



Citation: Chaudhry v. Intact Insurance Company, 2021 ONLAT 18-012357/AABS

**Released Date: 08/31/2021
File Number: 18-012357/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:

Farooq Chaudhry

Applicant

and

Intact Insurance Company

Respondent

DECISION

ADJUDICATOR: Robert Watt

APPEARANCES:

For the Applicant: Farooq Chaudhry, Applicant
Pasquale Maiolo, Paralegal

For the Respondent: Jaclyn Kram, Counsel
John P Desjardins, Counsel

Court Reporter: Michelle Gordon

HEARD: by Videoconference: May 4, 2021

OVERVIEW

- [1] The applicant was involved in an incident on August 31, 2016 and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (the "Schedule")*. The applicant was denied benefits by the respondent when it took the position that the applicant was not "involved" in an "accident" as defined by section 3(1) of the *Schedule* and therefore not entitled to benefits. The applicant disagreed and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal").

PRELIMINARY ISSUE

- [2] Does the incident of August 31, 2016 involving the applicant meet the definition of "accident" under section 3(1) of the *Schedule*?

RESULTS

- [3] I find that the incident that the applicant was involved in on August 31, 2016 was not an accident as defined by section 3(1) of the *Schedule*.

BACKGROUND

- [4] The applicant's evidence on examinations for discovery and at the hearing was that he works as a long-haul transport truck driver. He owns his own transport tractor trailer ("Trailer") which is always safety inspected before any long-haul driving, in accordance with trucking regulations. The applicant's evidence was that he had no prior problems with the electrical systems. His Trailer contained a small refrigerator, microwave oven and clothes prior to his trip. His Trailer also had an emergency button to stop the Trailer, if used.
- [5] On the date of the incident, August 31, 2016, the applicant was driving on Highway 27, at night, taking a load from Brampton, Ontario to Richie Bros. Auction in Edmonton, Alberta. He apparently smelled smoke and/or noticed smoke coming out of the vents by the dashboard and then fire coming from the fuse panel. The applicant tried to slow the Trailer down to stop. He could not get the Trailer to stop before he jumped out of the Trailer. Both door windows in the Trailer were open at the time of the fire. The Trailer went into the ditch and remained at an approximate 40-degree angle, where it continued to burn. The applicant called 911. After the accident, the Trailer was stored outside at a storage facility where it had been towed.
- [6] The applicant attended an examination for discovery and then attended to give evidence at a videoconference hearing on May 4 and 5th, 2021.

Evidentiary Issues

[7] I find the applicant's evidence was not clear on certain key issues.

a. How the fire started

[8] The evidence is unclear from the applicant as to how the fire in the Trailer started. The applicant gave evidence in his examination for discovery that the fire started in the vents near the windshield where the air conditioning and the heat comes out.¹ On another occasion, the applicant advised that he noticed smoke coming from the engine to the right of the fuse box.² At his examination for discovery, the applicant claimed that he had smelled smoke prior to the fire breaking out and that this was for "less than a minute."³ In the applicant's OCF-1 form, the applicant stated "driving self owned tractor trailer, when it suddenly burst into flames."⁴ Both experts for the parties discussed different consumption patterns of the fire.

b. Trailer brakes

[9] At his examination for discovery, the applicant stated that he tried to stop and that the brakes were in working order.⁵ However, the applicant told Dr. Dharamshi that there were no brakes on the Trailer and that he could not stop.⁶

[10] The applicant admitted on his cross-examination at the hearing that he could have activated the brakes by pulling a safety brake lever on the steering column. He could not recall if he did so.

c. Time frame between picking up the goods to be transported from 2 Cadetta Road in Brampton, Ontario, and when the fire started

[11] The applicant took one hour and 22 minutes from leaving the yard when he picked up his load to where the fire started in his Trailer. The distance was only 30 km. The applicant gave no explanation as to why it took him so long to go such a short distance.⁷

¹ Document Brief of Respondent Tab 11, Questions 138-142

² Report of Ashley Sylvester dated June 7, 2018 Respondent's Supplementary Brief Tab K

³ Document Brief of the Respondent Tab 11 Questions 134-136

⁴ Document Brief of the Respondent Tab 1

⁵ Document Brief of the respondent Tab 11 Question 150

⁶ Supplementary Document Brief of the Respondent Tab Q, page 3

⁷ Document Brief of the Respondent Tab 11 Question 119-120, Accident report filed by the Applicant

d. Microwave, Fridge and Clothing

[12] The applicant testified at the hearing that he had a microwave oven, fridge and clothing in the Trailer before the fire. There was no evidence found on any investigations of the fire of any remains of a microwave, fridge and clothing.

e. Cardboard

[13] There was cardboard found in the Trailer fused on the driver's seat after the fire. The applicant advised Mr. Shirer, the respondent's expert, that he had stored many broken down boxes in the Trailer.⁸ The applicant's testimony on the examination for discovery was that he did not know where the cardboard came from.⁹

EXPERT REPORTS

Shirer Report (March 9, 2018)

[14] The applicant hired R. J. Shirer & Associates Inc. ("Shirer") to complete a report after viewing the applicant's Trailer and going over with the applicant, using an exemplar Trailer, the process of what happened. The applicant told Shirer that he had just started the trip when he noticed smoke coming from the front dash to the right of the fuse panel.¹⁰ Shirer found greater consumption of materials to the right of the fuse box than to the left.

[15] The Shirer report concluded that since the Trailer was on an approximate 40-degree angle, the heat of the fire went up towards the driver's side when the fire started. This would explain the greater consumption of combustibles in the region of the driver's seat since it was elevated above the passenger side. The report did not conclude that the fire started at the driver's seat since this region would be expected to receive significant fire attack, owing to its elevated position within the tilted cab. Shirer concluded that the fire, because of greater consumption of the right passenger side of the dash, originated in the region of the front dash to the forward right side of the fuse panel.

[16] Shirer opined that there may have been a malfunction of electrical wiring which would provide sufficient heat energy to initiate a fire. There could have been a short circuit or leaking causing an unusually high flow of electricity, causing the wires to get very hot and melt. Shirer also opined that after-market products

⁸ Document Brief of Respondent Tab 11 question 182

⁹ Document Brief of the Respondent Tab 10A p2-3

¹⁰ Report of R. J. Shirer & Associates dated March 9, 2018 tab 10

could have been added to the Trailer and installed improperly without appropriate overcurrent protection. These products may have caused the fire.

- [17] Shirer opined that this fire also could have been caused through human-involved activity, either intentional or unintentional. He ruled out that the fire was initiated with intent through the placement and ignition of cardboard boxes under the driver's seat, because Shirer did not agree with the origin assessment as set out in the report. The report opined that there would have been a different consumption pattern, and this could not have resulted in such a significant consumption of the right side of the dash which was to the right and below the driver's seat. Shirer opined that it would be normal to have cardboard boxes stored in the Trailer. The report summarizes that the fire was probably caused by an electrical malfunction located in the right side of the fuse box, in the front dash of the Trailer.

Origin and Cause Reports (December 19, 2016) (Supplemental Report dated September 5, 2018)

- [18] Russ Colosi of Origin and Cause ("Colosi report") inspected the Trailer on November 1, 2016 and gave evidence on behalf of the respondent. He ruled out any electrical fault within the cab as an ignition source, as he found that some of the wires were still covered with protected hard plastic covering and would not have been if there had been an electrical fire. Colosi found no faults or failures with the battery cables, or failures within wire bundles or at connection points to components and no evidence of an electrical failure within dashboard components. His report found stacked, charred cardboard piled up on the driver's seat cushion which he opined would not normally be put there. The Colosi report concluded this cardboard was used as an incendiary device.¹¹
- [19] The Colosi report points out that between the time of their report and the Shirer report, evidence had been disturbed or removed. The report states that significant amounts of materials initially observed on the seats, floor, and bunk were removed prior to Mr. Shirer's examination, preventing him from properly analyzing fire debris for a pattern analysis. Another example was that the mattress located behind the driver's seat was found outside of the cab at the time of the Shirer report. There was no evidence of fire migration from the cab to the trailer at the time of inspection by Colosi, but fire migration showed up in pictures of the Shirer report.

¹¹ Colosi Report dated December 19, 2016 Tab 11

- [20] The Colosi report takes issue with the Shirer report's conclusion that the fire originated in the region of the front dash to the forward right side of the fuse panel. The Shirer report based its conclusion on the pattern indicating that the heat was localized at the fuse panel where the applicant saw the fire. The Colosi report opined that the intense damage close to the fuse panel was likely affected by the ventilation resulting from the HVAV opening when the plastic melted to let more air in. The Colosi report's position is that the consumption pattern at the right side of the fuse box does not preclude the possibility that fire originated on the driver's side.
- [21] The Colosi report takes issue with the Shirer report in that no cardboard was found anywhere else in the Trailer other than the stacked cardboard found on top of the driver's cushion. The Colosi report mentions a spray can of automobile brake cleaner located between the seats as being highly flammable and very volatile. This evidence of cardboard on the seat and the brake cleaner can was not mentioned in the Shirer Report. The Shirer report opined that cardboard could have been stored below the driver's seat and moved around. The Colosi report opined that there was no cardboard found below the seat and there was no room for storage below the seat. The driver's seat had a suspension mechanism and was surrounded by an outer collapsible boot which prevented articles within the cab from entering the space under the driver's seat. The Colosi report opined that the fire patterns in the engine compartment, as well as the burnt mattress and the vinyl on the dashboard all suggested that the fire started in the driver's seat.

ANALYSIS

- [22] The parties did not make any argument as to the issue of whether the Trailer was considered an automobile or not, within the definition of 224(1)(a) of the *Insurance Act*. The *Insurance Act* definition of automobile includes any motor vehicle required under any act, to be insured under a motor vehicle liability policy. The trailer was required to be insured under Ontario law¹² and would therefore meet the requirements of being included in the definition of automobile.
- [23] Section 2(3) of the *Schedule* indicates that the benefits in the *Schedule* apply in respect of all accidents in Canada. Section 3(1) of the *Schedule* defines an "accident as an incident in which the use or operation of an automobile directly causes an impairment or directly causes damage to any...."

¹² *Compulsory Automobile Insurance Act*, R.S.O. 1990 c. C. 25, s. (2)(1).

- [24] The courts have held that there is a three-part test to determine whether there has been an accident within the meaning of section 3(1) of the *Schedule*:¹³
1. Did the accident arise out of the ordinary use or operation of an automobile (purpose test)?
 2. Did such use or operation of an automobile directly cause the impairment (causation test)?
 3. Was there an intervening act or acts that resulted in the injuries that cannot be said to be part of the ordinary course of things?
- [25] The applicant's position is that the incident of August 31, 2016 involving the applicant meets the definition of "accident" under section 3(1) of the *Schedule*. The applicant's position is that a fire started in the Trailer because of overheating of the electrical wiring and the applicant was forced to exit the Trailer to prevent personal injuries.
- [26] The applicant's position is that the accident arose out of the ordinary use or operation of the Trailer. His position is that while driving the Trailer, a fire started in the electrical system which caused the applicant to have to leave the Trailer. He submits that the fire directly caused his injuries to himself and damage to the Trailer. There was no intervening act that resulted in the injuries to his Trailer or to himself personally.
- [27] The respondent's position is that that the incident of August 31, 2016 involving the applicant does not meet the definition of "accident" under section 3(1) of the *Schedule*. The respondent's position is the accident did not arise out of the ordinary use or operation of an automobile. It was not the ordinary use or operation of the Trailer that caused the fire but rather the applicant deliberately setting the Trailer on fire. The setting of the fire is an intervening act that resulted in the injuries, that cannot be said to be part of "the ordinary course of things."
- [28] The respondent's position is based on the following evidence: the applicant's inconsistent responses as to how and where the fire started; the applicant not using the emergency brake to stop the Trailer; the time frame between when the applicant left the depot and when he picked up the goods for delivery; the missing microwave oven, fridge, and clothing not found in the Trailer after the fire; the fused cardboard found on the driver's seat; the spray can of brake fluid found by the driver's seat; the Colosi report finding that the fire was deliberately

¹³ *Porter v. Aviva Insurance Company of Canada*, 2021 ONSC 3107 (Div. Ct.).

started; the fact that the applicant admitted only making \$15,576.00 in the previous year before the accident and was four months behind on his mortgage payments; both door windows were open at the time of the fire; and the applicant's medical issues with his right eye (diabetes) requiring him to have eye examinations every six months, thus potentially limiting his future ability to work.

[29] I find that the incident of August 31, 2016 involving the applicant does not meet the definition of "accident" under section 3(1) of the *Schedule*. I accept the respondent's position and the reasons given for the respondent's position, as set out in paragraphs [27] and [28], above.

[30] I accept the Colosi Report over the Shirer report, as the Colosi report was based on investigations done in November 2016, whereas the Shirer report was completed much later on March 9, 2018. Both experts on cross examination admitted that because the Trailer was left outside since the date of the accident that the evidence could be compromised. The Shirer report was created at a much later time, when all of the original evidence also was no longer available.

[31] I found at the hearing that the applicant could not answer a lot of the questions on cross-examination because he "couldn't remember." I find his credibility an issue because there were too many discrepancies in the applicant's evidence.

[32] For example, why were the driver door windows open at 10:00 p.m. when the applicant could have used his air conditioning to cool the cab down if it needed to be cooled down? The evidence given by Russ Colosi was that the windows, because they were open when the fire started, fanned the fire to make it worse. If the windows were not open, the fire would have likely just smouldered. No explanation was given by the applicant as to why the windows were open at that time of night.

[33] Further, the evidence given by the applicant as to how the fire started was not consistent and, in my view, kept changing. Many different versions were given. The issue of the Trailer brakes and why the applicant did not use the safety emergency lever was also unexplained/unclear. The applicant in his evidence could not remember whether he tried to use the emergency brake system or not.

[34] The applicant gave no explanation as to why he needed a lot of extra time to go a very short distance from where he picked up the load to be delivered, to where the fire started. The respondent's position is that the applicant used the time to go home and remove the refrigerator, microwave oven, and his clothes, knowing that there was going to be a fire in his trailer. The applicant could give no explanation as to why there were no burned remains of the refrigerator,

microwave oven and his clothes left in the Trailer, which there would have been if they had been left in the Trailer. I would have to come to the conclusion that these items had been removed before the fire started, and it therefore leads me to further question the credibility of the applicant.

- [35] The evidence of the stacked cardboard fused to the driver's seat and the can of brake cleaner are the most damaging evidence that the fire was an incendiary fire not the result of an accident, as defined by Sec.3(1) of the *Schedule*. There was no reason given by the applicant why he had stacked cardboard on his seat. His evidence was that he did not know where the cardboard came from. However, the cardboard was there at the time of the fire, as it was charred and fused to the driver's seat, as a result of the fire. The applicant has not demonstrated on a balance of probabilities that the causation branch of the test has been met because of his inconsistent evidence, the doubts raised by the Colosi report reports and the reasons set out in paragraph [28].

CONCLUSION

- [36] Based on the above analysis of the facts, I find that the incident did not arise out of the ordinary use or operation of the Trailer, that the operation of the Trailer did not cause the fire and that the fire that caused the damages, was an intervening act that was not part of the ordinary course of things.

Released: August 31, 2021



**Robert Watt
Adjudicator**