Count: -3

Azad, Bedros, and Vayranosh and Nordic
Decision Date: **2015-01-19**, Adjudicator: **Marvin Huberman**, Regulation: **403/96**, Decision: **Arbitration, Preliminary Issue, appeal rendered, FSCO 4377.**

Notes: Appeal dismissed. Costs to respondent.

Cases cited: Azimi and Economical Azimi and Economical - Expenses Kagan and CAA Insurance
Considered in: Johnson and State Farm Azad, Bedros, and Vayranosh and Nordic

FSCO A12-003253, A12-003336 and A12-003469

BETWEEN:

GHARRIB AZAD, AREN BEDROS and SEPAN VAYRANOSH

Applicant

and

NORDIC INSURANCE COMPANY OF CANADA

Insurer

REASONS FOR DECISION

Before: Arbitrator Marvin J. Huberman

Heard: In person at ADR Chambers on September 17 & 18, 2014 and by written submissions completed on October 5, November 5 & 27, 2014

Appearances: Mr. Joseph Nguyen, Licensed Paralegal, attended for Mr. Gharrib Azad, Ms. Aren Bedros and Ms. Sepan Vayranosh
Mr. Andrew C. McKague, Lawyer, attended for Nordic Insurance Company of Canada
Ms. Kimberly Tye, Lawyer, attended for The Personal Insurance Company

Issues:

The Applicants, Gharrib Azad, Aren Bedros, and Sepan Vayranosh, claim that they were injured in a motor vehicle accident on February 8, 2010. They applied for statutory accident benefits from the Insurer, Nordic Insurance Company of Canada ("Nordic"), payable under the applicable Accident Benefit *Schedule*.[1] Nordic denied their claims for accident benefits on the grounds that they were not injured in an "accident" within the meaning of section 2(1) of the *Schedule*.[2] The parties were unable to resolve their dispute through mediation, and the Applicants applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

At the Pre-Hearing discussion held on December 18, 2013, it was determined that it would be expeditious to proceed by way of a Preliminary Issue Hearing.

The issue in this Preliminary Hearing is:

1. Were the Applicants injured in an "accident" as defined in section 2(1) of the *Schedule*?

Result:

1. The Applicants were not involved in an "accident" as defined in section 2(1) of the *Schedule*. Their Applications for Arbitration are dismissed with costs to Nordic.

EVIDENCE AND ANALYSIS:

The Law

Section 2(1) of the *Schedule* defines "accident", in relevant part, to mean "an incident in which the use or operation of an automobile directly causes an impairment.[3] This definition has two components: (1) there must be an incident involving the use or operation of an automobile; and (2) the use or operation of an automobile must directly cause an "impairment".[4]

The burden of proof rests with the Applicants. They must prove, on the balance of probabilities, that there was an accident within the meaning of the *Schedule*. The situation does not change simply because the Insurer challenges the facts upon which the claims are based. It remains up to the Applicants to bring forward credible evidence in support of their claims.[5]

POSITIONS OF THE PARTIES

Nordic's Submissions

Nordic's position is that there was no accident within the meaning of section 2(1) of the *Schedule*. It submits that the motor vehicle accident, alleged to have occurred on February 8, 2010, did not occur as alleged but rather was the result of actions taken to give the appearance that an accident took place where none had.[6] As a result, the Applicants' claim for accident benefits was denied.

Nordic submits that an adverse inference should be drawn against the Applicants because they did not file any materials or a witness list prior to the Preliminary Issue Hearing and they relied only on their own testimony at this Hearing.

Nordic contends that there are numerous credibility issues that should result in little to no weight being ascribed to the testimony of the Applicants to the extent that it seeks to challenge the evidence relied upon by Nordic in respect of the following broad areas: (1) the accident/damage profile of the vehicles; (2) the accident benefits claims of the third party; (3) vehicle and insurance registration; (4) the purchase of Mr. Azad's Intrepid; and (5) the safety certifications of the vehicles.

Nordic submits that the Applicants led no expert evidence to counter that of Mr. Robert Seaton, who was qualified as an expert witness in the area of accident or collision reconstruction. Neither did they, in any way, undermine the logical coherence, scientific validity, assumptions, or conclusions of Mr. Seaton by way of cross-examination. As such, all the Arbitrator is left with is Mr. Seaton's clear and consistent unrefuted evidence.

Nordic submits that the Applicants' evidence is of a misleading or contradictory nature and it is inconsistent with the preponderance of the probabilities in the circumstances of this case.

As a result, Nordic submits that the Applicants have not adequately met their onus of proof that they were involved in an "accident" as defined in the *Schedule*.

The Applicants' Submissions

The Applicants take the position that they were involved in an "accident" within the meaning of section 2(1) of the *Schedule*.

Relying on the Motor Vehicle Accident Report, the Applicants submit that the accident occurred on Highway 27 and Highway 407 on February 8, 2010. Mr. Ara Dekran was operating a 1997 Pontiac Grand Am bearing Ontario license BJBH 705 heading northbound on Highway 27 in Vaughan, Ontario, at approximately 20:40 hours. The Pontiac was reported to have been travelling at a speed of 40 km/h and collided with the rear aspect of a 1999 Chrysler Intrepid bearing Ontario license BHXT 624, driven by Gharrib Azad, stopped at the intersection of Highway 407. Mr. Azad's wife, Sepan Vayranosh; his daughter, Aren Bedros; and his sister, Alice Azad, were passengers in the Chrysler Intrepid. Mr. Dekran's statement confirmed that this vehicle rear-ended Mr. Azad's vehicle and that he hit the gas pedal instead of the brake pedal, causing the accident.

The Applicants contend that they cooperated with Nordic and complied with all requirements such as attending insurance medical examinations, providing accident benefits statements, and attending examinations under oath. The Applicants submit that they tried their best to give fair and innocent evidence without intending to lie or providing wrong information.

The Applicants submit that Nordic unfairly treated them having based its decision to deny the accident benefits claimed on a poor accident reconstruction report which contained an opinion on the "ultimate issue" and was based on "novel science". It was provided by Mr. Robert Seaton who did not have the requisite qualifications to be an accident reconstruction expert. He did not apply any real technical information from both subject vehicles. He did not examine the car physically. He did not even know the condition of the cars prior to the accident. He based his opinion on photographs which were not from any engineering or any expert but from Aren Bedros who submitted hem to Nordic. He did not use an appraisal report from the property adjuster who examined the subject cars at the earliest stage. He did not account for the fact that the cars were sitting in the body shop for over six months in the winter and they were out of the control of the Applicants.

The Applicants further submit that much ado is made of the fact that the Applicants have not provided further evidence, other than their oral testimony. The Applicants are of modest means; additional evidence and witnesses would be a cost that the Applicants would not be in a position to carry. They argue that justice in this case should not be denied because of this reality.

The Applicants therefore submit that Nordic has not provided them with benefits based on a false supposition that the accident did not occur as claimed. They request the right to move forward to a full Hearing so that their cases may be heard.

Nordic's Reply Submissions

Nordic submits that in the Supreme Court of Canada case of *R. v. Mohan*,[7] Justice Sopinka made it clear that in more current times, there is no general rule precluding expert evidence on the "ultimate issue". Moreover, Nordic submits that even if this rule applied today, Mr. Seaton did not state his opinion with respect to whether the Applicants were involved in an "accident" as defined in the *Schedule*. In reply to the Applicants' submission that Mr. Seaton's report is based on "novel science" and "untested science", Nordic submits that the Applicants adduced no evidence at the Hearing to support their unclear assertions regarding the "science" guiding Mr. Seaton's report.

Regarding Mr. Seaton's qualifications, Nordic submits that it was the Arbitrator who qualified/"named" Mr. Seaton as "an expert in collision reconstruction" and not Mr. Seaton himself.

In reply to the Applicants' contention that Mr. Seaton had never been a witness at an Arbitration, Nordic submits that Mr. Seaton testified that he had been an expert witness at the Financial Services Commission of Ontario numerous times, and in qualifying Mr. Seaton as an expert, the Arbitrator stated that he had "... been qualified as an expert [on] numerous occasions since 1994, particularly in court and in other proceedings, including before this Commission...".

In reply to the Applicants' assertion that Mr. Seaton did not examine the car physically, Nordic submits that the reality is that Mr. Seaton did examine the 1997 Grand Am in person, which was confirmed by his evidence at the Hearing.

The Evidence of Mr. Gharrib Azad

Mr. Azad testified that an accident occurred on February 8, 2010. He was driving to take his family and his sister to his mother's house. Before Highway 27 and Highway 407, the traffic light was red. He stopped at the traffic light. Then, he just heard that someone hit him from behind. He stayed in the car. He could not move. Someone who he did not know called the ambulance and the police officer. Both came. The OPP from the Highway spoke to his sister and his wife. The ambulance took his wife, his daughter, and his sister to the Finch Hospital. He does not know who called the tow truck. The police officer opened his car door, took him to the tow truck, and told him to take his car to the body shop. He does not know which body shop or where it is. He just went with the tow truck.

Mr. Azad testified that, at the time of the accident, he did not see or talk to the other driver who rear-ended his car. Neither before nor after the accident on February 8, 2010, did Mr. Azad meet with the driver of the vehicle who rear-ended him.

Mr. Azad stated that he became the owner of the Chrysler Intrepid by getting it from a friend as a $200.00 gift. Mr. Azad does not know the name of the mechanic who performed the safety certification before the accident or before he bought the car.

After the accident, Mr. Azad testified that he went with his daughter to the body shop to take pictures of the Chrysler Intrepid. His daughter sent those pictures to Nordic. Mr. Azad was never at nor does he know what body shop repaired his vehicle after the accident. He testified that he does not know the tow truck that picked up his car from the scene of the accident. And he does not know who the driver was who rear-ended him.

In cross-examination, Mr. Azad confirmed that he was involved in an accident on February 8, 2010; that he attended at an examination under oath on October 4, 2011, approximately 18 months following the accident; that he bought the Chrysler Intrepid privately, from a man named Adnan, and paid about $800.00 for that vehicle. He also said that he purchased the Chrysler Intrepid from a dealership called Pickard Lane Leasing Ltd. for a sale price of $200.00 plus total tax of $26.00, for a total purchase price of $226.00. He further testified that at the time of the impact in respect of the subject accident, his body moved to the front.

In re-examination, Mr. Azad confirmed that he bought the car for $200.00 plus $26.00 tax from Adnan; that the $800.00 includes the administration tax of the Ministry of Transportation over and above the capital PST and HST.

In re-examination, Mr. Azad testified that, after he got an emission test, he went to take the vehicle for a safety test which cost him $600.00 - $800.00, and it did not mean he paid $600.00 tax; rather, Mr. Azad testified that he bought the vehicle for $800.00 total, and he gave Adnan $150.00 to $200.00 every month, and his brother-in-law helped him pay the balance to Adnan.

The Evidence of Ms. Sepan Vayranosh

Ms. Sepan testified that she and her family were involved in an accident on February 8, 2010. They were in traffic. The traffic light was red. They stopped at the traffic light and they heard someone hit them in the back. The police came and an ambulance took them to the Finch Hospital. She does not know the person

that hit them from behind. After the accident, she did not have a chance to meet with the person who hit them from behind. Her family does not know that person. Her daughter sat in the front of the vehicle with her husband, and she sat in the back behind them. At the time of the accident, she was shaking and she felt that something happened to her. She felt like she couldn't move. She doesn't remember anything. She was then in the hospital. Before this accident, she did not have an accident nor did she make a claim for accident benefits.

The Evidence of Ms. Aren Bedros

Ms. Bedros testified that she was in a car accident on February 8, 2010. She was in her father's car and was sitting in the front passenger seat. They were on their way to her grandmother's house. They were, approximately, at Highway 27 and Highway 407. They were stopped at a red light. It was not raining that much, but it had just started to rain and that's when somebody rear-ended them. A man came to the window and asked if everyone was okay. She told him that her mother and her aunt were not feeling well because they were in pain. He said he was going to call for help. By the time the police arrived, Ms. Bedros went with her mother in the EMS to the hospital.

Ms. Bedros did not know the people who rear-ended them. Nor does she recall anyone in her family knowing the man who hit them from behind. She does not know the tow truck that came to the scene to tow their car. She did not have any chance to see or identify the man who hit her from behind after the accident. Following the accident, the adjuster asked Ms. Bedros to take a picture of their vehicle and to send that picture to the insurance company. That was the first time she went into that body shop. Ms. Bedros has not had a car accident claim before this accident.

The Evidence of Mr. Ruben Castro

Mr. Castro testified that he is an adjuster at The Personal Insurance Company. He has worked in this capacity for 6 ½ years. He was the claims adjuster for The Personal with respect to an incident that allegedly occurred on February 8, 2010, involving its insured, Mr. Ara Dekran, and Nordic's insured, Mr. Azad. Mr. Castro's understanding as to how the incident alleged to have occurred on February 8, 2010, was as follows. The Personal's named insured, Mr. Ara Dekran, was travelling with two of his friends, Mr. Isaac Salem and Mr. Jan Soro. They were on their way to meet a friend at a Tim Horton's. Mr. Dekran believed that they were going to meet him at Highway 407 and Highway 27 and on their way there, they stated that the vehicle in front had slammed on the brakes and that he panicked and instead of hitting the brake, he hit the gas pedal and he struck the vehicle.

When the claim was initially reported, Mr. Castro stated that they reached out to Mr. Dekran for a signed statement. He was willing to provide them with a statement which they obtained in February, 2010.[8] In that statement, Mr. Dekran indicates that he struck the vehicle involved in the motor vehicle accident when he was going between 40 and 50 kilometers an hour.

After receiving Mr. Dekran's statement, a gentleman in The Personal's SIU department asked Mr. Robert Seaton to conduct an accident reconstruction report which Mr. Castro believes was done in June. The result of the reconstruction report shows that the incident or the areas of impact did not line up with the way the accident was reported. So at that time, they reached out to all three claimants for re-examination. They received correspondence from Summit Legal, which was representing Mr. Ara Dekran, and Mazin Rooz Mazin, Barristers and Solicitors, which was representing Mr. Isaac Salem and Mr. Jan Soro, and they stated that the Claimants no longer wished to claim and that they were no longer representing those Claimants.

After that, The Personal issued a certificate of non-attendance and sent the Claimants a denial letter, denying their claim in its entirety because Mr. Dekran literally misrepresented the facts in the incident. The evidence showed that the accident did not happen as they stated it happened. The same letter was sent to the two occupants of the vehicle. Mr. Dekran and the other two occupants and their counsel did not challenge The Personal's position that an accident did not occur pursuant to the definition in the *Statutory Accident Benefits Schedule*.

In cross-examination, Mr. Castro confirmed that Mr. Dekran's vehicle struck the Azad vehicle when Mr. Dekran stepped on the gas pedal.

The Expert Evidence of Mr. Robert Seaton

Mr. Robert Seaton operates a collision reconstruction consulting service. He has been doing collision reconstruction work since 1992. He has been on his own in that business for approximately 15 years since 1999. He was a police officer for 23 years. He worked with Metropolitan Toronto Police for approximately 10 years and he was with the Ontario Provincial Police for approximately 13 years. He taught self-defence and use of force at a number of police institutions. When he first joined the police service, he worked in uniform duties. He worked in criminal investigations and on a tactical team. He worked the intelligence bureau, outlaw motorcycle gang squad, and he finished his tenure with the police by being in charge of the self-defence or use of force program for the Ontario Police Commission at the Ontario Police College.

When he worked for the Ontario Provincial Police, Mr. Seaton started at a detachment in Bracebridge, doing uniform work and criminal investigation, and then worked in anti-rackets/criminal investigation for a short period of time, and then he became involved in collision reconstruction work. He worked in that field for a number of years and finished his tenure with the Ontario Provincial Police in charge of the Police Reconstruction Training for the Provincial Police at the Orillia Ontario Provincial Police Academy. He held that position for approximately two years following which he went off to start his own business, Collision Analysis and Reconstruction. He does subcontracting for a number of investigative firms, one being IRG, and he does work for civil litigation law firms and criminal law firms.

Mr. Seaton has educational training specifically with respect to analysis and accident reconstruction. He is a member of the Canadian Association of Technical Investigators and Reconstructionists and he is a member of the ARC Reconstruction Network in the United States.

Mr. Seaton explained that accident reconstruction or collision analysis is essentially a study of Newtonian physics or motion that examines the configuration of vehicles in relation to acceleration and deceleration. There are other components of human factors dealing with cause analysis of collisions. There is another area of occupant kinematics that deals with safety equipment, seatbelts, and airbag deployment. Essentially, it encompasses the motion of the vehicles, how they interact when they collide and when they separate, and the movement of the individuals in those vehicles.

Mr. Seaton testified that when he was with the Ontario Provincial Police, he completed thousands of reconstruction reports, directly and indirectly. Since 1999, when Mr. Seaton went off on his own, he said that he completed thousands of those reports as well. Mr. Seaton testified that he has been designated as an expert at various levels of court in Ontario for the last 23 years, the first of which was in 1992 when he started the reconstruction business with the police. He has given expert testimony at the Superior Court, the Provincial Offences Court, Coroners' Inquests, Arbitrations for the Financial Services Commission of Ontario, and Labour Hearings.

Mr. Seaton has been qualified as a collision reconstruction expert since 1994 in both the Ontario Court of Justice and the Superior Court of Justice. He has also been qualified as an expert numerous times before this Commission.

Mr. Seaton also took collision reconstruction courses, including a three-week program at the Canadian Police College which dealt with mathematical analysis of speed determination, momentum of various configurations of commercial vehicles, motorcycles, and pedestrians and a one-week advanced collision reconstruction course dealing with momentum analysis and crush analysis at the University of North Florida at Jacksonville.

In cross-examination, Mr. Seaton testified that he has investigated thousands of collisions at scene. He has taken the necessary courses to obtain the certification and designation as an expert based on his experience and academic training in those fields, and based on the definition of an expert laid down by the Supreme Court of Canada in the case of *R. v. Mohan*.

Mr. Seaton was qualified as an expert to give opinion evidence in the area of collision reconstruction for the purpose of this Hearing.[9]

Mr. Seaton received a request from Mr. William Hawley of Intact Insurance to do an analysis of the collision sequence of events of the February 8, 2010 accident. Following this request, Mr. Seaton completed a Motor Vehicle Collision Report, dated June 19, 2010, (the "Report") on behalf of the Investigative Research Group (IRG), the investigative firm that he does sub-contracting work for.[10]

Prior to beginning his analysis, Mr. Seaton reviewed documents provided to IRG, including:

a. The York Regional Police Service motor vehicle accident report prepared by PC Monk #1399;

b. The Intact Insurance Damage Appraisal Report and Photographs with respect to the 1999 Chrysler Intrepid bearing Ontario license plate BHXT 624;

c. The Intact Insurance statement provided by Alice Azad, dated May 18, 2010; and

d. The Personal Insurance statement provided by Ara B. Dekran, dated February 25, 2010.

Mr. Seaton testified that on April 14, 2010, he personally examined the 1997 Pontiac Grand Am bearing Ontario license BJBH 705 at 770 Martin Grove Road, in Vaughan, Ontario. His findings include:

- Superficial damage extending across the frontal aspect of the Pontiac that does not correspond with the profile, elevation, or extent of damage on the rear aspect of the Chrysler;
- Superficial abrasions to the engine hood cover that do not correspond to the profile, elevation or extent of damage on the rear aspect of the Chrysler;
- Superficial abrasions extending approximately 16 inches to 23 inches above the ground that do not correspond to the profile, elevation or extent of damage on the rear aspect of the Chrysler;
- The damage at the location of the missing front license plate that elevates approximately 14 to 20 inches above the ground does not correspond to the profile, elevation or extent of damage on the rear aspect of the Chrysler;
- An absence of damage to the front right headlight assembly and plastic bumper cover extending approximately 23 to 27 inches above the ground does not correspond to the profile, elevation or extent of damage on the rear aspect of the Chrysler;
- There was an absence of bending, abrasions and foreign grey paint transfer from the grey Chrysler on the front license plate.[11] There was no impression damage, abrasions or foreign blue and white paint transfer on the rear aspect of the Chrysler that would have been expected given that when painted components come into contact in a collision, there is heat exchange which results in paint melting, smearing and breaking and, as a result, paint will be transferred to the opposing vehicle;
- There was superficial damage extending across the frontal aspect of the Pontiac that does not correspond to the profile, elevation or extent of damage on the rear aspect of the Chrysler;
- With respect to the 1999 Chrysler Intrepid bearing Ontario license plate BHXT 624 the narrow scope of isolated direct contact damage does not correspond to the profile or extent of damage on the frontal aspect of the Pontiac and is not consistent with the collision sequence of events as reported. Further, the absence of green foreign paint transfer on the rear aspect of the Chrysler from the green Pontiac is not consistent with the expected damage profile;
- The absence of crush damage, displacement of the bumper cover, abrasions and green foreign paint transfer is not consistent with the expected damage. The rear bumper elevates approximately 14 to 27 inches above the ground. The front bumper of the Pontiac elevates approximately 10 to 23 inches above the ground;

- The narrow scope of isolated direct contact damage to the upper aspect of the plastic bumper cover and to the lower aspect of the trunk lid does not correspond to the profile, elevation or extent of damage on the frontal aspect of the Pontiac and is not consistent with the collision sequence of events as reported;
- The comparison 1997 Chrysler Intrepid illustrates the elevation of the rear bumper extending approximately 14 to 27 inches above the ground. Transport Canada vehicle specifications indicate the following:
    - 1997 Chrysler Intrepid: overall width: 74.5 inches; overall height: 56.4 inches; wheel base: 113.1 inches;
    - 1999 Chrysler Intrepid: overall width: 74.5 inches; overall height: 56 inches; wheel base: 113.1 inches;
- The comparison photograph of a 1999 Chrysler Intrepid illustrates the elevation of the factory equipped 205/70R15 tire on the Chrysler Intrepid that elevates approximately 24 inches above the ground. This equates to an elevation in-line with the upper aspect of the rear license plate secured to the bumper cover.

Mr. Seaton concluded that, in his opinion, the profile, elevation, and extent of damage on the frontal aspect of the Pontiac Grand Am is not consistent with the profile, elevation, and extent of damage on the rear aspect of the Chrysler Intrepid and is not consistent with the collision sequence of events as reported. The physical evidence that does exist indicates that these vehicles did not collide with one another as reported.

With respect to the description of the accident by Ms. Aren Bedros, that once they got hit, her body went forward and then back to the seat, Mr. Seaton said that, in his opinion, this statement is contrary to the expected occupant kinematics. According to Mr. Seaton, one's body is independent of the speed of the vehicle, which is why one has seat belts and air bags and why one has head rests. When a vehicle is struck from behind, the body will move towards the direction of the impact force. Therefore, Ms. Bedros would have, according to Mr. Seaton, been expected to move backwards, strike the seat, her head would have hit the head rest, and then she would have been projected in a forward direction.

Similarly, with respect to Ms. Sepan's evidence that her body moved forward at the time of the collision impact, according to Mr. Seaton, the vehicle being accelerated forward would cause the person to move rearward towards the impact force, which is the opposite to what Ms. Sepan reported.

The Evidence of Shawn Johnstone

Mr. Shawn Johnstone testified that he is a claims specialist in accident benefits at the investigative services department at Intact and Nordic Insurance. He has been an insurance adjuster since 2000 and has worked with the special investigations unit at Intact since 2009. In November of 2012, the file with respect to the subject accident of February 8, 2010 was transferred to him. He completed a review of the file and made recommendations as a result of his review. From his review, he determined that an accident reconstruction report had been completed, examinations under oath had been completed as well, and he noticed that the inception date of the insurance policy was just prior to the subject accident.

Mr. Johnstone decided to do some additional investigations including a VIN history search from the Ontario Ministry of Transportation (MTO) which shows the registration details of a vehicle using the vehicle's identification number. Most significantly, the VIN history of Gharrib Azad's 1999 Chrysler Intrepid indicates that this vehicle was registered to Mr. Azad just five days prior to the February 8, 2010 accident.

Mr. Johnstone testified that the VIN history search of Mr. Ara Dekran's vehicle, the 1997 Pontiac Grand Am, that reportedly rear-ended Mr. Azad's vehicle, shows that Mr. Dekran registered this vehicle to himself on January 30, 2010, which was just eight days prior to the subject motor vehicle accident.

Mr. Johnstone also testified that an AutoPlus Gold report was obtained with respect to the insurance history for Gharrib Azad. This report shows that Nordic's insurance policy inception date of February 6, 2010, was just two days prior to the motor vehicle accident in question. It also showed that between 2007 and 2010, Mr. Azad had no insurance until Nordic's policy, effective February 6, 2010, and then was allegedly involved in the subject motor vehicle accident on February 8, 2010. It further shows that Mr. Azad has had no insurance until 2010. Mr. Johnstone testified that another AutoPlus report was obtained with respect to the insurance history of Mr. Ara Dekran, the reported driver of the 1997 Pontiac Grand Am that reportedly hit Nordic's insured. This report shows that Mr. Dekran was insured with The Personal Insurance Company and that the effective date of that policy was February 3, 2010, which is just five days prior to the subject motor vehicle accident. It also shows that Mr. Dekran had no prior insurance before getting this policy and that he had no insurance since the alleged subject accident either.

Mr. Johnstone further testified that a license plate search enquiry was conducted with the MTO with respect to license plate number BHXT 624, which is Gharrib Azad's license plate number. The search results confirm that this license plate is registered to Gharrib Azad and it shows just one vehicle that it is registered to, namely, the 1999 Chrysler Intrepid. According to Mr. Johnstone, this means that there is only one vehicle that this license plate has been attached to since this particular search was conducted in January 2013, and that there is no other vehicle that this license plate has been attached to.

Mr. Johnstone further testified that the Safety Standards Certificate with respect to the Chrysler Intrepid shows that this vehicle was inspected on January 20, 2010 and certified by an mechanic at Express Auto as being road worthy, just a couple of weeks prior to the alleged reported accident. The Safety Standards Certificate for the 1997 Pontiac Grand Am, the vehicle that was reportedly driven by Ara Dekran when he struck Nordic's insured's vehicle, shows that on January 22, 2010, the vehicle was inspected by Express Auto and the same mechanic that inspected and certified Gharrib Azad's vehicle two days prior.

Mr. Johnstone concluded his testimony by stating that the decision was made by Nordic to formally deny the Applicants' claims because it felt that the information it had obtained through the accident reconstruction, the examinations under oath, and the various searches was strong enough that they could proceed to deny those claims. As a result, correspondence dated July 28, 2014 was sent by Nordic to each of the Applicants confirming that Nordic had denied their claims for accident benefits.[12]

FINDINGS AND REASONS

Based on the overall weight of the evidence, I am of the view that the Applicants were not involved in an "accident" as defined in section 2(1) of the *Schedule*. My reasons follow.

I accept the substance of the evidence given by Mr. Robert Seaton and Mr. Shawn Johnstone. They testified in a straightforward manner and they were impressive witnesses. Their demeanours carry the conviction of the truth. Their evidence was in harmony with the preponderance of the probabilities of this case as a whole. I give their testimony in general considerable weight. I find that their oral evidence expanded on and clarified the documentary evidence.

Mr. Seaton was qualified as an expert witness. I find that his expert evidence was relevant and necessary in assisting the trier of fact; it did not run afoul of an exclusionary rule of evidence separate and apart from the opinion rule itself; and it was given by Mr. Seaton who was shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he undertook to testify: *R. v. Mohan*.

I accept Mr. Seaton's opinion and find that the profile, elevation, and extent of damage on the frontal aspect of the Pontiac Grand Am is not consistent with the profile, elevation, and extent of damage on the rear aspect of the Chrysler Intrepid and is not consistent with the collision sequence of events as reported. The physical evidence that does exist indicates that the subject vehicles did not collide with one another as reported. There are numerous discrepancies with respect to the physical evidence that indicates that these vehicles did not collide with one another.

I accept Mr. Seaton's evidence and accord it significant weight. His evidence is consistent with the preponderance of probabilities and is reasonable in the circumstances of this case. I was impressed with his expert qualifications, reputation, objectivity, demeanour, and his performance under cross-examination. His methodology, reasoning, and analytical process by which he reached his conclusions were compelling. His expert opinion was founded on a factual foundation which was proved to my satisfaction according to the appropriate standard of proof.

Contrary to the submissions of the Applicants, the evidence does not support a finding that Nordic unfairly treated the Applicants having based their decision to deny the accident benefits claimed on a poor reconstruction report or a report based on novel or untested science. I find that Mr. Seaton's evidence is supported by a valid scientific foundation that meets a minimum threshold of reliability and accepted principles of scientific efficacy sufficient to warrant consideration by the trier of fact.

I am unable to accept the argument of the Applicants that Mr. Seaton should not be able to express an opinion on the "ultimate issue" in this case. As Justice Major, speaking for the majority of the Supreme Court of Canada, in the case of *R. v. D.R.*,[13] stated:

> 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 insure 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..."

Moreover, in my view, Mr. Seaton did not state his opinion with respect to whether or not the Applicants were involved in an "accident" as defined in section 2(1) of the *Schedule*, which is the ultimate issue in the present case.

Expert evidence must be viewed critically, assessed and weighed together with the other evidence, and it enjoys no special status. Moreover, I recognize that most people involved in accidents rarely have total recall of what happened and for this reason, likely, every time an accident reconstruction investigation is completed, it may be said that the damage does not correspond exactly to the reported scenario.[14]

That stated, I find that Mr. Seaton's evidence is highly credible and reliable and should therefore be given considerable weight. In my view, the expert evidence of Mr. Seaton establishes that the Applicants were not involved in an accident as reported. Mr. Seaton's analysis survived a thorough cross-examination by counsel for the Applicants. There is no persuasive evidence before me that the information provided by the expert is not credible nor were the Applicants able to persuade me on a balance of probabilities that the expert's report is flawed in any substantive fashion. Neither was any contradictory expert evidence adduced.

The Applicants contend that they are of modest means and additional evidence and witnesses would be a cost that they would not be in a position to carry. Justice in the case, they assert, should not be denied because of this reality. However, there is no evidence before me to support this contention. Therefore, it must fail.

Regarding the evidence of the Applicants, I have considered the generally accepted factors in assessing their credibility in this case including their demeanour, ability and opportunity to observe, power of recollection, interest, bias, prejudice, sincerity, inconsistency, and the reasonableness of the their testimony when considered in the light of all of the evidence.[15] The last factor has been of considerable assistance to me in the present case.

The Applicants claimed to be involved in an automobile accident on February 8, 2010 and they each testified in that regard. I find that the Applicants' evidence is unconvincing and lacks harmony with the preponderance of the probabilities disclosed by the facts and circumstances of the present case. I further find that their explanations are not reasonable in the circumstances disclosed in the evidence before me, and that their evidence conflicts with other evidence in this case.

John Sopinka, in his text, The Trial Of An Action, (1981 Toronto, Ontario: Butterworths), wrote of the role of the assessment of credibility through probabilities, at p. 77, as follows:

> "Probability is the great touch-stone of all evidence. A witness whose testimony strays from the truth will often have built into it some inherent improbability."

As the British Columbia Court of Appeal stated in the *Faryna v. Chorny*:[16]

> "...the real test of the truth of this story of a witness...must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

In my view, the Applicants' evidentiary story does not make sense nor does their story conform to the way people are expected to behave in the circumstances of this case.

I agree with counsel for Nordic and find that following the examinations under oath of the Applicants, Nordic's ongoing investigations revealed numerous inconsistencies and near impossible commonalities with respect to the two motor vehicles allegedly involved in the subject accident and their drivers leading up to and following the reported incident, as indicated above.

I find on the totality of the expert and non-expert evidence before me, that the motor vehicle accident, alleged to have occurred on February 8, 2010, 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, and that the February 8, 2010 incident does not meet the definition of an accident as defined in section 2(1) of the *Schedule*.

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.

CONCLUSION

For these reasons, I conclude that the Applicants were not involved in an accident as defined in section 2(1) of the *Schedule*. Their applications for arbitration are therefore dismissed with costs to Nordic.

EXPENSES:

If the parties are unable to resolve the issue of the amount of the expenses, either party may make an appointment for me to determine the matter in accordance with the Rules 75-79 of the *Dispute Resolution Practice Code*.

January 19, 2015

Marvin J. Huberman
Arbitrator

Date

FSCO A12-003253, A12-003336 and A12-003469

BETWEEN:

GHARRIB AZAD, AREN BEDROS and SEPAN VAYRANOSH

Applicant

and

NORDIC INSURANCE COMPANY OF CANADA

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. The Applicants were not involved in an "accident" as defined in section 2(1) of the *Schedule*. Their Applications for Arbitration are dismissed with costs to Nordic.

January 19, 2015

Marvin J. Huberman
Arbitrator

Date

[1] Effective September 2010, the *Statutory Accident Benefit Schedule – Effective September 1, 2010* (the "*New Regulation*") came into force. The transition rules in the *New Regulation* provide that, subject to certain exceptions, benefits that would have been available pursuant to the *Statutory Accident Benefit Schedule – Accidents on or after November 1, 1996* (the "*Old Regulation*") shall be paid under the *New Regulation,* but in amounts determined under the *Old Regulation*. As a result, both the *Old Regulation* and the *New Regulation* are applicable to accidents that occurred on or after November 1, 1996 and before September 1, 2010, and both should be considered.

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

[3] See footnote 2; the same definition of "accident" is found in section 3(1) of the *Statutory Accident Benefit Schedule – Accidents on or after September 1, 2010*, O. Reg. 34/10.

[4] Section 2(1) of the *Schedule*; *Gnanam v. Economical Mutual Insurance Co.*, 2013 Carswell Ont 6446; *Kagan and CAA Insurance Company*, FSCO A12-003935, June 2, 2014, at p.6.

[5] *Wootton v. TTC Insurance Co.*, 2004 Carswell Ont 6508; *Azimi and Economical Mutual Insurance Company*, FSCO A08-002596, June 7, 2010, at p.2; *Kagan and CAA Insurance Company*, *supra*.

[6] Section 48(1) of the *Schedule* 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...".

[7] *R. v. Mohan*, 1994 CanLII 80 SCC, [1994] 2 S.C.R. 9.

[8] Mr. Ara Dekran's statement dated February 25, 2010, was entered into evidence as Exhibit 3.

[9] Mr. Robert Seaton's Curriculum Vitae was entered into evidence as Exhibit 4.

[10] The Report was entered into evidence as Exhibit 1, Tab 1B.

[11] A photograph of Ontario license plate BJBH 705 was entered into evidence as Exhibit 5.

[12] These letters from Nordic to the Applicants, dated July 28, 2014, were entered into evidence as Exhibit 1, Tabs 7b, c, and d.

[13] *R. v. D. R.* [1996] 2 S.C.R. 291; [1996] S.C.J. No. 8, at Q.L., paras. 37, 39 – 40.

[14] *Gnanam v. Economical Mutual Insurance Co.*, 2013 CarswellOnt 6446, at para. 34; *Kagan v. CAA Insurance Company*, FSCO A12-003935, June 2, 2014, at p. 12.

[15] *Faryna v. Chorny*, [1952] 2 DLR 354, at pp. 356 – 8, per O'Halloran, J.A. (B.C.C.A.).

[16] *Supra*, at para 10.