Citation: B.F. vs. Certas Direct Insurance Company, 2021 ONLAT 19-004844/AABS

Released Date: 04/28/2021
File Number: 19-004844/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:

B.F.

Applicant

and

Certas Direct Insurance Company

Respondent

DECISION

ADJUDICATOR: **Melody Maleki-Yazdi**

APPEARANCES:

For the Applicant: Arthur Semko, Paralegal

For the Respondent: Jonathan B. Schrieder, Counsel

Court Reporter: [B.P.]

HEARD by videoconference: November 17 and 18, 2020

OVERVIEW

[1] B.F. (the "applicant") alleges that she was involved in an automobile accident on August 8, 2018. The respondent claims that, pursuant to s. 3(1) of the *Statutory Accident Benefits Schedule – Effective September 1, 2010*[1] (the "*Schedule*"), the applicant was not involved in an "accident." The parties have sought a preliminary issue determination on whether the applicant was involved in an "accident" for the purposes of entitlement to statutory accident benefits.

[2] I heard evidence from the following individuals: the applicant, Ms. Carlee Horan (investigator for the respondent who conducted an investigation of this claim) and Mr. William Jennings (the respondent's engineering expert in accident reconstruction).

PRELIMINARY ISSUES

[3] The following preliminary issues are in dispute for this hearing:

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 her application for benefits?

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

RESULT

[4] I find that the applicant was not involved in an "accident" as defined in s. 3(1) of the *Schedule* and, as a result, is not entitled to any statutory accident benefits.

[5] The respondent is entitled to terminate the payment of benefits under s. 53 of the *Schedule* because the applicant wilfully misrepresented material facts with respect to her application for benefits.

[6] The respondent is entitled to a repayment of benefits paid to the applicant as a result of her wilful misrepresentation or fraud, pursuant to s. 52(1)(a) of the *Schedule*. The quantum of the repayment is $1,757.24 plus interest in accordance with the *Schedule*. The respondent is not entitled to costs.

[1] O. Reg. 34/10.

ANALYSIS

Procedural issue

[7] At the start of the hearing, the applicant requested that her boyfriend, M.E., be added as a witness in this hearing. The respondent objected to the addition of the witness. The respondent submitted that the applicant's boyfriend was a surprise witness and it would be prejudiced if I allowed this witness to testify because its preparation for the hearing was guided by who the witnesses are going to be.

[8] I denied the applicant's request to allow this witness to testify because the applicant did not comply with the case conference Order dated September 14, 2020. The Order states the following: "At least 30 days before the hearing date, each party will advise/confirm with the other and the Tribunal any changes/details pertaining to the list of witnesses that they intend to call." The respondent complied with the Order and provided the information on October 7, 2020.

[9] The applicant first requested to add this witness to her witness list at the start of the hearing. The applicant could have brought a motion for an order regarding the addition of this witness prior to the hearing. At this stage of the dispute resolution process, an adjournment of the hearing was not an option as this hearing had been previously adjourned and granting an adjournment would result in a significant delay in a determination being made in this matter. I found that it would not be procedurally fair to the respondent who would be prejudiced if I allowed this witness to testify.

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

[10] In order to claim accident benefits from the respondent, the applicant must prove on a balance of probabilities that she was involved in an "accident" as defined in s. 3(1) of the *Schedule*. The definition of "accident" in s. 3(1) of the *Schedule* means an incident in which the use or operation of an automobile directly causes an impairment.

[11] The parties agreed that the onus shifts to the respondent to prove that there was a wilful misrepresentation and that it is entitled to repayment of accident benefits.

[12] The respondent submits that the collision the applicant was involved in did not occur as reported and that the applicant has not met her burden of proof. The applicant submits that she has met her burden of proof that she was involved in an accident. She concedes that the damage to the vehicle does not correspond

to the manner in which the accident happened. The applicant submits that after the rear accident, there was subsequent damage to the vehicle that she had no part in and she only became aware of the subsequent damage when she saw the vehicle at the tow truck lot. The applicant submits that she should not be responsible for anything that happened after the rear accident.

[13] In support of the respondent's allegation that the collision did not occur as reported, it relies on the following:

i. The applicant's evidence at the examination under oath ("EUO") is inconsistent with her evidence at the hearing and inconsistent with her boyfriend's (M.E.) evidence at his EUO;

ii. The applicant's evidence is inconsistent with the accident reconstruction report of Mr. Jennings;

iii. The evidence of the applicant and of M.E. are inconsistent with the applicant's cell phone records; and

iv. Adverse inferences should be drawn from the applicant's failure to provide her full cell phone records or to call any other witnesses to refute the allegation that the collision occurred as reported.

[14] I have not listed all of the inconsistencies in the applicant's evidence. The inconsistencies I have listed raise genuine issues about how reliable the applicant's evidence is overall.

The applicant and her boyfriend's accounts of the collision on August 8, 2018

[15] The respondent submits that there are discrepancies between the applicant's evidence at her EUO on January 8, 2019 (approximately five months after the collision) and her evidence during the testimony in this hearing. The respondent submits that there are also discrepancies between the applicant's evidence and her boyfriend's evidence at his EUO on November 30, 2018 (approximately 3.5 months after the collision). I find that the applicant could not describe basic facts regarding the collision at both her EUO and at the hearing. Furthermore, her statements regarding the collision conflicted with the statements of her boyfriend. I do not find her to be a credible witness. The following are examples of these inconsistencies.

[16] The applicant stated at her EUO that that she was at home in Mississauga when her boyfriend, M.E., called her through video calling and he asked if she could come pick him up. He was at a friend's house. She agreed to pick him up at an

address in Toronto. She did not recall the address, but she knew it was around the Steeles area. Her boyfriend stated at his EUO that he went to his friend's house at around 8:00 p.m. The applicant called him, and he believes it was about two to three hours after he arrived at his friend's house.

[17] The applicant stated at her EUO that she does not know exactly where the accident happened. She thinks that the accident may have occurred around Steeles and Jane at around 7:00 pm or 8:00 pm. She collided with the back of the vehicle owned by the other driver, M.T., that was in front of her at an intersection. From what she can remember, there was only one impact. The applicant testified at the hearing that she does not know exactly where the accident happened. She was driving straight on Steeles at around 7:00 p.m., but she was not sure of the time. She collided with the back of the vehicle owned by M.T. while she was driving at about 60 kilometres per hour. To the best of her knowledge, she hit the car in front of her once.

[18] The applicant stated at her EUO that after the collision, she got out of the vehicle and she thinks she called the tow truck company. She stated that she did not speak to anyone at the scene except her boyfriend. She did not take any photos of the accident, but she thinks her boyfriend did. She testified at the hearing that after the collision, she sat in the vehicle because she was in pain. Her boyfriend exited the vehicle and was talking to a person or to the people from the other car, while she sat in her car. Her boyfriend exchanged information with the other driver. Eventually, she exited the vehicle and saw the damage. She did not speak to the other driver. She did not think that she took photographs at the scene of the accident and she did not know if her boyfriend took photographs. Her boyfriend stated at his EUO that after the accident, he got out of the car. He told the applicant to get the registration, the licence and the insurance of the other driver's vehicle. He stated that the applicant exchanged vehicle and licence information with the driver of the other car. He stated that he did not have any specific conversation with the other driver. He did not have photos of the accident scene and he thought the applicant took photos of the accident scene.

[19] At her EUO, she was inconsistent on whether there were one or two tow trucks that arrived at the scene. Her car was towed by a tow truck. She stated that the tow truck driver had to drop off both damaged cars. At the hearing, she testified that just one tow truck came to the scene and, from her knowledge, both cars were towed by the same truck. The tow truck driver took herself, her boyfriend, the driver of the other car and one other person. She was not sure who the other person was. At his EUO, her boyfriend stated that two trucks came to the scene and he went in the tow truck that was taking the applicant's vehicle and he left

the scene with the applicant. Both the applicant and her boyfriend stated that afterwards, they rented a car from a car rental establishment.

[20] I find that the significant inconsistencies are, first, that the applicant and her boyfriend's accounts of when the collision occurred are hours apart. She stated at the EUO that the accident occurred at around 7:00 p.m. or 8:00 p.m. and she testified at the hearing that the accident happened at around 7:00 p.m., whereas her boyfriend stated that he went to his friend's house at around 8:00 p.m. and he believes he was there for about two to three hours when the applicant called him to pick him up. She testified at the hearing that following the accident, she is not sure what time she got home, but maybe around 9:00 p.m. or 10:00 p.m. When asked about the contents of the self reporting collision report, which indicates that the collision happened at 11:02 p.m. and that it occurred at Steeles and Jane, the applicant testified that she was giving estimates of the time and the location based on what she could remember. The collision report supplementary statement form indicates that the collision location was closer to Steeles and Dufferin, and the applicant stated that she is very bad with locations and that maybe her boyfriend suggested that location.

[21] The applicant and her boyfriend have inconsistent accounts regarding whether one tow truck towed one or both damaged vehicles. Although at the EUO the applicant was inconsistent on whether there were one or two tow trucks that arrived at the scene, she testified at the hearing that just one tow truck came, and the tow truck driver took both cars. Her boyfriend stated at his EUO that two tow trucks came to the scene and one tow truck took the applicant's vehicle. The applicant testified that herself, her boyfriend, the driver of the other car and one other person were in one tow truck, while her boyfriend indicated that he went in the tow truck that took the applicant's vehicle and he left the scene with the applicant.

[22] The applicant and her boyfriend have inconsistent accounts regarding which one of them spoke with the other driver after the collision and who may have taken photographs of the accident scene. The applicant stated at both the EUO and at the hearing that she did not speak with the other driver and she testified at the hearing that her boyfriend exchanged information with the other driver, whereas her boyfriend stated at his EUO that the applicant exchanged vehicle and licence information with the driver of the other car. He stated that he did not have any specific conversation with the other driver. The applicant stated at the EUO that she did not take any photos of the accident, but she thinks her boyfriend did. She testified that she does not think that she took photographs at the scene of the accident and that she did not know if her boyfriend took photographs. He stated

that he did not have photos of the accident scene and he thought the applicant took photos of the accident scene.

Inconsistencies with Mr. Jennings' report

[23] I find that the applicant's claims that, from what she can remember, her vehicle had only one impact with the other driver's (M.T.) vehicle and that she was driving at about 60 kilometres per hour prior to the collision are inconsistent with the accident reconstruction report of Mr. Jennings assessing the two-vehicle collision. His report is dated October 3, 2018.

[24] As the respondent's engineering expert in accident reconstruction, Mr. Jennings inspected the applicant's vehicle. He also inspected M.T.'s vehicle. Mr. Jennings based his opinion in the report on the applicant's self reporting collision report; M.T.'s self reporting collision report; review of the property damage documentation for the applicant's vehicle, including photographs and the repair estimate; review of a photograph of prior loss damage to the applicant's vehicle; review of property damage documentation for M.T.'s vehicle, including photographs and the repair estimate; and the examination of both the applicant's and M.T.'s vehicles.

[25] Mr. Jennings' opinion was based on a review of the damages incurred to both vehicles. He opined that it was evident that the applicant's vehicle collided with the rear of M.T.'s vehicle; however, the damages indicated that the applicant's vehicle struck M.T.'s vehicle three times, in separate and distinct impacts, meaning that each was unrelated to the prior impact. His analysis indicated that, had the collision occurred in a manner consistent with that described by the applicant, only a single area of contact would have been expected between these two vehicles. He opined that there was no logical or plausible explanation for the three separate and distinct impacts, as evident by the physical damage profiles that were documented on both vehicles.

[26] Regarding the applicant's testimony that she was driving at about 60 kilometres per hour prior to the collision, Mr. Jennings testified that his opinion was that the damage sustained is not consistent with that speed.

[27] I accept Mr. Jennings' expert opinion. He obtained his Bachelor of Engineering Science in Mechanical Engineering with a speciality in Automotive Engineering Design in 1994. His credentials were not questioned by the applicant. Given his credentials and experience, I accept that he is an expert in motor vehicle collision investigation and reconstruction.

[28] I find the accident reconstruction report and the expert witness testimony of Mr. Jennings to be persuasive. This evidence contradicts the applicant's position. I accept the opinions and conclusions reached by Mr. Jennings. The applicant did not provide any expert evidence to refute Mr. Jennings' opinion.

Cell phone records

[29] The applicant provided her cell phone records from Freedom Mobile between August 7, 2018 at 1:07 p.m. and August 8, 2018 at 11:07 p.m.

[30] The respondent submits that the records do not show a connection between the applicant and her boyfriend on the date of the collision. The applicant and her boyfriend stated at their respective EUOs and the applicant testified at the hearing that there was communication between herself and her boyfriend on the day of the collision; however, when questioned about why there were no calls to or from her boyfriend on the date of the collision, the applicant stated she cannot remember or does not know, and that she probably talked to him through social media or something else, but she knows that she did speak to him. At his EUO, the applicant's boyfriend said that the applicant called him while he was at his friend's house. Although he did not specify whether the call was a video call or a telephone call, he did not mention communicating with the applicant through social media.

[31] I find that the applicant's cell phone records do not show a telephone call between the applicant and her boyfriend on the day of the accident.

Evidence from Ms. Horan

[32] I heard evidence from Ms. Carlee Horan, investigator for the respondent who conducted an investigation of this claim. The applicant's collision was flagged for an investigation because of numerous factors, some of which include the following:

i. In the report from the applicant, she said that she was going to get lunch with her boyfriend before the accident happened; however, the police report indicates that the accident happened just after 11 p.m., so there was a discrepancy in timing;

ii. The collision reporting centre reports of the applicant and the other driver, M.T., were filed on the same day, August 10, 2018 (two days after the collision) and two hours apart;

iii. There were inconsistencies regarding the location of where the collision

occurred;

iv. Although the parties indicated that the applicant was directly following M.T.'s vehicle, which resulted in a rear-end accident, the photographs of the vehicle were not indicative of a straight rear-end accident; and

v. Both parties lacked familiarity with how many occupants were in each other's vehicle.

[33] When I view the above facts with the other inconsistencies, I find Ms. Horan's testimony to be persuasive. Based on all the evidence before me, I find that the applicant has not met her burden of proof.

[34] The applicant stated at her EUO that a couple of days following the collision, her adjuster called her and asked her to go to the tow truck lot to sign a consent for her to release the car to the adjuster. The applicant went to the tow truck lot and requested to see the car because she did not see the car properly the day of the accident because it was nighttime. She testified at the hearing that when she called her insurance, the adjuster told her to check her car. Before she went to the collision reporting centre, she went and saw the car. She saw that the front of her car was damaged badly and there were some scratches.

[35] The applicant submits that after the rear accident, there was subsequent damage to the vehicle that she had no part in and she only became aware of the subsequent damage when she saw the vehicle at the tow truck lot. The applicant submits that she should not be responsible for anything that happened after the rear accident. I find that there is no evidence to support this allegation. I accept Ms. Horan's testimony that the applicant did not express any concerns regarding the damage on her car at any point during the handling of the claim. The applicant provided a notarized proof of loss dated October 30, 2018 (approximately 2.5 months after the collision) regarding the property damage of the claim, and in that, there is no indication or declaration of unrelated damage.

[36] While I can accept that an individual's memory and ability to recall events is not perfect and can be flawed, considering the evidence, I find the number and nature of the inconsistencies supports that the collision the applicant was involved in did not occur as reported. Furthermore, as noted above, I find that the applicant could not describe basic facts regarding the collision at both her EUO and at the hearing.

[37] I do not accept the applicant's version of the events surrounding the collision, or that there was subsequent damage to her vehicle that she first saw at the tow

truck lot. I find that the applicant's evidence as to her collision dated August 8, 2018 is not reliable. Therefore, I find that the applicant has failed to satisfy her onus to show that she was in an "accident" as defined in s. 3(1) of the *Schedule*.

Did the applicant wilfully misrepresent material facts with respect to her application for benefits?

[38] Section 53 of the *Schedule* allows an insurer to terminate the payment of benefits to or on behalf of an insured person if the insured person has wilfully misrepresented material facts relating to the application for benefits. The insurer needs to provide the insured person with a notice which sets out the reasons for the termination.

[39] The respondent provided a notice letter to the applicant dated February 19, 2019, which advised her that her benefits were being terminated pursuant to s. 53 of the *Schedule* and noted that the applicant had wilfully misrepresented material facts when she applied for benefits from the respondent.

[40] I find the applicant wilfully misrepresented material facts when she described the events surrounding the collision, how the collision happened and her injuries. I find the applicant misled the respondent with respect to these details in an attempt to claim statutory accident benefits from the respondent to which she was not properly entitled. Therefore, the respondent has proven that the applicant's material misrepresentation of the facts was wilful. I also find the applicant's misrepresentation was material as she applied for and received benefits on the basis of injuries allegedly sustained as a result of the "accident" which were paid for by the respondent.

[41] I find that as a result of the applicant wilfully mispresenting material facts when she applied for benefits from the respondent, the respondent is entitled to terminate the payment of statutory accident benefits to the applicant pursuant to s. 53 of the *Schedule*.

Is the respondent entitled to repayment of accident benefits and costs associated with the application?

[42] It is noted within s. 52(1)(a) of the *Schedule* that a person is liable to repay an insurer any benefit which was paid to the person as a result of wilful misrepresentation or fraud.

[43] As noted above, the respondent provided a notice letter to the applicant dated February 19, 2019. In accordance with s. 52(2)(a), the letter requested a repayment of accident benefits the respondent paid in the amount of $1,757.24.

[44] It is noted within s. 52(3) that the insurer must give notice within 12 months after the payment is made otherwise the person ceases to be liable. The 12-month stipulation does not apply if the benefit was paid as a result of wilful misrepresentation or fraud.

[45] As I have already found that the respondent is entitled to terminate benefits pursuant to s. 53 of the *Schedule* on the basis of the applicant's wilful misrepresentation of material facts, I find that the respondent is entitled to a repayment of the full amount which it paid for accident benefits pursuant to s. 52(1)(a) of the *Schedule*. The amount of the repayment is $1,757.24 plus interest in accordance with s. 52(5) of the *Schedule*.

[46] The respondent's request for costs is denied because I am not satisfied that the applicant acted unreasonably, frivolously, vexatiously or in bad faith during this proceeding to warrant a costs award. Therefore, no costs are awarded.

CONCLUSION

[47] I find that the applicant was not involved in an "accident" as defined in s. 3(1) of the *Schedule* and, as a result, is not entitled to any statutory accident benefits.

[48] The respondent is entitled to terminate the payment of benefits under s. 53 of the *Schedule* because the applicant wilfully misrepresented material facts with respect to her application for benefits.

[49] The respondent is entitled to a repayment of benefits paid to the applicant as a result of her wilful misrepresentation or fraud, pursuant to s. 52(1)(a) of the *Schedule*. The quantum of the repayment is $1,757.24 plus interest in accordance with s. 52(5) of the *Schedule*. The respondent is not entitled to costs.

Released: April 28, 2021

Melody Maleki-Yazdi
Adjudicator