



Citation: Wardere v. Certas Home and Auto Insurance Company, 2023 ONLAT 22-003479/AABS

Licence Appeal Tribunal File Number: 22-003479/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:

Omer Wardere

Applicant

and

Certas Home and Auto Insurance Company

Respondent

DECISION

ADJUDICATOR: Brian Norris

APPEARANCES:

For the Applicant: Omer Wardere, Applicant
Nidhi Vinayak, Counsel

For the Respondent: Jonathan Schrieder, Counsel

Interpreters (Somali language): Mohamed Hussein, Fowzia Ahmed

Court Reporters: Trini Wannamaker, Corey Salazar

HEARD: by Videoconference: July 24, 25, 26, 27, and 28, 2023

OVERVIEW

- [1] Omer Wardere (“the Applicant”) claims to have been involved in an automobile accident on January 13, 2021 and sought benefits from Certas Home and Auto Insurance Company (“the Respondent”) pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the “Schedule”). The Applicant was denied benefits by the Respondent and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of the dispute.
- [2] The Respondent raised preliminary issues in response to the Application. The preliminary and substantive issues in dispute are all subject of this hearing.

PRELIMINARY ISSUES

- [3] The preliminary issues in dispute for this hearing:
- i. Was the Applicant involved in an “accident”?
 - ii. Is the Respondent entitled to terminate the payment of benefits because the Applicant wilfully misrepresented material facts with respect to the “accident” and his application for benefits under section 53 of the Schedule?
 - iii. Is the insurer entitled to repayment of the benefits paid to the Applicant because of his wilful misrepresentation or fraud, pursuant to section 52(1)(a)? If so, what is the quantum of the repayment?

ISSUES

- [4] The substantive issues in dispute are:
- i. Is the Applicant entitled to a non-earner benefit in the amount of \$185.00 per week for the period from May 31, 2021 to January 13, 2023?
 - ii. Is the Applicant entitled to a medical benefit in the amount of \$4,070.82, less \$3,175.90 approved by the Respondent, for chiropractic services, proposed by SpineTec Healthcare Solutions in a treatment plan dated July 8, 2021?
 - iii. Is the Respondent liable to pay an award under s. 10 of O. Reg. 664 because it unreasonably withheld or delayed payments to the Applicant?
 - iv. Is the Applicant entitled to interest on any overdue payment of benefits?

RESULT

- [5] I find that the Applicant was not involved in an “accident” as defined in section 3 of the *Schedule*.
- [6] The Respondent is entitled to terminate the payment of benefits pursuant to section 53 of the *Schedule* and is entitled to a repayment of benefits in the amount of \$6,012.65, with interest, because the Applicant wilfully misrepresented his involvement in an accident.
- [7] The Applicant is not entitled to the benefits claimed, nor interest or an award.

BACKGROUND

- [8] The Applicant claims that he was the front seat passenger of a vehicle which struck the rear end of another vehicle while driving on an urban roadway. He claims that he sustained injuries to his neck, shoulders, and back that impair his physical function and preclude him from completing his daily activities. He also claims that his pre-existing psychological issues were exacerbated as a result of the accident.
- [9] Yet, the evidence demonstrates on a balance of probabilities that the Applicant was not in the vehicle at the time of the accident. As a result, he is not entitled to the benefits claimed and the Respondent is entitled to a repayment of benefits paid because the Applicant wilfully misrepresented that he was a passenger in the vehicle at the time of the accident.

ANALYSIS

- [10] The onus is on the Applicant to demonstrate entitlement to the benefits claimed. For this hearing, the Applicant must first demonstrate on a balance of probabilities that he was involved in an accident and sustained an injury or impairment as a result. Further, the Applicant must demonstrate that he is entitled to the benefits claimed in this hearing.
- [11] To be entitled to a repayment of benefits, the Respondent must demonstrate on a balance of probabilities that it paid benefits to the Applicant in error or as a result of the Applicant’s wilful misrepresentation.
- [12] For the following reasons, I find that the Applicant was not involved in the subject accident and that the Respondent is entitled to a repayment of benefits due to the Applicant’s wilful misrepresentation.

The Accident

- [13] Typically, cases requiring a determination of whether an accident occurred involve an assessment of the mechanism of the incident and whether that incident involved the use or operation of a vehicle. However, there is no dispute that an accident occurred on January 13, 2021 and any reference to “the accident” herein, refers to this one.
- [14] Further, it is clear from the evidence that a vehicle driven by (“OA”), a friend of the Applicant, rear-ended a vehicle driven by another driver, (“WN”). At issue is whether the Applicant was involved in the subject accident. For the following reasons, I find that he was not involved in the accident.

The Applicant lacks credibility

- [15] I find that the Applicant lacks any credibility and reject his account of the events on January 13, 2021 because they are incredibly inconsistent and are not supported by the evidence.
- [16] Any evidence connecting the Applicant to the accident is based on the Applicant’s personal reports, which hold no weight. This includes the police report dated January 13, 2021 and the officers’ notes associated with the report, the claims forms submitted by the Applicant, and the Applicant’s reports to the various assessors, healthcare professionals, and during testimony at an examination under oath and at the hearing.
- [17] The police report relating to the accident is inconsistent with the Applicant’s differing accounts of the events of the accident. I agree with the Applicant that the police report notes that he was a passenger of OA’s vehicle. However, this fact alone is insufficient to meet the Applicant’s burden to demonstrate that he was involved in the accident. This is because the police were not at the scene of the accident at the time it occurred and thus, did not witness it. The police report was generated on or after 8 pm on the date of the accident, about three-to-four hours after the collision occurred and is based entirely on the reports of OA and the Applicant. Contrary to the Applicant’s testimony at this hearing, the report does not state that the other driver involved in the accident failed to remain at the scene because he only held a class G1 licence. Instead, the report notes that WN held a class G licence.
- [18] The accompanying police notes state that there are conflicting stories and that the police were unable to determine who was at fault for the accident. The notes indicate that officers found the vehicles at a different location from the accident,

which was nearby the original scene. The police notes state “no injuries admitted to officers” on two occasions, “friend declined (ambulance)” and “friend has headache, neck + back pain – friend hit face off mirror” and it identifies the Applicant as the friend. Another note states “report only as stories conflicting.” Together, these notes indicate that the Applicant and OA provided to police an inconsistent account of the events of the accident during the hours immediately after the accident occurred.

- [19] The Applicant’s account of the events at an examination under oath (“EUO”) dated January 27, 2022 were contradicted entirely by the Applicant’s testimony at this hearing. The contradictions are substantial in both substance and volume and, as a result, lead me to discount the Applicant’s testimony entirely. I have no reason to believe the associated transcript is in any way inaccurate, despite the Applicant’s claims that he never provided the answers and statements contained in the transcript. The Applicant identified himself in the EUO and was able to provide all relevant personal information and had his counsel present during the event and at this hearing. At no times has counsel advised or made any submissions that suggest the EUO transcript is inaccurate. Thus, I conclude that is a true account of the Applicant’s answers provided at the EUO.
- [20] As previously noted, the discrepancies in the Applicant’s account of the accident throughout his various statements to assessors and on various records are substantial and numerous. For example, the Applicant reported at the EUO that the vehicles collided while they were both in motion and that the airbags deployed. At this hearing, the Applicant testified that OA’s vehicle hit the other vehicle when the other vehicle stopped or slowed suddenly and that the airbags did not deploy. In contrast, photographs of the vehicles clearly demonstrate that no airbags deployed. Similarly, the police report indicates that the Applicant and OA reported to police that the other vehicle was not in motion when it was struck by the vehicle driven by OA.
- [21] Another remarkable discrepancy is that the Applicant reported in the EUO that he was out shopping for the day and ate lunch at an all-you-can-eat buffet and was returning home when the accident occurred. Yet, the province was engaged in wide-ranging Covid-19 preventative restrictions at the time, which barred the opening of such businesses to the public. In further contradiction, during testimony the Applicant stated that the accident occurred when he and OA were returning home from a chiropractic appointment at SpineTec that never occurred because the business was closed.

- [22] In yet another example of inaccurate reporting, the Applicant testified that he was unable to recall the colour of the vehicle that OA's vehicle struck but stated that the rear end of it was "destroyed". However, WN testified that his vehicle had minor damage that he only noticed once he went closer to inspect the vehicle. Photographs demonstrate that the damage was not significant and would never be reasonably described as destroyed.
- [23] The Applicant reported that he called the police immediately after the accident both in his EUO and testimony, but this is contradicted by the evidence. The other driver, WN, testified that he saw only one person in or around the vehicle immediately following the accident and the driver of the vehicle, OA, refused to call the police despite having a mobile phone and WN did not. Further complicating the account of events provided by the Applicant, he testified that he could not remember the mobile phone number he held at the time of the accident and refused to produce any mobile phone records. Mobile phone records have been used in prior cases at the Tribunal to corroborate a person's location at the time of an accident, as outlined in *G.S. vs. The Personal Insurance Company*, 2020 CanLII 98734 (ON LAT) and *ZJ v. Wawanesa Mutual Insurance Company-008967/AABS – R*, 2021 CanLII 111137 (ON LAT). I draw an adverse inference regarding the Applicant's outright refusal to produce the records and find that the records would be detrimental to the Applicant's claim had they been produced. The Applicant testified that he had a mobile phone with him at the time of the accident and the records from that phone would indicate his approximate location, whether he called the police, and the timing of the events. The records could ultimately corroborate his account of the accident. However, the failure to produce the records or permit the Respondent to obtain the records at its expense, suggests that they would be unhelpful to the Applicant.
- [24] Another remarkable comment during the Applicant's testimony was that the other driver, whom OA's vehicle hit from behind, left the scene of the accident before he or OA were able to get his licence and insurance information. He further stated that the police eventually told him that the other driver left the scene of the accident because he was driving unaccompanied with a class G1 licence. Yet, the testimony from WN directly contradicts such an account and the police report is silent on any vehicle failing to remain at the scene of the accident. The police report notes that WN held a class G licence, which WN confirmed during testimony. As previously noted, WN testified that he asked the other driver for his licence and insurance information at the scene and the driver refused, which is in direct contrast to the Applicant's version of events.

- [25] Returning my attention to the police report, it appears to shed light on a possible reason why OA was reluctant to provide his driver's licence and insurance information to WN. The report notes that it was OA who held a class G1 licence at the time of the accident. This is confirmed in an AutoPlus Gold Report, dated November 16, 2021. The AutoPlus Gold Report states that OA held a class G1 driver's licence and has been charged with driving unaccompanied on at least four occasions. If OA was driving unaccompanied at the time of the accident, it would explain his reluctance to produce his information for the other driver. It also would explain the delay between the time of the accident and when it was reported to police, which would permit the Applicant time to arrive at the scene of the accident.
- [26] Lastly, the Applicant testified and reported to assessors that he went to the hospital immediately following the accident but is unable to substantiate that claim. The multidisciplinary insurer's examination report dated August 12, 2021 states that the Applicant advised occupational therapist, Atul Kaul, that he was taken to the hospital following the accident, he advised Dr. S. Hasan, psychiatrist, that he was taken to the hospital from the scene by ambulance, and advised Dr. D. Berbrayer, physiatrist, that the airbags deployed, that he was helped out of the vehicle, and taken to the hospital by his friend, OA. Yet, the Applicant produced no hospital records to confirm that he sought emergency medical care immediately following the accident.

The Applicant failed to produce his only material witness to the accident

- [27] The Applicant's failure to produce his only material witness to the accident is fatal to his claim and I draw an adverse inference as a result. The Applicant failed to produce OA, whom was an anticipated witness for this hearing and could corroborate his account of the events. His absence at the hearing, without any reason for it, is suspicious.
- [28] The Applicant claims to have been a passenger involved in an accident, yet he was unable to produce OA, the driver of the vehicle as a witness. This occurred despite the Applicant advising the Tribunal and the Respondent at the outset of the hearing that OA would be a witness to the hearing. Further, the Applicant provided no reasons why OA was unable to participate in the hearing, despite significant flexibility in the hearing schedule.
- [29] OA was the driver of one of the vehicles involved in the accident and could corroborate the Applicant's account of the events on January 13, 2020. The Applicant's failure to produce him as a witness causes me to question the validity of the evidence provided by the Applicant. One of the best ways to test the

evidence of a witness is to subject them to a cross examination. This was the case for the Applicant, whose account of the accident could not withstand the scrutiny of a cross examination. His failure to produce OA denies the Respondent an opportunity to test the evidence and, as a result, I draw an adverse inference against the Applicant for his failure to produce OA to corroborate his claims.

[30] Further, the Applicant asked to include a photocopy of OA's driver's licence as part of the evidence for this hearing, but the Respondent objected. I agreed with the Respondent and denied the Applicant the opportunity to present the evidence for two reasons. First, it was disclosed late and precluded the Respondent from reviewing it and testing the accuracy or validity of the document leading to the hearing. The Respondent's inability to test the accuracy or validity of the document is an important factor considering the Applicant's lack of credibility. Second, I felt it was inappropriate to include the evidence related to a witness who failed to attend the hearing. As explained previously, the Applicant advised the Respondent and the Tribunal that he would produce OM as a witness, yet he never did and never gave any explanation for his absence. Thus, the Respondent would be unable to test the evidence by way of cross examination, causing further prejudice to it.

[31] The Applicant's wife, AE, was unable to corroborate the Applicant's account of the accident in testimony. She was not present at the scene of the accident and was unable to provide a first-hand account of it. Her recollection of the timing of the events leading up to the Applicant's departure from their home prior to the accident is inconsistent with the Applicant's timing. AE testified that the Applicant stayed home while she grocery shopped on the day of the accident and that he helped unload groceries upon her return. She reported that the two had lunch together and the Applicant was picked up by OA after. She was unsure where they were going but denied that it was to an appointment for treatment. AE testified that the Applicant returned home following the accident at about 10 or 11 p.m., and that he did not go to the hospital that night.

[32] Dr. J. Allen, formerly known as Dr. J. Paton, chiropractor, was the only other witness produced by the Applicant, however his testimony was completely unhelpful to the Applicant. Dr. Allen was unfamiliar with the Applicant, his care, and the events surrounding the accident. He testified that his office typically gets a police report of the accident but was unable to confirm if that was the case for the Applicant or whether he simply accepted the Applicant's account of the events. Notably, in testimony Dr. Allen agreed that certain intake notes from SpineTec were authored by him and that they state the Applicant reported to

have been the front-seat passenger in a vehicle involved in a rear-end collision and the airbags deployed. At best, Dr. Allen's testimony confirmed that the Applicant has wilfully misrepresented certain circumstances of the accident by confirming that the Applicant reported that the airbags deployed in the vehicle he was allegedly in, when they in fact did not deploy.

The only witness to the accident denied the Applicant's involvement

- [33] I find the testimony of the driver of the other vehicle, WN, to be a compelling account of the events and prefer his account of the accident over that of the Applicant's.
- [34] WN testified that the accident occurred around 4:15 p.m. and that he was struck from behind by another vehicle, which he believed included no passengers. WN testified that the other driver refused to produce his licence and insurance information. He further stated that he consulted an auto insurance information card which advised that he could leave the scene of a minor accident if no parties involved had any injuries. He said that he decided to leave the scene after the other driver refused to produce his information for a second time. He noted that his second request for the driver's information occurred at the window of the driver's vehicle, and that he noticed no other passengers in or around the vehicle at that time.
- [35] WN testified that he provided a recollection of the events based on notes he made following the accident. Those notes were not included in the evidence for this hearing. This issue was raised by the Applicant in closing submissions however I find that it is unnecessary to include the notes because they were not produced for the Respondent either and WN was available for and subject to cross examination.
- [36] I find that WN provided a consistent account of the events and circumstances surrounding the accident. During testimony and with the aid of his notes he was able to confirm the model and colour of other vehicle involved in the accident and, while noting that he had difficulty guessing a person's age, described the driver as a person much younger than his 66 years of age, guessing to be in his 20s or 30s. This is consistent with the statement WN gave to the Respondent's investigator, on November 11, 2021. He also noted that his vehicle may have been bumped forward a few feet, but was unsure of how much, and that he was certain he never bumped into anything else. Nothing in WN's testimony was proven to be inaccurate in cross-examination.

- [37] In closing submissions, the Applicant attacked WN's credibility because, according to him, WN's account of the accident is uncorroborated. I find this to be a completely untrue characterization of WN's testimony. Further, I consider the Applicant's submissions to be disingenuous in light of the fact that it is the Applicant himself who has an uncorroborated story of the accident and the events surrounding it, and it is the Applicant who carries the onus to demonstrate that the accident occurred.
- [38] Considering the above, I conclude that the Applicant wilfully misrepresented his involvement in the accident in an attempt to procure accident benefits when he was otherwise not entitled to any.

REPAYMENT

- [39] Having determined that the Respondent paid benefits to the Applicant on account of his wilful misrepresentation, it follows that the Respondent is entitled to seek a repayment of the benefits paid to the Applicant.
- [40] Section 52(1)(a) of the *Schedule* permits the Respondent to claim a repayment of any benefit paid to the Applicant as a result of wilful misrepresentation or fraud.
- [41] Section 52(2) of the *Schedule* provides that the Respondent must give the Applicant notice of the amount that is required to be repaid.
- [42] In order to claim entitlement to a repayment of benefits due to misrepresentation, the Respondent must demonstrate that the Applicant committed an act of wilful misrepresentation and that it properly advised him that it sought a repayment of the benefits paid. My analysis above demonstrates that the Applicant wilfully misrepresented his involvement in the accident. As a result, the Respondent has satisfied the first part of the test in order to claim a repayment of benefits.
- [43] I find that the Respondent's notice dated March 2, 2022 ("the Notice") is compliant with section 52 of the *Schedule*. The Notice states that it the Respondent is entitled to a repayment pursuant to section 52 of the *Schedule* on account of fraud or misrepresentation. The Notice clearly and unequivocally states that the Respondent seeks a repayment in the amount of \$6,012.65 for medical and rehabilitation benefits paid to the Applicant. It states that the reason for the repayment is because his claim in relation to the alleged accident on January 13, 2021 has been denied pursuant to sections 3(1) & 53 of the *Schedule*.

- [44] The Notice goes on to state that the reasons for the request for repayment. It notes that the Respondent's investigation concluded that the Applicant wilfully misrepresented material facts with respect to his application for accident benefits and it is the Respondent's position that the accident did not occur as the Applicant reported and that the Applicant was not in OA's vehicle at the time of the accident.
- [45] The Applicant has never contested the validity of the Notice or the Respondent's request for repayment. Likewise, he does not contest that the value of benefits paid to him to-date is \$6,012.65.

The misrepresentation was wilful

- [46] I conclude that the Applicant's misrepresentation of his involvement in the accident was a wilful attempt to access accident benefits in a situation where he was not entitled to any.
- [47] The Applicant, through his counsel, claimed that the misrepresentations noted throughout this hearing were not wilful. He submits that any misrepresentations can be attributed to a language barrier and his pre-existing psychological injuries. However, as noted by the Respondent, the Applicant presented no evidence from any healthcare professional, be it testimony or clinical notes and records, that suggests that the Applicant is unable to tell the truth or accurately recall events. Thus, I dismiss the argument on the grounds that it is unsubstantiated.
- [48] The only explanation for the Applicant's wilful misrepresentation of his involvement in an accident he was not involved in is that it was done to collect benefits he is not entitled to. Thus, I conclude that the benefits he received were as a result of wilful misrepresentation or fraud and that the Respondent is entitled to terminate those benefits pursuant to section 53 of the *Schedule*. Further, I conclude that the Respondent is entitled to a repayment of benefits in the amount of \$6,012.65 pursuant to section 52 of the *Schedule*.

Interest

- [49] Interest applies to the overdue repayment of benefits, pursuant to section 52(5) of the *Schedule*.
- [50] Having concluded that the Respondent is entitled to a repayment of benefits in the amount of \$6,012.65, it follows that it is entitled to interest is payable pursuant to the bank rate as per in sections 52(5) and 52(6) of the *Schedule*.

[51] Section 51 of the *Schedule* provides that the Applicant is entitled to interest on the overdue payment of benefits. Having found that the Applicant is not entitled to any of the benefits claimed, it follows that he is not entitled to interest.

Award

[52] The Applicant sought an award under section 10 of Reg. 664. He submits that the Respondent unreasonably terminated payment of benefits based on the uncorroborated report of WN.

[53] I find no award payable. Pursuant to section 10 of Reg. 664, the Tribunal may grant an award of up to 50 per cent of the total benefits payable if it finds that an insurer unreasonably withheld or delayed the payment of benefits. Having found no benefits payable, it follows that no benefits were withheld, and no award is payable.

CONCLUSION AND ORDER

[54] The Applicant was not involved in the subject accident on January 13, 2021 and is not entitled to benefits as a result.

[55] The Respondent is entitled to a repayment of benefits in the amount of \$6,012.65, which were paid on account of the Applicant's wilful misrepresentation when he falsely claimed to be involved in the accident.

[56] The Respondent is entitled to interest related to the repayment of benefits pursuant to section 52(5) of the *Schedule*

Released: August 16, 2023



Brian Norris
Adjudicator