Company.

Mr. Ruben Castro, an adjuster at The Personal, testified that Mr. Dekran and his passengers claimed benefits from The Personal. The accident reconstruction report, discussed below, showed that the incident or the areas of impact did not line up with the way the accident was reported. The claimants then withdrew their claims, and The Personal denied them on the basis that the accident did not happen as stated.

Mr. Shawn Johnstone of the investigative services department at Nordic testified that it was only very shortly before the accident that both cars were certified by the same mechanic and purchased by owners who had had no car insurance before or since the accident.

Mr. Robert Seaton, who received a request from Intact Insurance to do an accident reconstruction report, was qualified by the Arbitrator as an expert witness on accident reconstruction based on his experience. After examining the Grand Am, the photos of the Intrepid taken at the body shop by Mr. Azad's daughter, and other material, Mr. Seaton concluded that the physical evidence showed that these vehicles did not collide with one another as reported. Further, he concluded the description by the Appellants of what happened to their bodies upon impact did not match the physics.

The Arbitrator found the evidence provided by the Insurer's witnesses to be credible. He gave significant weight to that of Mr. Seaton. As for the Appellants, he found their evidence unconvincing and lacking harmony with the preponderance of the probabilities disclosed by the facts and circumstances of the present case. He also found their explanations not reasonable and conflicted with other evidence in this case.

The Arbitrator concluded that the alleged accident did not occur as stated "but rather, was the result of actions taken to give the appearance that an accident took place where none had":

> The Applicants' claim that an "accident" occurred as reported deserves little weight, especially given the considerable weight of the evidence in respect of the accident/damage profiles of the vehicles, the accident benefit claims of the third party, the vehicle and insurance registrations, the purchase of Mr. Azad's Intrepid, and the safety certifications of the vehicles.

Accordingly, the Arbitrator found that there had been no "accident" within the meaning of the *SABS*.

III. ANALYSIS

The Appellants' submissions relate almost entirely to the expert evidence of Mr. Seaton upon which the Arbitrator relied in reaching his determination.

For instance, the Appellants submit that the Arbitrator erred in qualifying Mr. Seaton as an expert when that evidence was not necessary, usurped the Arbitrator's role, and was given undue weight.

However, I find it was entirely within the Arbitrator's discretion to accept Mr. Seaton as an expert and to determine what weight and credibility to give to Mr. Seaton's report and evidence. The Arbitrator correctly cited Justice Major in *R. v. D.R.*, [1996] 2 S.C.R. 291, on exactly that point:

> Expert testimony is admissible even if it relates directly to the ultimate question which the trier of fact must answer. In *R. v. Burns*, [1994] 1 S.C.R. 656, at p. 666, McLachlin J. writing for the Court said:

> "While care must be taken to ensure that the judge or jury, and not the expert, makes the final decisions on all issues in the case, it has long been accepted that expert evidence on matters of fact should not be excluded simply because it suggests answers to issues which are at the core of the dispute before the court…"

I find no error in the Arbitrator's consideration of the Seaton report.

The Appellants submit that the Arbitrator applied an "adverse inference" because they provided no evidence other than their own testimony. However, the Arbitrator simply recognized that the onus was on the Appellants to prove their case. I find his treatment of the evidence appropriate. Furthermore, I find it was up to the Arbitrator to determine the credibility of the witnesses, and he found that of the Appellants wanting. That was his role, and it is not my role to substitute my own views, especially when the Arbitrator had the advantage of seeing and hearing the evidence: *Kanareitsev v. TTC Insurance Co.*, [2008] O.J. No. 2132.

The Appellants submit that the Arbitrator erred in finding that no accident occurred when no charges were laid. I find that is irrelevant.

Accordingly, I find that the Arbitrator committed no error in finding that the Appellants were not involved in an accident. The appeal is denied, and the Arbitrator's order is affirmed.

IV. EXPENSES

I will deal with expenses on the record in the same manner as I have dealt with this appeal. I am prepared to apply R. 77.1 and make an award of appeal expenses as part of this order. Nordic was entirely successful, so it is entitled to its appeal expenses. It may provide its claim for the quantum of expenses within 30 days of this decision.

David Evans
Director's Delegate

September 15, 2015
Date