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

Date: 2017-12-15
Tribunal File Number: 17-000532/AABS
Case Name: 17-000532 v Intact Insurance Company

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:

M.D.

Applicant

and

Intact Insurance Company

Respondent

AMENDED DECISION

ADJUDICATOR: Deborah Neilson

APPEARANCES:

For the Applicant:	MD, Applicant
	Kristine Geronimo, counsel
For the Respondent:	Tina Cumbo, representative
	John Desjardins, counsel
	Marko Radulovic, counsel

HEARD: In person on July 12 and 13, 2017
By teleconference on July 17, 2017

I. OVERVIEW

[1] The applicant claims he was involved in a motor vehicle accident on March 13, 2014. He applied to the respondent, Intact Insurance Company, for statutory accident benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* ("*Schedule*"). The respondent stopped paying the applicant income replacement benefits pending receipt of information from the applicant. The applicant applied to the Licence Appeal Tribunal (the "Tribunal") to dispute the suspension of his income replacement benefits. The respondent has since denied that the applicant was in a motor vehicle accident and claims the March 13, 2014 collision was staged. The respondent also claims the applicant made a material misrepresentation in describing the circumstances surrounding the incident on March 13, 2014. The parties have sought a preliminary determination on whether the applicant was involved in an accident and whether he wilfully made a material misrepresentation when he applied for accident benefits.

[2] The applicant denies that the collision was staged. He claims that he was stopped at an intersection behind a Mazda when a Hyundai car rear-ended his Toyota Tundra truck, forcing the Tundra forward into the rear end of the Mazda. The applicant claims that his Tundra struck the Mazda once. The respondent relies on an accident reconstruction report and claims that the collision could not have happened in the manner reported by the applicant. The accident reconstruction engineer determined that a collision likely occurred between the applicant's Tundra and the Hyundai, but the Tundra struck the Mazda five times or not at all. The respondent's position is that all three cars were part of a conspiracy to stage an accident. The applicant was either not in an accident as reported or he staged an accident with the two other vehicles.

[3] The respondent alleges that the applicant is not credible. It relies on a number of circumstances, connections and similarities that the applicant's collision has in common with four other collisions that took place over a four month period to allege the collision was staged. Some of those factors are that all five accidents occurred after 10:00 p.m., rental vehicles were involved in 4 of the accidents, and some of the occupants or drivers of the vehicles were Facebook friends with other drivers or occupants in the other collisions, or they attended Seneca College at the same time. This includes the fact that the applicant's collision took place at the same location as another accident that occurred about 5 weeks later and involved a passenger in a vehicle who was a Facebook friend with the driver of the Mazda involved in the applicant's collision.

[4] I heard evidence from the applicant, the respondent's accident reconstruction engineer, Michael Jenkins, and Pratheepan Kumaran, a Unit Manager for the respondent who conducted an investigation into the five accidents.

II. ISSUES

[5] The substantive issues I must determine are as follows;

a. Was the collision an "accident" as defined by section 3(1) of the *Schedule*?
b. 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 s.53 of the *Schedule*?

[6] For me to find that the applicant's collision was an accident, the applicant must prove on a balance of probabilities that the collision was an incident in which the use or operation of an automobile directly caused an impairment as defined in s.3(1) of the *Schedule*. In order to determine the issue, I must determine whether the accident was staged.

[7] The applicant raised a preliminary issue at the start of the hearing on whether he was required to present evidence first or whether the respondent was required to present evidence first, given that the respondent was alleging that he made a material misrepresentation.

III. RESULT

[8] I found that the applicant was required to present his evidence first because he has the onus to prove he was in an accident as defined under s. 3(1) of the *Schedule.*

[9] I find the applicant has failed to prove that he was in an accident as defined in s.3(1) of the *Schedule*. I find the collision did not occur in the manner the applicant claimed it did. I find the respondent was entitled to terminate benefits under s.53 of the *Schedule* because the applicant wilfully made a material misrepresentation in his application for benefits.

IV. BURDEN OF PROOF

[10] The applicant claimed that the respondent is relying on an exclusion in the *Schedule* to deny the applicant's entitlement to benefits. Part VII of the *Schedule* deals with general exclusions for a claimant's actions such as driving without insurance, without a driver's licence, or where the driver was engaged in a crime at the time of the accident and is subsequently convicted of that crime. The respondent does not rely on that Part of the *Schedule.* The respondent relies on s.53 of the *Schedule,* which allows an insurer to terminate the payment of benefits to or on behalf of an insured person if he or she wilfully misrepresented material

facts with respect to the application for the benefit and the insurer provides the insured person with its reasons for terminating the benefit.

[11] The applicant relies on a couple of arbitration decisions from the Financial Services Commission of Ontario (FSCO)[1] that determined the insurer has the initial burden of proving the facts it relies on when it claims an applicant made a material misrepresentation with respect to the application for a benefit. I find the cases do not assist the applicant. They were overruled by the Divisional Court's judicial review of a FSCO appeal decision of *Owusu v. TD Home & Auto Insurance Company et al*.[2] In the FSCO appeal, the Director's Delegate relied on a decision of the Ontario Court of Appeal, *Shakur v. Pilot* [3], which held that the burden of proof rests on the insured person to establish a right to recover under the terms of the policy and does not shift. The Divisional Court determined that *Shakur and Pilot* was correctly applied to claims for accident benefits in *Owusu v. TD Home & Auto*.

[12] I am bound by the Court of Appeal and, accordingly, I accepted the respondent's submission that the burden of proof to show that he was in an accident in accordance with s.3(1) of the *Schedule* rests with the applicant. For this reason, I ordered the applicant to present his case first.

V. ACCIDENT

[13] In order to claim accident benefits from the respondent, the applicant must prove on a balance of probabilities that he 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 caused an impairment. The respondent submits that the collision the applicant was involved in was staged. The applicant claims that even if the accident was staged, a staged collision will meet the definition of "accident" in the *Schedule.* I disagree with the applicant and have determined that if the collision was staged, the applicant will be unable to prove he was in an accident as defined in the *Schedule* for the following reasons.

[14] The applicant relies on the Supreme Court of Canada decision of *Amos and Insurance Corporation of British Columbia*[4] for interpreting the definition what is meant by the use or operation of a vehicle. Mr. Amos was shot while driving his vehicle. The applicant submits that the relevant test from *Amos* is as follows:

[1] *Hassan and State Farm Mutual Automobile Insurance Co.* (FSC0 A13-003484, March 10, 2015) and Kanagalingam and Economical Mutual Insurance Company (FSCO A12-007802, January 19, 2015)
[2] *Owusu v. TD Home & Auto Insurance Company et al*, 2010 ONSC 6627 (CanLII) (Ont. Div. Ct.)
[3] *Shakur v. Pilot Insurance Co.* (C.A.), 1990 CanLII 6671 (Ont. C.A.)
[4] [1995] 3 SCR 405

a. Did the accident result from the ordinary and well-known activities to which automobiles are put, or was the car used for an "ordinary and well-known" motoring activity?

b. Is there some nexus or causal relationship (not necessarily a direct or proximate causal relationship) between the appellant's injuries and the ownership, use or operation of his vehicle, or is the connection between the injuries and the ownership, use or operation of the vehicle merely incidental or fortuitous?

The first part of the two part test, the ordinary and well known activities to which vehicles are put, is described as the purpose test. The second part of the test, the nexus or causal relationship, is the causation test. [5]

[15] The *Amos* purpose test has been found by the Ontario Court of Appeal to apply to the definition of "accident" in s.3(1) of the *Schedule*.[6] This means that for me to find that the applicant's collision was an accident as defined in s.3(1) of the *Schedule,* the applicant must prove on a balance of probabilities that the collision resulted from the ordinary and well-known activities to which automobiles are put. The applicant submits that travelling in a vehicle and stopping at a red light at an intersection, just as he was doing, is an ordinary and well known activity for a truck.

[16] The respondent relies on a number of decisions from the Financial Services Commission of Ontario (FSCO) that held that a staged accident is not an "accident" as defined in the *Schedule.*[7] Those cases appear to have accepted that deliberately driving a vehicle into another vehicle is not an ordinary or well known activity for vehicles without analysing the purpose test.

[17] The applicant relies on a more recent appeal decision from FSCO, *Madinei and Ebadi and TD General Insurance Company,* where Director's Delegate Evans

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[5] The causation test was rejected by the Court of Appeal in *Chisholm v. Liberty Mutual Group*, 2002 ONCA 45020 (CanLII) (Ont. C.A.) because *Amos* dealt with British Columbia legislation that required insurers to provide benefits for death or injury caused by an accident that "arose out of the ownership, use or operation of a vehicle." The term "arose" in the B.C. legislation is much broader than the "direct cause" requirement in the definition of "accident" in s.3(1) of the *Schedule*. Further, ownership of the automobile was part of the definition of "accident" that Supreme Court of Canada was dealing with in *Amos*. Ownership of a vehicle has no relationship to the definition of "accident" in s.3(1) of the *Schedule*.

[6] *Chisholm v. Liberty Mutual Group*, 2002 ONCA 45020 (CanLII) (Ont. C.A.), [2002] O.J. No.3135
Greenhalgh v. ING Halifax Insurance Co., 2004 CarswellOnt 3426 (Ont. C.A.) leave to appeal to the Supreme Court
of Canada denied, *Downer v. Personal Insurance Co*. , 2012 ONCA 302 (CanLII) (Ont. C.A.) leave to appeal to the
Supreme Court of Canada denied

[7] *Johnson and State Farm* (FSCO A12-007836, July 23, 2015) , *Azad, Bedros, and Vayranosh and Nordic* (FSCO A12-003253, January 19, 2015) and *Kagan and CAA Insurance* (FSCO A12-003935, June 2, 2014)

determined that a staged collision does meet the definition of "accident" in s.3(1) of the *Schedule.* I am not bound by *Madinei and Ebadi* and find that it does not assist the applicant.

[18] Section 118 of the *Insurance Act*, RSO 1990, c I.8[8] essentially states that a person shall not profit under an insurance policy from that person's intentional or criminal act. This is essentially a codification of a long held public policy that was applied in the common law dealing with insurance. Director's Delegate Evans held in *Madinei and Ebadi,* that he need not consider the history of the common law that had applied public policy in the interpretation of "accident." Director's Delegate Evans did not discuss s.118 of the *Insurance Act* and relied on the Court of Appeal decision of *Vijeyekumar*[9] as his authority for rejecting public policy. That case dealt with whether Mr. Vijeyekumar's spouse and child were entitled to statutory accident death benefits as a result of Mr. Vijeyekumar's suicide. He died from carbon monoxide poisoning by attaching a hose from the exhaust pipe of his running car into the car window. The Court of Appeal noted that suicide was no longer a crime and that there was no specific exclusion in the applicable version of the *Schedule* for suicide, unlike an earlier version of the *Schedule*[10]*.* The Court of Appeal agreed with the trial judge that the suicide was an "accident" under the *Schedule*.

[19] According to the reasoning in the *Madinei and Ebadi* decision*,* a spouse who murders his or her spouse by car would be entitled to claim statutory accident death benefits. I do not agree with Director Delegate Evans that this is what the Court of Appeal meant in *Vijeyekumar*. The Court of Appeal in *Vijeyekumar* did not reject all public policy considerations, only those dealing with suicide, in part because suicide is no longer a crime. When the Court of Appeal held that a suicide by car meets the definition of "accident," they stated that their interpretation was consistent with the case law that considers the victim's perspective in determining whether an event is an accident. In the same manner that murder is "accidental" from the victim's standpoint, Mr. Vijeyekumar's death was accidental from the victims' or his family's perspective. The victims are the people who claim benefits, but did not commit the intentional act causing death. I do not interpret this to mean that the Court of Appeal has overruled s.118 of the *Insurance Act* and discarded the public policy against a person profiting from an insurance policy because of his

[8] Section 118 of the *Insurance Act* states that unless the contract otherwise provides, a contravention of any criminal or other law in force in Ontario or elsewhere does not, by that fact alone, render unenforceable a claim for indemnity under a contract of insurance except where the contravention is committed by the insured, or by another person with the consent of the insured, with intent to bring about loss or damage. This applies to disability benefits, but not to death benefits under contracts of life insurance .

[9] *Vijeyekumar v. State Farm Mutual Automobile Insurance Company*, 1999 CanLII 1640 (ON CA)

[10] Part VII of the *Schedule* lists a series of exclusions denying accident benefits to an insured in specified cases of wrongdoing. This list of exclusions, however, does not apply to the payment of death and funeral benefits

intentional acts. The deceased in a suicide does not profit from the insurance. In a staged accident, that is exactly what the claimants seek.

[20] In *Madinei and Ebadi*, Director's Delegate Evans relied on the obiter comments of the Supreme Court of Canada in *Citadel General Assurance Co. v. Vytlingam* [11], that even purposefully driving a car off a bridge still satisfies the *Amos* purpose test. In the *Vytlingam* case, two thrill seekers dropped boulders off an overpass onto the Vytlingam's car as it was driving under the overpass. The issue in that case had nothing to do with entitlement to statutory accident benefits. The issue was whether the thrill seekers who threw the boulder were "motorists" as defined in the Vytlingam's policy. The definition was important for determining whether the Vytlingams had uninsured underinsured coverage under their automobile insurance policy. I find *Vytlingam* is distinguishable because the insurance coverage sought by the Vytlingams was not for their intentional acts, but for the damage they suffered from the intentional acts of the thrill seekers.

[21] When the definition of "accident" in the *Schedule* is interpreted in light of s.118 of the *Insurance Act* , "accident" does not include a staged collision. The purpose of a staged collision is for the participants to profit from the insurance policy. A definition of "accident" that allows people to profit under the insurance policy because of their intentional acts is contrary to public policy and s.118 of the *Insurance Act.*

[22] The respondent relies on the following in support of its allegation that the collision was staged;

a. The applicant's evidence is logically inconsistent with his previous statements and the statement of one of the occupants;
b. The applicant's evidence is inconsistent with the accident reconstruction report of Mr. Jenkins;
c. The applicant has presented no expert or other evidence to call into question the findings and opinion of Mr. Jenkins; and
d. An adverse inference should be drawn because of the applicant's failure to call evidence from any of the occupants of his truck or any of the people involved in the collision.

a. Inconsistent Statements

[23] I agree that the applicant's evidence is inconsistent and, when provided with an opportunity to explain the inconsistencies between prior statements, he was unable to do so in a satisfactory manner. The inconsistencies arise in the applicant's evidence in a number of instances. The most significant include the events leading up to the accident and the explanation of why the applicant was at

[11] *Citadel General Assurance Co. v. Vytlingam* [2007] 3 SCR 373, 2007 SCC 46 (CanLII)

the accident location at that time. The inconsistencies in the applicant's evidence are seen in the following:

i. his statement dated April 28, 2014;
ii. his statement to the police on March 13, 2014;
iii. his examination under oath (EUO) taken on February 17, 2015; and
iv. his testimony at the hearing.

i). THE EVENTS LEADING UP TO THE ACCIDENT

February 17, 2015 - EUO of the Applicant

[24] The applicant lived in Stoney Creek and was a self-employed pipe fitter. The accident took place in Toronto at the intersection of Bayview Avenue and Proctor Avenue. The applicant stated at his EUO that:

- He worked in Hamilton the day of the accident and drove to Toronto to see his girlfriend;
- He picked up his girlfriend around 7:00 or 8:00 p.m., then took her out for about three hours for coffee and a drive.
- He took her back home around 10:00 p.m. then went to visit a friend Nick who was part owner of OCHS where the applicant worked.
- He picked up EP at her house on Rayette Street around 11:30 p.m. to 12:00 a.m. They drove to the Tim Horton's coffee shop at Bathurst and Steeles where they ran into EP's friend, Alex. Alex was already at the Tim Horton's.
- They went inside the Tim Hortons (not the drive through) and stayed there for about 15 to 20 minutes.
- Alex asked the applicant for a ride and then they decided to go somewhere to eat.
- They left together after midnight in order to go eat at Dave & Buster's at Hwy 7 and Hwy 400.
- The applicant initially said that he had never met Alex before that night and never spoke to him after. The applicant later stated in his EUO that Alex had shown up at the OCHS office a couple of times, but the applicant never spoke to him or communicated with him. a drive.

Statement dated April 28, 2014 and testimony of the applicant

[25] In his statement dated April 28, 2014, the applicant said he was in Toronto in order to go shopping. At the hearing, he said he was in Toronto because he was working there that day. At the hearing, after being asked about the three different stories, the applicant stated he was doing an inspection in Toronto, and then said his initial statement was probably correct. He stated he gave three different versions because he has psychological issues.

[26] The applicant testified that they left Tim's at about 11:30 p.m. or so, or about 15 to 20 minutes before the accident, and did not decide to go to Dave & Buster's until after they had been driving around. The applicant agreed they may have left Tim Horton's after midnight.

EUO of EP

[27] The transcript from EP's examination under oath taken on February 15, 2015 was entered as evidence. EP stated at her EUO that she believed the applicant and Alex had met before the night of the accident, but they were not friends. She could not recall how they met up with Alex on the night of the accident, if he was in the applicant's Tundra when the applicant picked her up or if they picked up Alex afterward. She had never been to Alex's house and was certain that he was already in the Tundra when they went through the Tim Horton's drive through at Bathurst and Steeles.

[28] The applicant testified that he did not know why EP said he knew Alex.

ii) EXPLANATION OF WHY THE APPLICANT WAS AT THE ACCIDENT LOCATION AT THAT TIME

[29] I find that the explanation given by the applicant about why he ended up at the accident scene, in the opposite direction of their intended destination when he is familiar with the area is not logical.

February 17, 2015 - EUO of the applicant

[30] Dave & Buster's is located in the opposite direction from the Tim Horton's in relation to the location of the accident. When asked at his EUO how he ended up at Bayview and Proctor heading south when Dave & Buster's was in the opposite direction, the applicant claimed that he was not familiar with the area and was following EP's directions. Then he said Alex was telling him where to turn

[31] The applicant said at his EUO that he did not talk to Alex because Alex did not really speak. Alex chatted quite a bit in Russian and the applicant does not speak or understand Russian. Alex could not understand the applicant and spoke broken English. Either he did not speak with Alex because of the language barrier, in which case he did not get directions from Alex, or the applicant was not being truthful about not speaking to Alex until he was at the accident scene. It is also not clear to me how the applicant could know that Alex lived locally if he did not speak to him and had never met him before.

[32] EP stated at her EUO that she did not know how they ended up at the accident site because she was not paying attention. She was not paying attention to where they were because she was half turned in her seat talking to Alex. Her evidence is not consistent with the applicant's evidence that he was following her directions.

Statement dated April 28, 2014 and testimony of the applicant

[33] In his statement, the applicant said he used to work in the area and so was familiar with it. At the hearing, he said he is familiar with the area and knew how to get to Dave & Buster's from the Tim Horton's. He did not know why he needed the directions from EP and Alex. He said he was following both EP's and Alex's directions because they knew the area better than he did because they were local. The applicant also testified that he never spoke to Alex until at the scene of the accident.

iii). DETAILS OF THE ACCIDENT

February 17, 2015 - EUO of the applicant and statement dated April 28, 2014

[34] The applicant stated he was driving south on Bayview and came to a stop behind a car that was stopped at a red light. He was at a complete stop. About 15 to 30 seconds later he was rear ended and he did not see it coming. The Hyundai struck the rear of the Tundra once and pushed the Tundra forward into the Mazda. He struck the Mazda once only.

[35] The applicant also stated on April 28, 2014 that he tried to brace himself with his right hand. This statement would not make sense if he did not know his vehicle was going to be struck as he had testified.

Statement to the police

[36] The applicant told the police that he was coming up to a red light and was almost stopped when he was struck from behind and pushed into the car in front of him.

Testimony of the applicant

[37] When asked about his inconsistent statements at the hearing, the applicant said that he was completely stopped, then started creeping up or advancing to close the gap between the Tundra and the Mazda. He explained that he gave three different versions of the accident because it was a traumatic event. He was consistent in his evidence that he struck the Mazda in front of him once only.

[38] It is not uncommon for a person's evidence to change over time without any intent to mislead. However, the applicant was very certain about his evidence in some areas, despite being confronted with his inconsistent statements. His certainty of some aspects of the evening is inconsistent with the applicant's submission that his memory is poor. His insistence and consistent evidence that he had never met Alex before the night of the collision is inconsistent with his excuse that his memory is poor because the accident occurred so long ago. Further, he submitted his inconsistencies were due to psychological problems. I was presented with no evidence such as a neuropsychological assessment report to support the

applicant's allegation that he has a poor memory because he has psychological problems.

[39] I find the applicant's evidence is internally or logically inconsistent. For example, he claimed that he was freezing while waiting for the emergency services to arrive because his vehicle would not start after the accident. This is inconsistent with his evidence of how long he was outside and how long he sat in his vehicle before an ambulance arrived. According to the applicant's evidence and the motor vehicle accident report, he could not have been outside more than 5 minutes and waited inside the Tundra for no more than 10 minutes before the ambulance arrived. I find it highly unlikely that after 15 minutes the inside of the applicant's Tundra would be freezing, especially with the body heat of two other people in the vehicle. This, however, raises the question of whether the applicant was outside for a longer period of time and, if so, why.

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

b. Inconsistencies with the Jenkins Report

[41] The applicant's claim that the Tundra struck the Mazda in front of him no more than once is not consistent with the accident reconstruction report of Michael Jenkins, the respondent's accident reconstruction engineer. Mr. Jenkins' opinion was that the Tundra either did not strike the Mazda, or struck it no less than five times.

[42] Mr. Jenkins' opinion was that the damage to the Hyundai's front end and the Tundra's rear end was consistent with the Hyundai rear-ending the Tundra. However it was not consistent with the Tundra then being pushed forward and hitting the Mazda only once. The applicant had estimated the Hyundai was travelling 60 km per hour when it struck the Tundra. His estimate was based on what the police accident report. However, Mr. Jenkins' opinion was that the Hyundai was travelling between 35 km/hr to 50 km/hr or much slower than 60 km/hr.

[43] I accept Mr. Jenkins' opinion. He obtained his Bachelor of Engineering Science in Mechanical Engineering in 2000. His credentials were not questioned and given his credentials and experience, I accepted that he is an expert in mechanical engineering, automotive engineering and accident reconstruction.

[44] Mr. Jenkins did not inspect the vehicles involved in the accident. He based his opinion on photographs of the vehicles, the accident report, the statement of the applicant, EP's EUO, the VIN histories for the vehicles, their damage appraisals and a GoldPlus report. The applicant questioned how accurate Mr. Jenkins' opinion on the impact between the Mazda and the Tundra could be given that he

did not conduct a physical inspection of the vehicles. Mr. Jenkins has completed about 200 to 250 accident reconstructions based on photographs without a physical inspection and is comfortable doing so. There was no expert or other evidence presented by the applicant to question Mr. Jenkins' claim that an accident may be reconstructed without inspecting the vehicles involved.

[45] The applicant submits that little weight should be given to Mr. Jenkins' opinion that if the Mazda and the Tundra struck each other, they did so no less than five times because his opinion was based on a photograph taken at an angle. Mr. Jenkins' evidence was that the photograph of the Tundra's front bumper was taken at an angle instead of head on and this prevented a true comparison of numerous scratch marks on the Tundra to the damage to the Mazda's rear end. None of the other damage on the Tundra's front bumper correlated to the damage to the rear end of the Mazda. The numerous scratches on the Tundra may have correlated to a recessed licence plate feature on the Mazda, but because of the angle of the photo of the Tundra, Mr. Jenkins' could not provide a conclusive opinion that the Mazda caused the numerous scratches. However, he was certain that if it did, the scratches were consistent with more than one impact between the Tundra and the Mazda, contrary to the evidence of both the applicant and EP. I accept Mr. Jenkins' opinion and do not give it less weight because a better photograph would have disclosed either that, there was no impact between the Mazda and the Tundra, or they collided no less than five times. In either case, the mechanics of the accident are not consistent with the applicant's and EP's description.

[46] The applicant also submits that little weight be given to Mr. Jenkins opinion because he was not provided with photographs taken by the applicant of the Tundra a few days after the accident. I do not agree with the applicant. Mr. Jenkins reviewed those photographs at the hearing and they did not change his opinion. I was provided with no other evidence to question or refute Mr. Jenkins' opinion.

[47] The applicant also submits that little weight be given to Mr. Jenkins' opinion because he did not have the black boxes from the vehicles.[12] Mr. Jenkins' evidence was that the Mazda likely did not have a black box that would have recorded any useful information. He stated a black box may be helpful because it may disclose a change in speed. However, most black boxes do not record rear-end impacts. There are one to seven memory slots in a black box and they are overwritten sequentially if there are other accidents, such as there was with the applicant's Tundra in January 2015. This means that by the time the respondent was questioning how the incident occurred and that it should be getting the data from the black box, some or all of the data would have been overwritten from the January 2015 accident. While Mr. Jenkins' evidence was that a black box is

[12] A black box is a form of computer that is put in many vehicles by the manufacturer that records a limited amount of data under certain conditions. Special equipment is required in order to "read" the data from the black box and in some cases the information can only be obtained from data read by the manufacturer.

helpful, the lack of a black box did not prevent him from forming the opinion that the collision between the Mazda and the Tundra did not occur as stated by the applicant. I accept that Mr. Jenkins was still able to form his opinion despite the lack of information from any of the black boxes.

[48] According to Mr. Jenkins, the impact to the rear of the Tundra by the Hyundai would have propelled the Tundra forward. I take judicial notice of the fact that when a person is sitting in a vehicle that is suddenly accelerated forward, the person is still stationary and, accordingly is seems as if the person is forced or thrown back into their seat. The applicant's description of what happened to his body when the vehicles collided is the opposite of what one would expect. He stated at his EUO that upon the first impact, he went over the steering wheel and then bounced back and hit his head on the metal rail between the doors. The applicant's description is consistent with a front end impact, not a rear-end impact.

[49] I find that the applicant's evidence about how the collision occurred is inconstant with Mr. Jenkin's evidence. For this reason, together with the inconsistencies in the applicant's previous statements and the logical inconsistency to his evidence, I find the applicant's evidence as to what occurred the evening of March 12, 2014 and the early morning of March 13, 2014 is not reliable.

c. Failure to Call Corroborating Evidence

[50] I heard evidence from Pratheepan Kumaran, a Unit Claims Manager with the respondent who, at the time of the applicant's collision, was an investigator for the respondent. The applicant's collision along with four other collisions that occurred on March 5, 2014, April 4, 2014, May 5, 2014 and June 24, 2014 were flagged as a project for investigation for potentially staged accidents because of patterns or connections the applicant's collision had with those claims. Mr. Kumaran was assigned to investigate the applicant's claim and the other claims in the project. The factors that raise a red flag to the respondent for creating a project to investigate are as follows:

a. rental vehicles are involved;
b. the towing company used;
c. the time of day of the collisions;
d. the day of the week of the collisions;
e. patterns with locations such as geographic boundaries or similarities;
f. social media links; and
g. other community or social links such as attendance at the same college;

[51] Mr. Kumaran's evidence was that all the people involved in all five collisions were around the same age and each incident occurred after 10:00 p.m. Four out of five of the incidents involved rental vehicles. The collisions occurred in the same geographic area between Steeles to Hilda to Hwy 404 and from Bayview to Bathurst. Mr. Kumaran observed the Facebook pages of the various people

involved in the project collisions. According to his evidence, there are social media links between the passengers and drivers from 3 out of the 5 accidents. The most notable social media link was between that of the passenger of the Mazda the applicant allegedly rear-ended, who is Facebook friends with the driver of a vehicle struck by a U-Haul rental on April 4, 2014 at Bayview and Proctor, the same location as the applicant's collision. The driver of the Mazda and the driver of the U-Haul rental are Facebook friends with the driver of a vehicle struck on June 24, 2014 at Bayview and Steeles. Three of the people involved in that collision went to Seneca College around the same time as EP. The connections are red flags for a fraud investigator because there are too many connections to be coincidental and are typical indicators of a ring of conspirators who stage accidents.

[52] I accept that the social network community among the people involved in the five collisions, together with the other so-called coincidences, including those listed as factors by Mr. Kumaran, raise a strong possibility that this collision was staged. The applicant was aware that the respondent suspected the collision was staged by the nature of the questions put to him at his EUO. He had no doubt when he received the respondent's letter of February 16, 2017, advising that all benefits were terminated because the applicant was involved in staging the accident.

[53] There was no expert evidence to refute Mr. Jenkins' opinion. The applicant submits this is because he could not afford to retain an expert. That is unfortunate, but does not mean that I can give less weight to Mr. Jenkins' opinion. It means that it was incumbent upon the applicant to present some evidence to corroborate his story as to how the collision occurred. He could have called either EP or Alex as witnesses and did not do so. In fact, he submitted that he did not call EP because her evidence would have been construed as a misrepresentation. I find this to be essentially an admission by the applicant that EP was not called as a witness because her evidence would have been detrimental to the applicant's claim.

[54] The applicant submitted that he was unable to locate Alex to summons him as a witness to corroborate that an accident occurred. The applicant provided no evidence that was the case or of his attempts to do so. The applicant was in contact with EP three days before the hearing and EP is friends with Alex. I heard no evidence that the applicant made an effort to obtain Alex's contact information from EP.

[55] The applicant submits that the police report and the investigating officer's notes are proof the collision was not staged. I do not agree. The police arrived after the fact and did not witness the accident. The applicant's evidence was that the police did not ask him any questions about whether the collision was staged. The applicant has no information on the investigating officer's training with respect to staged accidents. Accordingly, the notes of the investigating officer do not address the issue of a staged accident and do not assist the applicant. I, therefore, draw an adverse inference from the applicant's failure to call any other witnesses to refute the respondent's allegations that the collision was staged.

[56] The applicant submits that the medical report from the respondent's neurologist, Dr. Brown, supports that the applicant was in an accident. The report was dated May 24, 2016, which was over two years after the alleged accident in this case. Dr. Brown provided an opinion that the applicant sustained a minor concussion and cervical radiculopathies of C6-7 consistent with the mechanism of the accident. Dr. Brown's opinion does not assist the applicant because Dr. Brown's report was based on what the applicant's statement and the applicant's information of what occurred. Dr. Brown did not have Mr. Jenkins' report. Further, from my review of Dr. Brown's report, it appears he was not aware that the applicant was in a motor vehicle accident on January 8, 2015. Without a discussion by Dr. Brown eliminating any other cause for his findings, I cannot accept that Dr. Brown's opinion is evidence that the applicant was in his Tundra when it was struck by the Hyundai.

[57] The applicant relies on the evidence of Mr. Kumaran that he did not have conclusive evidence that the accident was staged, only circumstantial evidence. Mr. Kumaran was not present during the testimony of the applicant and Mr. Kumaran is not the trier of fact. Although the evidence was circumstantial, I find that, because of the opinion of Mr. Jenkins, the unreliability of the applicant's evidence together with the adverse inference I have made against the applicant, the applicant has failed to satisfy his onus to show he was in an accident as defined in the *Schedule.*

[58] I have found the applicant's evidence is unreliable and there is no expert evidence to refute Mr. Jenkins' opinion. I have drawn an adverse inference from the applicant's failure to call any evidence to corroborate his version of the collision. For all of these reasons, I find, therefore, that the collision was staged.

[59] Given my finding that the accident was staged, I find that the applicant has failed to prove that he was injured in an accident as defined in s.3(1) of the *Schedule*.

VI. MISREPRESENTATION

[60] Under s.53 of the *Schedule*, the respondent may stop paying the applicant benefits if I determine that the applicant wilfully misrepresented material facts with respect to his application for a benefit. The applicant relies on the FSCO arbitration decision of *Fisk and ING Insurance Company of Canada* (FSCO A02 B 001682, July 2, 2003) that determined the respondent bears the onus of proving that there was a misrepresentation, that it was wilful and that what was misrepresented was a material fact respecting an application for accident benefits. The *Fisk* decision also determined that willful misrepresentation means an intentional or deliberate misrepresentation of fact. The Arbitrator in *Fisk* relied on the FSCO arbitration

decision of *Szabo and CAA Insurance Company* (FSCO A02 B 000678, March 14, 2003). *Szabo* was upheld on appeal.[13]

[61] I find the reasoning in the *Fisk* and *Szabo* decisions is compelling. The consequence of a wilful material misrepresentation under s.53 of the *Schedule* is that the insured person is barred from receiving accident benefits, regardless of the injuries they sustained. The consequences are very harsh and the respondent does not dispute that it bears the burden of proof to show there was a material misrepresentation. For these reasons, I agree that the insurer has the burden of proof to show that s.53 of the *Schedule* applies.

[62] I also agree with the applicant that the respondent is required to show the misrepresentation is intentional. I agree that the term "wilful" used together with "misrepresentation" in s.53 of the *Schedule* requires intent. On its own, the word "misrepresentation" implies there is already disregard to the truth and that recklessness would be encompassed by the "misrepresentation." The addition of the word "wilful" must be given meaning and for this reason, together with the harsh consequences of a material misrepresentation, the wilful misrepresentation must be intentional.

[63] The applicant also submits that because the respondent has the onus of proof, and the respondent relied on inconsistencies between the applicant's evidence and that of EP, that I should draw an adverse inference from the respondent's failure to summons EP to the hearing. The applicant's submission assumes that the respondent is required to prove that an accident did not occur and assumes that EP's evidence was necessary for that. I have already determined that the onus was on the applicant to prove he was in an accident. Accordingly, it was the applicant who ought to have called EP as a witness. For this reason, I do not draw an adverse inference against the respondent.

[64] I find that regardless of what the applicant's role was in the staging of the collision, his description of the collision and the circumstances leading up to it were made with the intent of misleading the respondent about what actually happened. This is a willful misrepresentation.

[65] The term "material" has traditionally meant that that there must be a financial consequence to the insurer because of its reliance on the insured person's misrepresentation. In *Szabo,* the Arbitrator stated that a misrepresentation may be so basic or fundamental to the relationship between the insured and the insurer such as insurance coverage that a misrepresentation may be found material without a profit and loss analysis. I find the reasoning in *Szabo* is compelling.

[13] *Szabo and CAA Insurance* Company (FSCO Appeal P03-00015, March 31, 2004, application to the Divisional Court for judicial review was dismissed 26 April 2006, Court File #1455, London.

[66] The purpose of the applicant's wilful misrepresentation was to receive accident benefits from the insurer. The payment of accident benefits is fundamental to the relationship between the applicant and the respondent and, for this reason, I find the applicant's misrepresentation was material. For all of these reasons, I find that the respondent is entitled to terminate the payment of accident benefits in accordance with s.53 of the *Schedule*.

VII. ORDER

[67] The applicant was not in an "accident" as defined in s.3(1) of the *Schedule* and is, therefore, not entitled to any accident benefits.

[68] The respondent is 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 s.53 of the *Schedule.*

[69] The applicant's appeal is dismissed.

Released: December 15, 2017

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Deborah Neilson, Adjudicator