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

Ontario

Citation: Georgios Stergiou vs. The Personal Insurance Company, 2020 ONLAT 19-001049/AABS

Released: 05/28/2020
File Numbers: 19-001049/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:

Georgios Stergiou

Applicant

and

The Personal Insurance Company

Respondent

DECISION

ADJUDICATOR: Rebecca Hines

APPEARANCES:

For the Applicant: Victoria Polyakevich, Counsel

For the Respondent: Jonathan Schreider, Counsel

HEARD: In person on November 28, 2019

OVERVIEW

[1] Georgios Stergiou (the "applicant") claims to have been injured in an automobile accident on October 12, 2017. He applied for accident benefits to the Personal Insurance Company (the "respondent") under the *Statutory Accident Benefit Schedule – Effective September 1, 2010* (the "*Schedule*").

[2] A case conference was held and the parties were unable to resolve the issues in dispute. The matter proceeded to a preliminary issue hearing which took place in-person on November 28, 2019. I heard evidence from the applicant, while the respondent called Carlee Horan, Investigator with its Special Investigation Unit ("SIU").

ISSUE IN DISPUTE

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

i. Was the applicant involved in an "accident" as defined in s. 3(1) of the *Schedule*?

ii. Did the applicant wilfully misrepresent material facts with respect to his application for benefits?

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

RESULT

[4] For the reasons that follow, I find that the applicant was not involved in an "accident" as defined by s. 3(1) of the *Schedule*. As a result, he is not entitled to claim accident benefits under the *Schedule*. Further, I find that the applicant willfully misrepresented material facts relating to the accident. I find that the applicant was not in the vehicle when the accident occurred. Therefore, the respondent is entitled to repayment in the amount of $8,884.29 for accident benefits paid to date.

BURDEN OF PROOF

[5] The parties disagreed over who has the burden of proof that an accident occurred under s. 3 of the *Schedule*, as well as whether the applicant made a willful misrepresentation of material facts relating to his application for accident benefits. The applicant argued that it is the respondent's onus to prove that he

was not in an accident and that he made a willful misrepresentation of material facts relating to the accident. The respondent argued that the applicant bears the onus of proving that he was involved in an accident.

[6] The applicant relied on *M.F. v. The Personal Insurance Company*, 2019 CanLII 101546 (ON LAT) ("*M.F. v. The Personal*") in support of his position that it is the respondent's onus to prove that he was not involved in an accident. In *M.F v. The Personal*, the sole issue to be determined was whether the insurer was entitled to repayment as a result of willful misrepresentation pursuant to s. 53 of the *Schedule*. In that case, the application was commenced by the insured claiming that the insurer was not entitled to repayment. The adjudicator concluded that, despite the fact that the application was commenced by the insured, the onus was on the insurer to prove that there was a willful misrepresentation and that it was entitled to repayment of accident benefits.

[7] The respondent relied on *17-000532 v. Intact Insurance Company*, 2017 CanLII 87155 (ON LAT) ("17-000532") in support of its position that the onus is on the applicant to prove that he was involved in an accident. In 17-000532, the adjudicator determined that it is the insured's onus to prove that he or she was involved in an accident. The adjudicator relied on jurisprudence from the Court of Appeal, which confirmed that the onus to prove entitlement to benefits under a policy does not shift from the insured.[1]

[8] I agree with the respondent that the onus is on the applicant to prove that he was involved in an accident. I find the case law relied upon by the applicant distinguishable. In particular, *M.F. v. The Personal* dealt with the sole issue of whether the respondent was entitled to repayment of benefits as a result of willful representation under s. 53. Moreover, the application in that case was pursued by the insured not the insurer, which caused some confusion about which party's onus it was to prove that the insurer was or was not entitled to repayment. In this case, the respondent raised a preliminary issue challenging that the applicant was not involved in an accident. It is well accepted law that the onus is on the applicant to prove that an accident occurred. However, I agree with the applicant that the onus shifts to the insurer to prove that there was a willful misrepresentation and that it is entitled to repayment of accident benefits.

[1] This decision discusses *Shakur v. Pilot Insurance Co.*, 1990 CanLII 6671 (Ont. C.A) and *Owusu v. TD Home and Auto Insurance Company et al*, 2010 ONSC 6627 (Div. Ct.).

ANALYSIS

[9] I find that the applicant was not involved in an "accident" within the meaning of the *Schedule* and, thus, is 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 applicant bears the onus of proving on a balance of probabilities that there was an accident within the meaning of the *Schedule.*

[12] The applicant contends that, on October 12, 2017, he went to a casino in Ajax with two friends: Maia Lolua (M.L.) and Ilija Vojnovic (I.V.), the driver of the vehicle. He claims that, on their way home from the casino, they were involved in an accident in Toronto and, as a result, he sustained injuries.

[13] The respondent argues that the applicant is not credible, and the incident did not happen as reported. Significantly, it maintains that, while there was a collision, the applicant was not a passenger in the vehicle. It argues that this is supported by the many inconsistencies in the medical documentation and Examinations Under Oaths (EUOs). Further, it argues that a negative inference should be drawn from the applicant's failure to call M.L. and I.V. as witnesses at the hearing. It also relies on the applicant's cell phone records, which support that the applicant was not in Ajax on the date of the accident, which undermines the applicant's reason for being in the vehicle.

[14] After completing an investigation on July 3, 2018, the respondent notified the applicant that his claim was denied since, in its view, he was not injured in an accident within the meaning of s. 3(1) of the *Schedule.* Specifically, the respondent believed that the applicant's claim was based on a staged accident.

[15] For the reasons that follow, I find that the applicant has not met his onus in proving that the accident occurred.

[16] First, I have drawn a negative inference by the fact that the applicant did not call I.V. and M.L. to testify at the hearing. In my view, this was a mistake. Credibility is at the core of this dispute and, consequently, corroborating evidence is key. The respondent submitted the Financial Services Commission of Ontario's (FSCO) decision in *Nguyen and State Farm Mutual Insurance Company,* A13-

012623 in support of its position that a negative inference should be drawn because of the applicant's failure to call the other occupants in the vehicle. This decision also involved a challenge by the insurer that the insured was not involved in an accident and that there was a willful misrepresentation. The arbitrator drew a negative inference from the insured's failure to call important witnesses. The arbitrator stated that if a witness with knowledge of the facts who would be assumed to be willing to assist a party is not called to testify a negative inference should be drawn if no explanation is provided. 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, I.V. and M.L. 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. The respondent submitted the EUO and medical records of M.L. These records contained numerous references to the facts surrounding the accident which conflicted with the applicant's version of events. I find that these records support the respondent's position that the applicant did not call M.L. as a witness because her testimony would not have been credible. In addition, I.V., the driver of the vehicle, did not participate in the respondent's investigation and his current whereabouts are unknown. Consequently, I draw a negative inference as I do not find that M.L. or I.V. would have been helpful in supporting the applicant's case that an accident occurred. In addition, the applicant did not provide any explanation for why these witnesses were not called to testify.

[18] Second, the applicant failed to submit any evidence in support of his application that an accident occurred. The applicant submitted a fact sheet which provides details about the date and time of the accident, make and model of the car involved, owners of the vehicle and contact information for the occupants in the vehicle. In my view, this fact sheet raises further suspicion. The applicant could not explain who gave it to him or why he has it in possession. Further, the applicant did not submit any medical documentation to support that he was injured in the accident. Other than one visit to his family doctor where he reports that he was involved in an accident and inconsistent reports that he made to insurer examiner ("IE") assessors, no evidence was submitted to support that he was injured or that he was in the vehicle when the accident occurred. Moreover, the respondent submitted post-accident hospital records in which the applicant attended for non-accident related health issues shortly after the accident. The applicant did not report that he was involved in an accident or had been injured even though his attendance at the hospital was shortly afterwards. The

applicant's medical history in these hospital reports do not mention the accident at all.

[19] Third, I find the applicant's testimony wholly inconsistent with his EUO, the EUO of M.L. and the other evidence. The following are examples of these inconsistencies:

i. The applicant testified that he knew I.V. and M.L. from a Greek Orthodox Church. In his EUO, he stated that he knew I.V. from a Greek club, yet he reported that I.V. was Yugoslavian. This conflicted with M.L.'s statement in her EUO that I.V. could not speak Greek, he could only speak English. Further, she described I.V. as "a thin young man." The medical records support that M.L. is in her 50s. The self-collision report which attached a copy of I.V.'s driver's licence revealed that I.V. is three years older than M.L. The applicant testified that he knew M.L. for six months prior to the accident. In his EUO, the applicant indicated that he had known M.L. for five years prior to that date. In her EUO, M.L. testified that she did not know I.V. prior to the date of the accident but stated that her and the applicant knew each other from Church. Despite noting that she and the applicant were friends, M.L. did not know the applicant's last name.

ii. The vehicle that I.V. was driving belonged to two third-parties, including Viktor Uzlyuk, who is the applicant's acquaintance. The registration of the vehicle demonstrates that Mr. Uzlyuk lives in Niagara Falls. The applicant could not explain I.V.'s connection to the owners of the vehicle or why he was driving their car on that date when I.V. lives in Toronto, not Niagara Falls.

iii. The applicant testified that he made plans at Church to go to the casino on the Sunday prior to the collision. The accident happened on a Thursday. No phone calls or texts were exchanged between Sunday and Thursday to confirm those plans or arrange for pick-ups. This was confirmed by the applicant's cell phone records submitted by the respondent.

iv. The applicant testified that he met M.L. and I.V. at a Tim Hortons in Toronto to go to the casino in Ajax. In his EUO, the applicant stated that his nephew, Peter (the last name of whom he could not recall), dropped him off at the Tim Hortons in Toronto to meet I.V. They proceeded to pick up M.L. at her house before driving to the casino in Ajax. In M.L.'s EUO, she reported that, even though she did not know I.V., he picked her up at her house first. They then drove to pick up the applicant at his apartment. M.L. could not recall the general area in which the applicant lived.

v. The applicant first testified that, on their way home from the casino, I.V. got lost and got off at Morningside in Scarborough, made a left hand turn onto a side street and rear-ended the other vehicle. He then clarified that the accident occurred on a side street off of Sheppard Avenue in Toronto. In other records, he reports that the vehicle he was in t-boned the other vehicle. In the IEs submitted by the respondent, the applicant reported to assessors that the accident happened in the city of Ajax. The location of the accident was also inconsistently reported in his EUO. He first reports that the accident happened in Ajax on Sheppard Avenue East. Then he clarifies that the accident happened in Toronto. In her EUO, M.L. could not explain how the accident occurred.

vi. The applicant testified that he was sitting in the backseat behind the driver and M.L. was sitting in the front passenger seat when the accident occurred. In his EUO, he reported that he and M.L. sat in the back-passenger seats for the entire journey, to and from the casino. In IEs submitted by the respondent, M.L. reported that the applicant sat in the front passenger seat.

vii. At the hearing, the applicant could not recall the type or colour of the vehicle that he was in and stated that the driver of the other vehicle involved in the accident was male. In his EUO, he stated that the occupant in the other vehicle was female and that the occupants of both vehicles involved in the accident were all transported from the scene of the accident to a plaza by the same tow truck driver.

viii. The applicant testified that, on the day after the accident, his friend drove him to the self-collision reporting centre to meet up with I.V. to report the accident. The self-collision police report notes that only I.V. attended to report the accident.

ix. The applicant testified that he went to meet M.L. and I.V. at a Tim Hortons at 4:00 p.m. and that they were at the casino until 8:30 p.m. and that the accident happened between 9:00 and 9:30 p.m. The respondent submitted the applicant's phone records, which provide details of the date, time and location of the phone calls the applicant made on that date. The phone records reveal that the applicant made approximately 44 phone calls between 8:38 a.m. and 8:42 p.m. The phone records support that the applicant was in Toronto the entire day and could not have attended the casino in Ajax, as no calls were made from Ajax during the time period in which the accident reportedly happened.

[20] The applicant relied on *M.F. v. The Personal* in support of his position on how credibility should be assessed. In that case, the insured was inconsistent, had a poor memory, and could not recall basic details that most reasonable people would not struggle with. Despite the insured's inconsistency, the adjudicator found the insured credible because medical evidence was submitted that she suffered from significant cognitive dysfunction. I find this decision distinguishable from the present case as the applicant did not submit any medical evidence that he suffers from any cognitive disorder that would affect his memory. While the applicant is a 74-year-old man, and it is accepted that a person's memory declines with age, no medical records were submitted that confirm that the applicant has been diagnosed with any disorder affecting memory. Further, this does not explain the inconsistencies in M.L.'s EUO and other records.

[21] The respondent submitted FSCO decision *Tran and Vu v. State Farm Insurance Company*, FSCO A13-000958 and A13-001548. I found this decision helpful 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.[2] The decision highlights how the truth and credibility of a witnesses' story is to be assessed:[3]

> "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."

[22] I find that the applicant is a bad historian and the many inconsistencies were not explained or clarified in a reasonable manner. During the applicant's cross-examination, his counsel interrupted, as in her view, the applicant was not answering the respondent's questions in a logical manner. I find the timing of counsel's objections convenient as she did not raise any concerns when the applicant was providing his in-chief testimony. Therefore, I ordered that the cross-examination continue. I conclude that the applicant was not answering questions in a logical manner because he was not being forthcoming with his answers to the respondent's questions.

[23] I find the evidence supports that the applicant was not in the vehicle when the incident occurred. As highlighted above, how the three occupants in the vehicle

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[2] *Tran and Vu v. State Farm Insurance Company (FSCO A13-000958 and A13-001548) 2015*, pages 6 &7.
[3] Ibid, page 7.

knew each other was at odds, how they made plans to get together on the date did not make sense, and how they met up on that day was reported inconsistently. The applicant's testimony about the accident itself was equally as unreliable as was where everyone was sitting in the vehicle when the accident occurred. Furthermore, the applicant could not consistently describe the occupant of the other vehicle involved in the collision. Finally, his phone records prove that he was not in the Ajax vicinity on the date the accident occurred. In my view, the applicant picked the wrong day to be busy making phone calls as these records completely discredit that he was in the vehicle at all on the date the accident allegedly occurred.

[24] Finally, I heard the testimony of Carlee Horan, Investigator, with the respondent's SIU. Ms. Horan testified that the file was flagged because there were indicators that the accident did not happen as reported as there were inconsistencies in the medical records and IEs. As a result, the respondent requested that the applicant, M.L., and I.V. attend EUOs so that they could clarify the inconsistencies. I.V. refused to cooperate with the respondent's investigation. Ms. Horan stated the following factors were present in the applicant's accident, which are common in staged accidents:

i. There were inconsistencies in how the driver and the applicant described the accident. The applicant reported that I.V. made a left hand turn and I.V. reported that he turned right. There were also inconsistencies about the timing of the accident, where the occupants were seated, and that the accident was a t-bone verses a rear-end collision.

ii. The fact sheet the applicant submitted is uncommon and is something you would see in a staged accident.

iii. 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 in Scarborough. This did not make sense as I.V. lived in Toronto and the other driver lives in Whitby. What was extra perplexing about this case was the fact that both vehicles involved in the collision were towed from different addresses to the body shop.

iv. Both cars went to the auto body shop first, and were then towed to the collision centre.

v. The photographs of the damage done to the vehicle did not match up with I.V.'s description of the how the accident occurred.

[25] When I view the above facts with the other inconsistencies, I find Ms. Horan's testimony persuasive in demonstrating that the applicant was not involved in an accident. I find that the accident fits the profile of a staged accident and the circumstantial evidence more than just coincidental. For all of the above noted reasons, I find that the applicant has not met his onus in establishing on a balance of probabilities that he was involved in an "accident" pursuant to section 3(1) of the *Schedule*

Is the respondent entitled to repayment of accident benefits?

[26] I find the respondent is entitled to repayment, as I find the applicant made a willful misrepresentation in his application for accident benefits.

[27] 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.

[28] I find that the respondent has met its onus in proving that the applicant made a willful misrepresentation as I have determined that the applicant was not a passenger in the vehicle and that this was a staged accident. In my view, based upon the evidence before me, the applicant was dishonest in reporting that he was involved in an accident for the sole purpose of receiving monetary gain through payment of accident benefits. Therefore, I find that the respondent is entitled to repayment.

[29] The respondent submitted correspondence to the applicant dated July 3, 2018 indicating that it was seeking repayment in the amount of $16,063.84 which represents $1,590.00 paid for medical benefits, $7,294.29 paid for non-earner benefits, $7,045.55 paid for insurer examinations and $134.00 paid for records.

[30] I find that s.52 of the *Schedule* is clear that an insurer is entitled to repayment of any benefit paid to an insured as a result of willful misrepresentation. In my view, this does not include payments the respondent made for insurer examinations and records as these are not defined as benefits under the *Schedule.* Therefore, I find the respondent is entitled to repayment from the applicant in the amount of $8,884.29.

ORDER

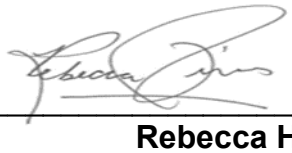
[31] The applicant was not in an “accident” as defined in section 3(1) of the *Schedule*.

[32] I find the applicant made a wilful material misrepresentation of material facts with respect to his application for accident benefits.

[33] The applicant is ordered to repay the respondent the amount of $8,884.29 in accordance with s.52(1)(a) of the *Schedule*.

[34] The applicant’s application to the Tribunal disputing his entitlement to accident benefits is dismissed.

Released: **May 28, 2020**



Rebecca Hines
Adjudicator