LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Citation: R.I. & K.C. vs Certas Home and Auto Insurance Company, 2019 ONLAT 18-006374/AABS & 18-005514/AABS

Tribunal File Numbers: 18-006374/AABS & 18-005514/AABS

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

[R.I] and [K. C.]

Appellants

and

Certas Home and Auto Insurance Company

Respondent

PRELIMINARY DECISION

PANEL:	**Rebecca Hines, Adjudicator**
APPEARANCES:	
For the Applicant:	Lisa Bishop, Counsel
For the Respondent:	Jonathan Schreider, Counsel
Interpreter:	Rita Naftalieva, Russian Language
HEARD:	**In person on April 15, 2019**

OVERVIEW

[1] R.I. and K.C. (the "applicants") claim to have been injured in an automobile accident on July 25, 2016. They both applied for accident benefits to Certas Home and Auto Insurance Company (the "respondent") under the *Statutory Accident Benefit Schedule – Effective September 1, 2010* (the "*Schedule*").

[2] After completing an investigation on April 25, 2018, the respondent notified both applicants that their claims were denied as it concluded that the applicants were not injured in an accident within the meaning of s. 3(1) of the *Schedule*. Further, the respondent explained that it believed they willfully misrepresented material facts with respect to their application for accident benefits. The respondent determined that the accident did not occur based on certain inconsistencies and a significant lack of recall of details pertaining to the loss itself as obtained through an Examination Under Oath (EUO). Essentially, the respondent takes the position that this was a staged accident.

[3] The applicants deny that the accident was staged. They filed applications for dispute resolution with respect to the respondent's determination that they were not involved in an accident and subsequent denial of accident benefits. A case conference was held, and the parties were unable to resolve the issues in dispute. Pursuant to the Licence Appeal Tribunal's Common Rules of Practice and Procedure (LAT Rules), Tribunal File 18-006374/AABS (commenced by K.C.) was combined with 18-005514 (commenced by R.I.).

[4] This preliminary issue hearing took place in person on April 15, 2019. R.I. is the only witness who testified on behalf of the applicants. K.C. did not participate in the hearing and no explanation was provided for his absence. The respondent called Aubrey Avertick, Investigator, with the respondent's Special Investigation Unit.

ISSUE IN DISPUTE

[5] I have been asked to decide the following preliminary issues:

i. Were the applicants involved in an "accident" as defined in s. 3(1) of the Schedule?

ii. Did the applicants wilfully misrepresent material facts with respect to their application for benefits?

iii. If the applicants wilfully misrepresented material facts in relation to their application for benefits, is the respondent entitled to a repayment of any accident benefits and costs associated with the application?

RESULT

[6] For the reasons that follow, I find that the applicants were not involved in an "accident" as defined by s. 3(1) of the *Schedule*. As a result, the applicants are not entitled to claim accident benefits under the *Schedule*. Further, I find that the accident was staged, and the applicants willfully misrepresented the facts relating to the accident. Therefore, the respondent is entitled to repayment of past accident benefits paid to date.

PROCEDURAL ISSUE

Internet News Articles

[7] At the outset of the hearing, the respondent asked to file as an exhibit a number of internet news articles (articles) about S.I., the other driver involved in the alleged accident. R.I. objected on the basis that the articles are not relevant to this preliminary issue hearing. Further, R.I. argues that the authors of the articles were not listed as witnesses. The respondent argued that the articles were served on the applicants on February 15, 2019 and, therefore, the applicants are not prejudiced as they had ample notice of the respondent's intention to rely upon them at the hearing. Further, the articles are relevant to the preliminary issue hearing as S.I. is the subject discussed in the articles, which provide insight into the life of the other driver involved in the accident.

[8] I allow the articles to be entered into evidence as I find them relevant to the issues in dispute. Further, I find that the applicants are not prejudiced as they were served with them two months prior to the in-person hearing. Therefore, they were not taken by surprise and should have anticipated that the respondent would rely upon them.

ANALYSIS

[9] I find that the applicants were not involved in an "accident" within the meaning of the *Schedule* and, thus, are not entitled to claim accident benefits.

[10] Section 3(1) of the *Schedule* provides the following definition of an "accident":

> "accident" means an incident in which the use or operation of an automobile directly causes an impairment or directly causes

damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device.

[11] The applicants bear the onus of proving on a balance of probabilities that there was an accident within the meaning of the *Schedule.*

[12] According to R.I., he was driving northbound on Bathurst Street on July 25, 2016 at 10:00 p.m. At that time, he claims, his vehicle was rear-ended by another driven by S.I. R.I's niece, M.M., and her husband, K.C. (the co-applicant), were in the vehicle when the incident occurred. R.I. submits that he had picked up the couple to bring them to his home so that M.M. could make dinner for them and R.I.'s ex-wife.

[13] The respondent argues that R.I. is not credible, and the incident did not happen as reported. Further, it argues that a negative inference should be drawn from the co-applicant's lack of participation in the investigation and at this hearing. It also relies on a number of circumstances, connections and similarities that this collision has with two other accidents involving R.I.'s ex-wife and his friends on July 12, 2016 and July 17, 2016.

[14] For the reasons that follow, I find that the applicants have not met their onus in proving that the accident occurred.

[15] First, I have drawn a negative inference by the fact that R.I. was the only witness who testified at the hearing. For example, K.C., the co-applicant, and the other witness, M.M., who were in R.I.'s vehicle when the incident occurred did not testify. In my view, this was a mistake as credibility is at the core of this dispute and, consequently, corroborating evidence is key. I find that this was a major oversight. Nor did the applicant summon S.I., the driver of the other vehicle involved in the accident. S.I. is an important witness as he acknowledged liability when he made his self-reported police statement that he rear-ended the applicant's vehicle. No explanation was provided for K.C.'s absence or why the other witnesses were not called to testify.

[16] The respondent submitted the Financial Services Commission of Ontario's (FSCO) decision in *Nguyen and State Farm Mutual Insurance Company,* A13-012623 as authority in support of its position that an adverse inference should be drawn if a party fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. While I am not bound by FSCO decisions, I find the principle highlighted by the arbitrator with respect to a party's decision not to call important witnesses persuasive.

[17] In my view, the co-applicant and two other witnesses would have valuable first-hand knowledge about the incident and could have been helpful in corroborating the applicant's version of events. Instead, the absence of these witnesses without explanation raises suspicion that they did not testify because their testimony would not be credible. In fact, the respondent submitted articles which directly challenged S.I.'s character and credibility.[1] These articles depict S.I. as being involved in criminal behavior, and being wanted by police for theft, fraud and breach of probation. While no evidence was submitted that S.I. has been convicted of the alleged crimes, I find the fact that he did not testify suspect and give the articles some additional, albeit not decisive, weight in drawing an adverse negative inference.

[18] Second, I find R.I.'s testimony inconsistent with his EUO and the other evidence. The following are examples of these inconsistencies:

i. R.I. reported that he was driving northbound on Bathurst Street when he was rear-ended by S.I. S.I. reported to police that he was driving southbound on Bathurst Street when he rear-ended R.I.[2]

ii. In his EUO, R.I. reported that he did not remember if he was involved in any prior accidents.[3] At the hearing, R.I. first testified the same. However, when under the respondent's questioning, he recalled being involved in "maybe two small accidents." Notably, R.I. remembered a 2006 accident but not a 2013 accident. The respondent submitted evidence that the applicant received significant payments for accident benefits on both prior accidents;[4]

iii. In his EUO, R.I. reported that he did not call the tow truck – it just showed up. He also reported that police attended the scene.[5] At the hearing, however, he said that he did call the tow truck and that he did not call police but attended a self-collision reporting centre the next day. When asked about the inconsistencies at the hearing, he said some days he has a good memory and some days he does not;

[1] Exhibit 15: Bayview-news.com: The South Bayview Bulldog article dated April 12, 2018 indicated that S.I. was wanted by police for using a stolen credit card, fraud, theft and failure to comply with probation; YorkRegion.com article dated December 7, 2017 reports S.I is facing theft and fraud charges after a woman's wallet was snatched in a grocery store.
[2] Exhibit 7: York Regional Police General Occurrence Report dated July 26, 2016, page 4.
[3] Exhibit 8: EUO of R.I. dated December 6, 2017, page 8.
[4] Exhibit 10: Autoplus Gold Report, Respondent's Brief, Tab 16 H.
[5] Exhibit 8: page 39.

iv. In his EUO, R.I. could not provide a description of the other vehicle involved in the accident or how many occupants were in that vehicle.[6] At the hearing, R.I. testified that the other vehicle was a station wagon with three occupants;

v. R.I. testified at the hearing that his ex-wife recommended that he go to Allania Rehabilitation Centre (Allania). However, his ex-wife reported in an EUO that R.I. recommended Allania to her, 13 days prior to the subject accident;[7]

vi. Despite going to Allania for treatment two to three times a week for over a year, R.I. could not recall the names of any of the doctors or service providers who treated him;

vii. In his EUO, he stated that he previously lived at [a Toronto address], which is the same address as G.K. the driver involved in the July 12th accident. During cross-examination he testified that he lived at [a Toronto address] and was GK's neighbor.

[19] While the above inconsistencies are not proof that the accident did not occur, when viewed as a whole, the inconsistencies, together with other evidence, cast serious doubt that the accident occurred. As already highlighted, the onus is on the applicants to prove on a balance of probabilities that the accident happened resulting in injuries. Neither applicant submitted any medical evidence to demonstrate that the incident caused any impairments at the hearing, which is a requirement under the *Schedule* for an incident to fit within the definition of "accident".

[20] The respondent submitted FSCO's decision in *Tran and Vu v. State Farm Insurance Company*, FSCO A13-000958 and A13-001548. I found this decision useful in determining the factors to consider when assessing an individual's credibility. These factors include an individual's demeanor, ability and opportunity to observe, power of recollection, interest, bias, prejudice, sincerity, inconsistency and the reasonableness of their testimony when considered with all of the evidence.[8] The decision highlights how the truth and credibility of a witnesses' story is to be assessed:[9]

[6] Exhibit 8, page 40.
[7] Exhibit 12, EUO of A.I. dated January 26, 2018, page 47.
[8] *Tran and Vu v. State Farm Insurance Company (FSCO A13-000958 and A13-001548) 2015*, pages 6 &7.
[9] Ibid, page 7.

> "A witnesses' story must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place in those conditions."

[21] I find R.I. to be a bad historian, as during the hearing he frequently answered questions with "I don't remember", and his answers to questions were overall inconsistent. Despite having an interpreter, he could not recall basic details and required significant probing. As already highlighted above, R.I.'s statements during his EUO were inconsistent with the testimony he gave at the hearing and other evidence. R.I. maintains that he has consistently reported the details pertaining to the accident. I find the opposite, as even his ability to recall his previous address during cross-examination changed with no valid explanation for the discrepancy other than to separate himself from the friend that was involved in the July 12, 2016 accident.

[22] Third, I find the circumstances of why K.C. and M.M. were in R.I.'s vehicle in the first place unlikely. For example, why would R.I. pick up his niece and her husband at their house at 10:00 p.m. on a Monday night to drive them to his house so M.M. could make dinner for R.I., his ex-wife, and K.C.? No practical explanation was given for this. For example, perhaps it was a special occasion or common in the applicant's culture to eat dinner at 10:00 or 11:00 p.m. on a Monday evening. But, again, I was given no reason. R.I. could not explain what they were going to have for dinner or whether M.M. had the ingredients to make it at R.I.'s house. In my view, I think a reasonably informed person would find this scenario highly improbable.

[23] The applicants submitted the Applications for Accident Benefits and Statutory Declarations of R.I., R.C. and M.M., which provide consistent accounts of the accident details.[10] While I agree that the description of the accident is consistent in these documents, of significance is that they were completed in the presence of counsel. It is not clear that the documents contain independent accounts of the applicants. Therefore, I find the records of little value.

[24] Finally, I heard the testimony of Aubrey Avertick, Investigator, with the respondent's SIU. Mr. Avertick testified that, while he did not investigate this file himself, the file was flagged because R.I. had connections to two other accidents which occurred in July 2016 involving his friends and ex-wife. Mr. Avertick stated that the following factors were present in the applicant's accident in this case which are common in staged accidents:

[10] Exhibits 1, 2, 3, 4 and 5.

i. The same tow truck company was used to tow both vehicles involved in the accident and both vehicles were taken to the same body shop which is not common;

ii. The damage photographs did not match up with the applicant's description of the accident. R.I. was not able to articulate the damage to his vehicle and was vague about the accident at his EUO;

iii. R.I. showed up to the EUO, while K.C. and M.M. did not;

iv. The other vehicle involved in the accident did not have collision coverage, which is not common. Therefore, the insurer could not inspect the vehicle.;

v. Both vehicles had high kilometers and had been involved in prior accidents.[11]

[25] I found Mr. Avertick's evidence pertaining to staged accidents and why the subject accident is suspicious persuasive. The respondent also submitted numerous documents relating to accidents involving R.I.'s ex-wife and friends which occurred on July 12, 2016 and July 17, 2016, which involve some connections and perplexing similarities such as:

1. all the vehicles were used, and/or had high kilometers and had been involved in prior accidents;

2. the occupants in the July 12, 2016 accident did not have a reasonable explanation for why they were in the car together;

3. the occupants in the cars did not witness the accident because they were on their phones;

4. the accidents took place around the same geographic area;

5. they were all going shopping at the same mall prior to the accident occurring;

6. the same tow truck was used, and the cars went to the same body shop prior to going to the self-collision reporting centre; and,

7. all involved in the accident went to Allania.

[11] Exhibit 9: Carfax Vehicle History, Respondent's Brief, Volume 2, Tab 16 A.

[26] While I agree that the evidence involving the other two accidents is circumstantial, when viewed along with the many inconsistencies and lack of recall of R.I., K.C's failure to participate at the hearing, and that the accident fits the profile of a staged accident, I find the circumstantial evidence more than just coincidental. However, one thing which I found lacking from the respondent's evidence was the production of an investigation or accident reconstruction report. This would have greatly assisted the Tribunal in making a determination in this matter. Regardless, I find that the applicants have not met their onus to establish on a balance of probabilities that they were involved in an "accident" pursuant to section 3(1) of the *Schedule.* To the contrary, and more to the point, I find that this incident was a staged accident.

Is the respondent entitled to repayment of accident benefits?

[27] I find the respondent is entitled to repayment, as I find the applicants made a willful misrepresentation in their application for accident benefits.

[28] Section 52 of the *Schedule* provides that a claimant is liable to repay any benefit paid to him or her as a result of willful misrepresentation or fraud. While the onus was on the applicants to prove that they were involved in an accident, the onus to prove that the applicant's made a willful misrepresentation of material fact shifts to the respondent.

[29] Neither party submitted case law that was helpful with respect to defining what constitutes a willful misrepresentation or the test to order repayment. I find that, based upon the above-noted reasons, the respondent has met its onus in proving that the applicants made a material misrepresentation as I have determined that this was a staged accident. In my view, based upon the evidence and facts before me both applicants deliberately participated in a staged accident for the sole purpose of receiving monetary gain through their insurance policies. Therefore, I find that the respondent is entitled to repayment.

[30] The respondent contends that it is also entitled to costs associated with adjusting its file. The respondent did not submit any authority to support that these costs are payable. By contrast, the applicants submitted two LAT decisions 17-004352/AABS, 2018 CanLII 39447(ON LAT) and 17-004341/AABS, 2018 CanLII 76422 (ON LAT) in which the adjudicator determined that there is no jurisdiction under the *Schedule* to award adjusting costs. I agree with the adjudicator's analysis in these decisions in finding that s. 52 of the *Schedule* does not provide the authority to award adjusting costs. In the absence of any other authority, I do not find the costs associated with adjusting payable.

[31] The respondent submitted correspondence to R.I. indicating that it was seeking repayment in the amount $4,091.00 which represents $3,300.00 paid to Allania for medical benefits and $791.00 paid for an IRB calculation report.[12]

[32] I find the respondent is entitled to repayment from R.I. in the amount of $3,300.00. In my view, the IRB calculation report is an adjustment expense and, as highlighted above, is not payable under the *Schedule*.

[33] The respondent submitted correspondence to K.C. indicating that it was seeking repayment in the amount of $17,637.97, which represents $3,500.00 paid to Allania for medical benefits, $12,259.14 paid for insurer examinations and interpreter services and $1,878.83 paid for non-earner benefits.

[34] I find the respondent is entitled to repayment from K.C. in the amount of $5,378.83 which represents $3,500.00 for medical benefits and $1,878.83 paid for non-earner benefits. I do not find the $12,259.14 payable as insurer examination expenses and interpretation services fit within the definition of adjustment services and are not payable under the *Schedule*.

CONCLUSION

[35] The applicants were not in an “accident” as defined in section 3(1) of the *Schedule*.

[36] I find the applicants made a wilful material misrepresentation of material facts with respect to their application for benefits pursuant to section 53 of the *Schedule*.

[37] R.I. is ordered to repay the respondent the amount of $3,300.00 in accordance with s.52(1)(a) of the *Schedule*.

[38] K.C. is ordered to repay the respondent $5,378.83 in accordance with s.52(1)(a) of the *Schedule.*

[39] The applications for accident benefits of R.I. and K.C. are both dismissed.

Released: December 18, 2019

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Rebecca Hines
Adjudicator

[12] Exhibit 16: Correspondence to both applicants dated April 25, 2018 from the respondent enclosing Explanation of Benefits (OCF-9s).