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

Tribunal File Number: 17-001918/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:

S.L.

Applicant

and

Intact Insurance Company

Respondent

DECISION

ADJUDICATOR:	**Deborah Neilson**
APPEARANCES:	
For the Applicant:	S.L., Applicant
	Crystal Krandel, Counsel
For the Respondent:	Tina Cumbo, Respondent
	John Desjardins, Counsel
	Harvey Kruger, Counsel
Court Reporter:	Rose Uriega
Observers:	Karina Kowal, Member, LAT
	Amanda Fricot, Member, LAT
HEARD in-person on:	**January 10 to 12, 2018**

I. OVERVIEW

[1] The applicant, SL, claims he was injured in a motor vehicle accident on February 13, 2016, and sought benefits from the respondent, Intact Insurance Company, pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* ("*Schedule"*). The respondent initially paid the applicant some benefits. The respondent stopped paying the applicant weekly income replacement benefits on November 29, 2016 because the applicant failed to provide the respondent with information it had requested. The respondent later denied that the applicant was entitled to any accident benefits.

[2] The applicant submitted an application for dispute resolution services to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal"). He alleges he was injured when he struck a fishing hut with the snowmobile he was riding. He is seeking payment of income replacement benefits ("IRBs") from November 29, 2016 to date.

[3] The respondent denies that the applicant's injuries were caused by a motor vehicle accident in accordance with the definition set out in s.3 of the *Schedule*. The respondent claims that the applicant either fell off a fishing hut or was injured in a slip and fall incident, according to what he told hospital staff, and was not in a single vehicle snowmobile accident as he later stated. The applicant denies that he was injured from falling off of a fishing hut or falling on the ice.

[4] In the alternative, the respondent claims the applicant made a material misrepresentation in describing the circumstances surrounding how he was injured on February 13, 2016, specifically he misrepresented the amount of alcohol he consumed that evening.

II. ISSUES IN DISPUTE

[5] The issues that I must determine are as follows:

(a) Was the applicant involved in an accident as defined by the *Schedule*?

(b) If so, is the applicant precluded from receiving a weekly income replacement benefit in the amount of $400.00 per week for the period November 29, 2016 to-date and ongoing because he wilfully misrepresented material facts with respect to his application for benefits, within the meaning of s.53 of the *Schedule*?

(c) Is the respondent liable to pay an award under *Automobile Insurance, RRO 1990, Reg 664* ("*O.Reg. 664* award") because it unreasonably withheld or delayed payments to the Applicant?

[6] According to the case conference Adjudicator's Order, the issue of the applicant's entitlement to IRBs is also in dispute. However, the respondent takes no issue with whether the applicant meets the test for entitlement for IRBs if his injuries were

caused by a single vehicle snowmobile accident. This means that if I find the applicant was injured while riding his snowmobile, he will be entitled to IRBs unless I find that he made a material misrepresentation to the respondent about the amount of alcohol he drank on the night he was injured.

III. RESULT

[7] The applicant has not proven on a balance of probabilities that his injuries were caused by a motor vehicle accident. Therefore I need not consider the other two issues.

IV. ANALYSIS

(a). Accident

[8] 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*. Under s. 3(1) of the *Schedule,* "accident" means an incident in which the use or operation of an automobile directly caused an impairment. There is no issue that, if the applicant was injured while riding the snowmobile, the snowmobile is considered to be an automobile under the definition of "accident" in the *Schedule.* Whether I find the applicant was involved in an accident is determined by whether the applicant and his witnesses are credible and reliable.

[9] The respondent relied on the FSCO decision of *Azad and Nordic Insurance Company of Canada*.[1] In that case, the Arbitrator stated that credible evidence is evidence that is in harmony with the preponderance of the probabilities of this case as a whole.[2] The Arbitrator stated the accepted factors in assessing credibility include the witnesses' demeanour, their ability and opportunity to observe, powers of recollection, interest, bias, prejudice, sincerity, inconsistency, and the reasonableness of the their testimony when considered in the light of all of the evidence.[3] The considerations and factors for determining credibility set out in *Azad and Nordic Insurance* are compelling and for that reason I have applied them to the evidence in this case. If I find the witnesses are not credible, then it follows that their evidence is not reliable. Having said that, a witness may be credible, but his or her evidence may, none the less, be unreliable.

[10] The applicant's testimony, his signed statement[4] and the transcript from his examination under oath[5] were consistent in that the applicant claimed that on

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[1] *Azad v. Nordic Insurance Company of Canada* [2015] O.F.S.C.D. No.11, upheld on appeal at *Azad, Bedros and Vayranosh and Nordic Insurance Company of Canada*, (FSCO Appeal P15-00016, P15-00015, P15-00017, September 15, 2015)
[2] *Azad and Nordic Insurance*, p.9, para.61,
[3] *Azad and Nordic Insurance,* relying on *Faryna v. Chorny*, [1952] 2 DLR 354 (B.C. C.A.), at pp. 356 – 8, per O'Halloran, J.A.
[4] Exhibit 4, signed statement of the applicant dated March 6, 2016
[5] Exhibit 7, transcript from the examination under oath of the applicant taken on September 26, 2016

February 13, 2016, he had been out snowmobiling all day on Cook's Bay on Lake Simcoe with friends, MC and RL. At times throughout the day he would stop to visit people at their fishing huts on the lake. At the end of the day of snowmobiling he went to RL's house. His girlfriend (now common-law wife), DM, showed up at RL's house at some point in the evening and stayed no longer than an hour. The applicant left after DM left, anywhere from 9:30 to 11:00 p.m., on his snowmobile to travel across the lake to his house, a trip he had taken in the past and that usually takes either 5 or 10 minutes. He lost consciousness because at some point he found himself on the ground without his helmet or gloves on. His snowmobile was about 20 to 30 feet away from him on its side or back. He was able to spot a light on the shore and made his way to the light, which came from a house belonging to JK. JK let him in the house and called an ambulance.[6] The applicant recalled the paramedics arriving and placing him on a gurney, but claimed he cannot recall being at the Southlake Hospital in Newmarket. His next memory was waking up in Sunnybrook Hospital in Toronto.

[11] There are major discrepancies in the applicant's versions of what happened between his statement, his EUO and his testimony at the hearing. Some small discrepancies in the applicant's evidence over time are to be expected. For example, there were discrepancies between whether the snowmobile was on its side or it was upside down, whether the applicant was following a trail or a marked path on the lake when returning home, whether he left RL's house at 9:30 or 11:00 p.m. The respondent submits that a major discrepancy that makes the applicant's evidence unreliable is the applicant's EUO evidence that he snowmobiled as far as Barrie, Minden and Orillia the day of the alleged accident. The respondent submits that based on the evidence of Danielle Fortier, a senior investigator with Rogers Communications Canada, and the applicant's cell phone records, the applicant was fairly stationary out on Cook's Bay, which is consistent with him being at a fishing hut for most of the day and not out snowmobiling. I find the evidence of Ms. Fortier and the applicant's cell phone records show that the applicant did not make or receive any calls on his phone on February 13, 2016, other than while he was on or near Cook's Bay. I do not accept the cell phone evidence proves that the applicant was out on the ice on Cook's Bay for the entire day. Nor does the evidence assist the applicant as it does not prove that he was anywhere else but Cook's Bay. Having said that, the applicant testified that he did not travel to Minden or Orillia on February 13, 2016. He denied that his evidence at his EUO was that he traveled to those locations, but had no explanation of why he was recorded as having given that evidence on his EUO transcript. This was not his only denial of his EUO evidence and I find the applicant's denials of the evidence he gave at his EUO diminished his credibility.

[12] Because of the major discrepancies and contradictions between the applicant's version of events in his statement, EUO, his testimony, the documentary evidence

[6] Exhibit 2, the Southlake Hospital records show the call was received by the emergency medical services at 11:49 p.m. on February 13, 2016. An ambulance arrived at the house in Keswick about seven minutes later and the applicant was transported to Southlake Hospital in Newmarket, arriving at about 12:20 on February 14, 2016.

and the testimony and evidence of the applicant's witnesses, I found no reliable evidence to support the applicant's submission that he was in an accident as defined in the *Schedule.* Those major discrepancies consist of the following:

i. The ambulance call report and Southlake Hospital records state that the applicant was injured from a fall while out on the ice and not from a snowmobile accident;

ii. The family physician's notes record that the applicant reported he was injured from a fall off of a fishing hut while intoxicated;

iii. The applicant submitted he struck a hut but he has no recollection of doing so and the evidence he relies on is too contradictory to support his claim.

iv. The applicant denied being intoxicated and claimed he only drank two beers that day, but a toxicology report based on his blood alcohol levels taken at Southlake Hospital show he was well over the legal limit for blood alcohol levels during the time of his alleged snowmobile accident;

[13] I have not listed all of the discrepancies and contradictions that I find problematic, such as the applicant's written statement that the police came to the house in Keswick when, in fact, they did not. I have listed those discrepancies that are most troublesome because the applicant was unable to provide an explanation for them that rendered his version of events as probable. His explanations for the discrepancies do not make sense. The evidence that the applicant relies on to corroborate his submissions that he was injured in a motor vehicle accident is unreliable and inconsistent. In sum, the applicant's evidence falls short of proving on a balance of probabilities that his injuries were sustained in a single vehicle accident from a loss of control of his snowmobile.

i. Fall While on the Ice

[14] According to the medical records, the applicant reported to the ambulance attendants and the emergency staff at Southlake Hospital that he had been out on the ice since around 2:00 p.m. drinking alcohol, he fell on the ice and may have lost consciousness. It was believed this was when he hurt his shoulder.[7] This version of events is completely different from the applicant's testimony that he lost control of his snowmobile on his way home from a friend's house, after which he woke up on the ice without his snowmobile helmet or gloves.

[15] The applicant's explanation for the difference between his testimony and the medical records is that he had a head injury. He testified that he has no recollection from the time he was put on the stretcher by the ambulance attendants until he woke up in Sunnybrook Hospital. However, the ambulance call report

[7] Exhibit 2, Southlake Regional Hospital records, including the ambulance call report dated February 14, 2016

shows the applicant was alert and oriented throughout the 17 minute trip to Southlake Hospital with a GCS of 15/15.

[16] The Southlake emergency record states that the applicant did not remember the events leading up to the fall. This evidence of a lack of memory at first glance appears to support the applicant's explanation that he sustained a head injury. The applicant also relies on the fact that DM signed the consent form for the applicant to have a chest tube inserted. The applicant submits that she signed it because he was unconscious at the time. However, the Sunnybrook Hospital records[8] disclose that the applicant, who was admitted on February 14, 2016, had a normal cognitive assessment except for impulsive and unsafe movement – he kept wanting to sit up in bed while he was on a c-spine watch protocol. He also underwent an alcohol withdrawal assessment. Otherwise, the applicant's memory, orientation and thinking while in Sunnybrook Hospital were normal.

[17] The applicant's girlfriend, DM, testified that she told the doctors at Sunnybrook that the applicant was snowmobiling. However, there is no reasonable explanation for why this was not mentioned in the Sunnybrook Hospital records. In fact, Dr. Rice, the admitting doctor at Sunnybrook Hospital, noted that the collateral history from the applicant's wife later on could not clarify the details of how the applicant was injured. The Sunnybrook Hospital records disclose that the applicant was ice fishing and fell on the ice while intoxicated, suffering right rib fractures, a pneumothorax, a clavicle fracture and frostbite. In Sunnybrook's trauma admission sheet, under the heading for the mechanism of the injury, there is a space to record whether a recreational vehicle, including a snowmobile, was involved. I find it telling that this section was left blank whereas the section just below it lists the mechanism of the injury from a slip and fall. I would expect that if the Sunnybrook were advised that a snow mobile may have been involved in the applicant's trauma, this would have been recorded somewhere in the records at that time. No reasonable explanation has been provided to me as why that is not the case.

[18] The applicant denied that he told the Sunnybrook staff that he was ice fishing. The applicant's wife, DM, testified that the applicant never fished. The applicant also stated that he did not fish. His evidence from his EUO was that he stopped at a few fishing huts to visit for no longer than 20 to 30 minutes a few times during the day where he may have held a fish. The applicant explained the discrepancy between his version of events and the hospitals' records was because the hospital staff misunderstood his explanation. He believes they misunderstood him when he said he struck a fishing hut. DM testified the applicant was mumbling something about an ice hut, but the hospital records state nothing about an ice hut. Further, the applicant testified that he has no recollection of hitting a fishing hut and that there were no fishing huts around him when he woke up in the snow. The applicant's explanation also makes no sense in light of his testimony that the hospital records do not disclose the correct mechanism of his injury because he was never asked by the hospital staff at Sunnybrook what happened. I am unable

[8] Exhibit 3, Sunnybrook Hospital records

to reconcile the applicant's or his wife's evidence that he told the hospital staff something that was misconstrued, yet did not tell the hospital staff anything because he was not asked.

ii. Fall From a Fishing Hut

[19] Dr. Alexander is the applicant's family physician and her records were made an exhibit at the hearing. Dr. Alexander recorded on February 23, 2016 that the applicant was ice fishing and fell off of an ice hut from the roof[9]. He had been drinking alcohol and was alone. He was not sure if he lost consciousness, but he was clearly out there for some time, then was able to walk to shore and find help. The applicant testified that he did not tell Dr. Alexander that he fell off an ice hut and that her note incorrectly described what occurred because she read it from some papers. It is unclear what papers she would have obtained the information from as there was nothing in her clinical notes and records or in the in the hospital records that were filed about the applicant falling off of a hut, only about a fall on the ice while out ice fishing. Further, Dr. Alexander recorded on April 7, 2016, that it was the applicant who told her about falling off a fishing hut.[10]

[20] Dr. Alexander also noted on April 19, 2016, that the applicant did not want his clinical notes and records sent to the insurance company. On January 24, 2017, Dr. Alexander wrote to the applicant's lawyer enclosing further chart information dated April 7, 2016 that she stated was somehow missed from information that was previously sent. The April 7, 2016 note recorded a phone call with the applicant as follows:

> spoke with pt to clarify request from insurance company re snowmobile accident pt had reported to me that he fell off an Ice hut- today he clarified that he was at an Ice hut but he had been In a snowmobile accident that had caused the Injuries also advised that the Insurance company is asking for records from back to Jan 2013 including all chart notes pt is not comfortable with this he would like me to wait until he speaks with them before I send any records.

[21] Following the April 7, 2016 note is a note dated January 16, 2017 stating the applicant realizes now why the confusion about what happened in his accident as he has some amnesia about this from a head injury. The accident with the snowmobile caused him to end up in an ice hut, which is why he initially thought he fell off the roof. I find this explanation to Dr. Alexander does not make sense because the applicant's testimony was that he may have tried to get into some ice huts, but he had no memory of doing so.

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[9] Exhibit 17, Dr. Alexander's clinical notes and records from the respondent's brief

[10] Exhibit 18, Dr. Alexander's clinical notes and records dated April 7, 2016 and January 16, 2017, sent under cover of letter dated January 24, 2017.

[22] The applicant testified that while he was in the Sunnybrook Hospital, he remembered that his injuries were caused by a snowmobile accident. This does not explain why after his memory returned, he told his family doctor five days after he was released from Sunnybrook, that he was injured while ice fishing and he fell off an ice hut. Dr. Alexander was not called as a witness to confirm the applicant's evidence. I find the applicant's explanations are not coherent and do not make sense. I am further troubled by the applicant's allegation that it was Dr. Alexander's suggestion to withhold the applicant's clinical notes and records from the respondent. I find it difficult to believe that Southlake Hospital, Sunnybrook Hospital and Dr. Alexander all got the event surrounding the applicant's injuries so wrong, and yet the applicant did not seek to either cross-examine anyone from the hospitals or to call anyone from the hospitals or Dr. Alexander to explain how their record keeping could be so incorrect. For these reasons, I find as a matter of fact that the mechanism of the applicant's injuries set out in the hospitals' and Dr. Alexander's records up to and including February 24, 2016 are an accurate record of what the applicant told the hospital staff and Dr. Alexander.

iii. Struck an Ice Hut

[23] The applicant sought to introduce as evidence a print-out from an internet forum that discussed an ice hut on Lake Simcoe that had either been vandalized or struck by a snowmobile on February 15, 2016. The respondent objected, but I allowed the printout to be made as an exhibit as it had been served on the respondent in a timely manner. However, I give it very little weight for the following reasons. According to the internet evidence, the hut was either allegedly struck or vandalised two days after the applicant's incident or was taken a year prior, and there was no time stamp on the photo. The applicant testified that MC showed the photo to him about six months before the hearing and told the applicant he had struck the hut. The applicant later testified that he has not spoken to MC since February 13, 2016 because they had a falling out. The falling out was because the applicant went out driving his snowmobile alone. When reminded of this inconsistency, he then claimed that MC's girlfriend showed the photo to his wife. I find that this is one example of the applicant's attempts to justify his evidence when confronted with an inconsistency in his evidence. I also find that the applicant's evidence that his wife was shown the photo is not evidence that MC identified it as having any relation to the applicant. If the applicant believed that MC could identify the hut in the photo, the applicant ought to have called him as a witness, but he did not.

[24] The applicant testified that RL told him that the person who owned the damaged hut in the website photos threatened the applicant. However, RL did not testify at the hearing and was not summonsed. Given how unreliable the applicant's evidence was with respect to MC, I am unable to accept the applicant's evidence of what RL allegedly told him about the fishing hut in the website photos.

[25] RC testified by telephone at the hearing. RC owns a garage and does car repair. The applicant referred to RC as his "buddy," but RC testified that he knows the

applicant from having worked on his vehicles in the past. RC testified that he received a phone call in the early morning of February 14, 2016 to go pick up a snowmobile off of the lake at Cook's Bay on Kempenfelt Bay. He did not know who made the phone call. He went out on the lake that morning and picked up a green and black Arctic Cat that had been wrecked with more than $400 damage from a rollover. It took him a while to locate the machine because it was snowing and blowing out on the lake. There were no ice fishing huts located near the snowmobile or within 100 feet of it. He had it back to his shop by about 8:30 a.m. where it sat for about three weeks until the applicant retrieved it. He did not report the incident to the police as he thought they already knew about. I find it troubling that although he runs a garage, RC was unaware that he has an obligation to report to the police about accidents involving more than $400 damage. He did not take any photos or maintain any record of the type of machine or the serial number of the machine.

[26] The applicant's friend, MC, apparently gave an interview to the respondent's investigator on August 2, 2017, but did not sign a statement. The will say statement of MC from August 2, 2017 was filed as an Exhibit.[11] MC had allegedly advised the respondent's investigator that he fell asleep at RL's house and woke up about 6:00 a.m. on February 14, 2016 and had a number of phone messages from DM (the applicant's wife). He went out on the ice with RL and picked up the applicant's snowmobile early that morning. There was a fish hut nearby that had some damage to it. There was some minor damage to the front end of the snowmobile, but MC was able to drive it back to RL's garage. This conflicts with RC's sworn affidavit that RC picked up the applicant's orange Arctic Cat snowmobile that morning off the ice and RC's testimony that there were no huts near it.

[27] The applicant's evidence was that after the accident he saw a light on the shore and made his way a house belonging to JK. JK testified that when the applicant showed up at his door, the applicant told him he was injured because he hit a pressure crack. JK saw an ice hut through his binoculars the next morning around 8:00 a.m. or 9:00 a.m., about 150 yards to 300 meters away from his house that had been damaged. He did not see a snowmobile near the hut. He did not see the damage to the hut the day before. I am unable to find that the hut that JK saw was damaged by the applicant's snowmobile. If the applicant was riding his snowmobile and RC picked it up, then I find JK would have seen the applicant's snowmobile the next morning near the hut. I make this finding based on RC's affidavit. RC testified that when he picked up the applicant's snowmobile, he was back at his shop with it by 8:30 a.m. However, he also swore in his affidavit that he received a phone call to pick up the machine at 9:00 a.m. or half an hour after he supposedly returned with it to his office.[12] While I have concerns about the reliability of RC's evidence[13], I give more weight to his affidavit evidence because

[11] Exhibit 12, will say statement of MC dated August 2, 2017
[12] Exhibit 13, affidavit of RC sworn September 17, 2017.
[13] RC testified that visibility was poor when he went out to retrieve the snowmobile. If that was the case, I question whether JK would not have been able to see damage to the hut through his binoculars.

it was prepared about 6 months before the hearing. According to RC's affidavit and his testimony, there were no huts near the snowmobile that he retrieved, nor any evidence that the snowmobile that he retrieved struck a hut.

[28] The will say statement of MC conflicts with the evidence of RC. MC's will say statement was not signed by him and is a description of a discussion the respondent's investigator had with MC. The fact that MC did not attend at the hearing, despite being summonsed to do so by the respondent does not assist the applicant in this regard because MC and the applicant were supposed to be friends. I would have expected the applicant to call MC as a witness, especially since the applicant alleges that the reason the medical records do not show the applicant was injured in a snowmobile accident was because they misunderstood him when he claimed his snowmobile struck a fishing hut. MC's evidence would have supported that the applicant struck a hut with his snowmobile. RC's evidence, on the other hand, does not support the applicant's claim that he struck a fishing hut. For these reasons, there was no reliable evidence that the applicant struck a fishing hut with his snowmobile.

[29] The applicant relies on the fact that the respondent reimbursed him for damage to an orange Arctic Cat snowmobile.[14] RC testified that the snowmobile he picked up off the ice was a green Arctic Cat. RC stated in his affidavit that the snowmobile he picked up off the ice was an orange arctic cat. The applicant testified that he made a claim to the respondent for damage to an orange and black Arctic Cat snowmobile, not a green one. The applicant claims RC made a mistake with respect to the colour of the applicant's machine and the mistake was reasonable because the incident took place two years prior and RC would have had to confirm the machine belonged to the applicant before releasing it to him. However, the applicant's wife also stated the applicant's snowmobile was green, then changed her answer to orange when the applicant shook his head at her while she was testifying. This seems to indicate the applicant had more than one machine. Further, the applicant's submission that the Arctic cat was damaged on the night of February 13, 2016 does not explain why he told the hospital staff and Dr. Alexander he was injured in a completely different fashion. For this reason, and given the unreliability of the applicant's other evidence, I am unable to accept that the orange Arctic Cat was damaged as the applicant submits.

iv. Intoxication

[30] According to his signed statement taken on March 16, 2016, the applicant consumed two beers at his friend's house. At his examination under oath ("EUO") taken on October 26, 2016, the applicant stated he had two beers around 2:00 p.m. that day and no other alcohol for the remainder of the day. The Sunnybrook records state the applicant advised he had been drinking since noon. The applicant denied that was what he told the hospital staff. He testified that he told the staff that he had a couple of drinks at noon.

[14] Exhibit 8, property damage file of Intact Insurance for the Arctic Cat snowmobile

[31] The applicant's blood was tested for alcohol at the Southlake Hospital and according to the report and testimony of James Wigmore, an expert in toxicology, the applicant's blood alcohol level at the time of the alleged accident would have been between 198 and 270 milligrams of alcohol in 100 milligrams of blood. The legal limit for driving is 80 mg/100ml.[15] Mr. Wigmore's evidence was that the applicant's blood alcohol level was consistent with him drinking between 15 to 26 beers or the equivalent of that amount since 2:00 p.m. The risk of a person falling while walking on an ice surface increases to 3 times as great with the a blood alcohol level of 50/100 mg to 100/100 mg; increases to 10 times as great with a blood alcohol level of over 100/100 mg to 150/100 mg; and increases to 60 times as great with a blood alcohol level of 160/100 and greater than if no alcohol is consumed.

[32] I accept Mr. Wigmore's evidence. He is a very experienced toxicologist and his evidence was unchallenged. He relied on the Southlake Hospital's report of the level of alcohol in the applicant's blood and the applicant did not challenge the hospital's test results.

[33] The applicant denied drinking more than 2 beers before the incident out on the ice on February 13, 2016, but testified he has consumed between15 to 26 beers within that time frame in the past. He then later denied he ever drank more than 15 beers in the past. He also testified that he would not drink that much alcohol and drive a vehicle and that if he drank 15 to 26 beers from noon onward on February 13, 2016, he would not have had time to snowmobile. DM also testified that the applicant would not drink and drive his snowmobile.

[34] JK testified that the applicant did not drink any alcohol while at his house. The applicant's only explanation for his level of intoxication was that he might have found something in a fishing hut to drink. According to his EUO, he tried to enter a few fishing huts after walking towards a light he spotted near the shoreline. He did not know if he was able to enter any of the huts. He also testified that he may have entered some huts after waking up, but he could not recall doing that.

[35] I find that the applicant reported to the hospital that he had been drinking since noon because that is more consistent with the medical and expert evidence that disclosed that he was intoxicated and the extent of his intoxication. The applicant had no other explanation for how he could be so intoxicated if he only drank a couple of beers around noon or 2:00 p.m. or in the evening at RL's house. The explanation that he might have consumed alcohol in a hut that he broke into after he was injured on his snowmobile is not persuasive. Given Mr. Wigmore's evidence that consumption of alcohol increases impairment in alertness, choice reaction, risk taking, and increases the risk of falls and the risk of falling off of a hut, I find it more probable than not that the applicant's injuries were sustained after he consumed alcohol to the levels revealed at Southlake Hospital.

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[15] Exhibit 19, report dated April 11, 2017 and CV of James Wigmore.

[36] I find that the contradictions in the evidence are more than just minor discrepancies that one would expect from evidence over time. The explanations offered by the applicant just do not make sense and raise even more questions for me that remain unanswered. The explanations for the applicant's and DM's evidence that he never drinks alcohol and then drives his snowmobile, but yet was in a snowmobile accident and was intoxicated beyond the legal limit; the clinical notes and records of what the applicant told the ambulance crew, the staff at the hospitals and Dr. Alexander of how he was injured; the conflicting evidence of what colour the applicant's snowmobile was and who retrieved it off of the lake do not make sense or present preponderance of reasonable probability that the applicant's injuries were sustained in a single vehicle snowmobile accident. Without any sensible explanation for these inconsistencies, I am unable to find the applicant has proved on a balance of probabilities that he was involved in an accident as defined in s.3 of the *Schedule.*

(b). Material Misrepresentation

[37] 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. Because I have found that the applicant has failed to prove on a balance of probabilities that his injuries were sustained in an accident as defined in the *Schedule,* I need not address this issue.

(c). *O. REG. 664* Award

[38] The applicant seeks an *O. Reg. 664* award. Section 10 of *O. Reg.664* provides me with the discretion to award a lump sum of up to 50% of any benefits owing to the applicant at the time of the award if I find the respondent unreasonably withheld or delayed payments to the applicant. Since I have found the applicant failed to prove that he was injured in an accident within the meaning in the *Schedule,* no benefits were or are payable to the applicant. Therefore, no amount could be awarded under s.10 of Ont. Reg. 664.

V. DETERMINATION AND ORDER

[39] 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.

[40] The applicant's appeal is dismissed.

Released: August 2, 2018

Deborah Neilson, Adjudicator