Citation: Abdi v. BelairDirect Insurance Company, 2025 ONLAT 23-005786/AABS

Licence Appeal Tribunal File Number: 23-005786/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:

Deeq Abdi

Applicant

and

Belair Direct Insurance Company

Respondent

DECISION

ADJUDICATOR: **Rachel Levitsky**

APPEARANCES:

For the Applicant: Hamoody Hassan, Counsel

For the Respondent: Kyle Mcnerney, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] Deeq Abdi, the applicant, alleges that he was involved in an automobile accident on May 11, 2017, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the "*Schedule*"). The applicant was denied benefits by the respondent, Belair Direct Insurance Company, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

ISSUES

[2] The issues in dispute are:

i. Is the insurer entitled to repayment of $3,806.09 relating to its payment of medical benefits for the period from March 22, 2017, to May 15, 2021?

ii. Is the insurer entitled to interest on any overdue repayment of benefits?

[3] I note that, at the case conference on January 4, 2024, the responded requested that two preliminary issues be heard: whether there was an accident under s. 3(1) of the *Schedule*, and whether the applicant wilfully made a material misrepresentation when he applied for accident benefits under s. 53 of the *Schedule*. The Tribunal declined to specifically add these as separate preliminary issues, but stated that they would be considered as part of the respondent's submission on the substantive issues. I have accordingly addressed them below.

RESULT

[4] The applicant has not established that he was involved in an "accident" pursuant to s. 3(1) of the *Schedule*. The respondent is entitled to terminate the payment of benefits to the applicant pursuant to s. 53, and is entitled to a repayment pursuant to s. 52(1)(a) in the amount of $3,806.09 plus interest in accordance with s. 52(5).

PROCEDURAL ISSUES

Applicant's Request to Extend Time to File Submissions

[5] The Case Conference Report and Order of January 16, 2024 ("CCRO") specified that the applicant's submissions were due 14 calendar days prior to the scheduled hearing, which was to take place on August 23, 2024, meaning that his submissions were due on August 9, 2024. He served and filed his

submissions on August 14, 2024, five calendar days late. He requests leave to file his submissions. The respondent notified the Tribunal in an email that it opposes this request but did not make specific submissions on this issue in its reply.

[6] Although the applicant did not comply with the CCRO, the respondent does not allege that it has been prejudiced by the late submissions or that it was not able to address the submissions in its reply as a result of this lateness. I find that there would be significant prejudice to the applicant if I were to exclude his submissions on the basis of them being five calendar days late. I accordingly grant the applicant's request and will consider his submissions in this hearing.

Applicant's Request for an Adjournment to an In-Person Hearing

[7] The applicant requests that I grant an adjournment and allow this hearing to proceed in person. He submits that the allegations made by the respondent are serious and could impact his insurability and employability; he requests the right to give evidence in person and call witnesses; he wishes to give evidence in his language; and his understanding of the English language is not adequate without an interpreter. Further, he submits that he did not receive certain documents from his former counsel until the respondent's submissions were received by his new counsel, as they were not included in his former counsel's file.

[8] The applicant quotes from the Notice of Written Hearing, dated January 18, 2024, which states that if he satisfies the Tribunal that there is a good reason for not holding a written hearing, the Tribunal will hold the hearing either electronically or in person. It also states that the Tribunal may order an electronic or in-person hearing to accommodate a need under the *Human Rights Code*. The applicant argues that the transcript of his evidence depicts his insufficiency in English.

[9] The applicant acknowledges that requests for an electronic or in-person hearing should be made by a motion in writing. However, he does not provide a compelling explanation as to why he failed to bring a motion or notify the Tribunal at all prior to the hearing itself. He knew as of the date of the case conference on January 4, 2024, that the hearing would be proceeding in writing. There is no indication in the CCRO that a hearing in person was ever requested, or that the applicant opposed a written hearing. The CCRO also states that the parties agreed that no affidavit evidence would be filed. The applicant knew that the respondent would be relying on reports from an engineer, as his sole production request at the case conference was the complete file that the engineer relied upon.

[10] The applicant's former counsel filed a Removal of Representative form on January 25, 2024. The Tribunal sent an email to the applicant on May 30, 2024, confirming that he advised via telephone that he had obtained new counsel, although he did not file a Declaration of Representative until August 14, 2024, when he filed his submissions. Otherwise, there is no evidence before me as to when the applicant's current counsel became involved, or what efforts were made to obtain the previous counsel's file. If the applicant was having difficulty obtaining the file, it would have been prudent to request an adjournment at that time as opposed to requesting one at the hearing itself.

[11] I also note that the applicant appears to allege that the respondent did not provide the sole production ordered at the CCRO: the complete file used in the preparation of the respondent's accident reconstruction report. The respondent denies this allegation, and submits that the applicant was provided with the complete file relied upon by its forensic reconstructionist. While the respondent did not adduce evidence that it had actually provided this file, I find that even if it had not been produced, that is not reason enough to adjourn this entire hearing at this late stage after the parties have already made their submissions.

[12] I find that the applicant has failed to establish that an in-person hearing is required due to a language barrier. In a sworn statement dated May 24, 2017, the applicant stated: "I speak, read and write English". At no point in the statement does he mention not being proficient in English. Further, the applicant attended an Examination Under Oath ("EUO") on October 2, 2018, with his counsel present. When asked if he was fully comfortable proceeding in English, he said yes. No interpreter was present. I have read the entirety of the EUO transcript and at no point did the applicant request an interpreter or advise that he was not able to understand the questions being posed to him due to a language barrier. In fact, he testified that when he visited the collision centre after the accident, he was helping translate for the driver, Mr. Ali, because Mr. Ali's English was not fluent. He has not pointed to any section of the transcript that would demonstrate an insufficiency with the English language. I accordingly do not agree with the applicant that the transcript depicts an insufficiency in English such that he should be afforded an opportunity to give further evidence at an in-person hearing. Further, in his application to the Tribunal, the applicant indicated that his preferred language was English, he did not require accommodation under the Ontario *Human Rights Code* to participate in the hearing, and he did not require language interpretation services.

[13] The applicant points to the OCF-1 that he completed on May 24, 2017, as evidence of his lack of fluency in English. In it, he wrote "I was motor vecol

accident I am inger my back my neck and sholder [sic]". However, I find that the EUO transcript provides much more information about the applicant's English proficiency than this one line, and given the rest of the evidence indicated above, I am not persuaded by this document that this hearing should be adjourned in order to take place in person.

[14] Further, the *Human Rights Code* states: "Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability." The applicant has not explained how a lack of fluency in English gives rise to a need for accommodation under the *Human Rights Code*.

[15] The applicant also submits that, as affidavit evidence is not permitted at this hearing, the driver of the vehicle, Ahmed Muhyadin Ali, should be called as an essential witness in person. However, the applicant's former counsel agreed at the case conference that no affidavits would be submitted as evidence, and the applicant has not alleged that he erred in doing so. I see no reason why, during the case conference, he could not have instead requested the ability to file an affidavit from Mr. Ali as part of this hearing. Further, despite being in possession of evidence from Mr. Ali, specifically a self-reported collision report which apparently included his description of the accident, the applicant failed to provide it as evidence in this hearing. I am not satisfied that Mr. Ali's in-person testimony is crucial where the applicant appears to have felt it was not necessary to produce evidence from Mr. Ali that he had in his possession.

[16] For the reasons above, I am not prepared to adjourn this hearing to a new in-person hearing date.

Applicant's Request for an Adverse Inference to be Drawn

[17] The applicant argues that an adverse inference should be drawn from the respondent's failure to examine Mr. Ali or produce his transcript and insurance file.

[18] According to the CCRO, the applicant did not make a request for Mr. Ali's transcript or insurance file. Further, there is no information before me showing that Mr. Ali provided evidence such that a transcript would even exist. I see no reason why the applicant could not have obtained evidence from Mr. Ali himself, and he has not provided a compelling explanation as to why it was the

respondent who was obligated to do so. For those reasons, I decline to draw an adverse inference.

ANALYSIS

Was the applicant involved in an "accident"?

[19] I find that the applicant has not met his onus to prove that he was involved in an "accident" pursuant to s. 3(1) of the *Schedule*.

[20] The respondent submits that the applicant was not involved in an "accident" as defined within the meaning of s. 3(1) of the *Schedule*. It submits that if a collision did occur, such a collision was occasioned on purpose rather than by accident, and that the applicant was involved in a scheme to stage an accident and/or caused or contributed to damage to give the appearance that the May 11, 2017, collision had taken place when it did not.

[21] Pursuant to s. 3(1) of the *Schedule*, an accident is defined as an incident where the use or operation of a vehicle directly caused an impairment. There is a two-part test to determine whether an accident occurred: whether the use or operation of an automobile was involved in the incident, and if so, whether such use or operation directly caused the claimant's injuries (*Amos v. Insurance Corp. of British Columbia*, 1995 CanLII 66 (SCC); *Chisholm v. Liberty Mutual Insurance Group*, 2002 CanLII 45020 (ON CA); and *Greenhalgh v. ING Halifax Insurance Co.*, 2004 CanLII 21045 (ON CA)).

[22] The applicant alleges that he was a passenger of a vehicle that was moving through an intersection when it was struck by another vehicle that ran a red light. I accept that the use or operation of a vehicle was involved in an incident that led to damage to that vehicle. However, for the reasons below, I find that the applicant has not provided compelling evidence that he was in the vehicle when the damage occurred and I accordingly find that he has not met his burden to prove, on a balance of probabilities, that the use or operation of the vehicle caused him to sustain injuries.

[23] The applicant submits that he has met his onus of proving, on a balance of probabilities, that he was involved in an "accident". He argues that the Tribunal should accept his sworn evidence provided at the EUO, as well as the evidence of Mr. Ali, and that he has provided ample evidence to support his position.

[24] I note that the applicant did not provide me with any evidence from Mr. Ali. The respondent provided me with a copy of the applicant's OCF-1, a sworn statement

of the applicant from May 24, 2017, the EUO transcript, and two reports from Impact Forensics. The applicant provided me with a copy of court documents from his tort claim, none of which include compelling evidence that would help me determine whether the applicant was involved in an "accident". Although briefly referred to in his submissions, the applicant did not provide me with a copy of the self-reporting collision report of Mr. Ali from the date of the accident.

[25] The applicant's sworn statement indicates that, at about 10:30 a.m. on May 11, 2017, he was with Mr. Ali and their friend, Abdi, and they were going for a cup of coffee. He was the front-seated passenger of a 2003 Chevrolet Impala, which he did not own. Mr. Ali was driving the Impala on Dundas Street in London, Ontario, and they were going through a green light at the intersection of Second Street. A grey mini van that was travelling on Second Street ran the red light and the front end of the van struck the driver's side of the Impala. The applicant did not see the van coming as he was talking to Abdi and looking down reading something. The van driver did not pull over and instead took off. They did not call the police, as they thought it would take too long for them to come to the scene, so Abdi suggested they go to the collision reporting centre. They went to the collision reporting centre right after the accident.

[26] This evidence was largely in line with the sworn testimony given at the applicant's EUO, but he provided additional details. He did not know the model of the van, and although he thought it was a Caravan, he was not sure. The Impala was travelling about 50 or 60 km/hr and the van suddenly came and hit them. The van hit the left bumper and the side by the front left tire. Mr. Ali had to force his door open because it was difficult to open it. Some of the grey from the van was left on the Impala.

[27] The respondent relies on the report from Michael Jenkins, engineer of Impact Forensics, dated December 14, 2020. Mr. Jenkins reviewed the collision report completed by Mr. Ali, the damage appraisal of the Impala, and the applicant's EUO transcript. He also examined the Impala on September 1, 2017. I find that the following conclusions from Mr. Jenkins' report puts the applicant's testimony into question:

> The scratches on the left headlight and fender were primarily aligned horizontally and directed from front to rear, which indicated that the left side of the Ali Chevrolet was subjected to a glancing or sideswipe contact. Although neither Mr. Ali nor Mr. Abdi specified how fast the unidentified van was travelling, there was no conclusive evidence to suggest that the unidentified van had any significant forward speed when this impact

> occurred. The alignment of the scratches on the Ali Chevrolet's fender were more consistent with impacting a stationary vehicle (or object) rather than being impacted from the side in a T-bone collision engagement with a vehicle running a red light, as reported.
>
> […]
>
> Further, the limited width of the contact on the Ali Chevrolet, confined primarily to the left headlight and the forward half of the fender, indicated that there was limited engagement between the vehicles during the collision. Had the unidentified vehicle been moving forward (at any speed) and had the Ali Chevrolet been travelling at a speed of between 50 km/h and 60 km/h, extended contact between the vehicles would be expected. In this case, the damage to the Ali Chevrolet would have extended further rearward along the left side than was observed. The width of the fender damage indicated that the Ali Chevrolet was moving considerably slower than 50 km/h at impact.

[28] Mr. Jenkins then used software to analyse the collision, and concluded that the Impala was likely travelling at a speed of 20 km/hr or less at impact. At that speed, the Impala must have impacted a stationary vehicle and Mr. Ali must have steered to the right prior to the impact, otherwise the contact damage would have extended further rearward than was observed. Mr. Jenkins noted that, had the unidentified vehicle been moving forward at impact at any speed, or if Mr. Ali did not steer to the right prior to impact, the Impala must have been travelling slower than 20 km/hr and was braking heavily at impact.

[29] The applicant did not produce an engineering report to contradict Mr. Jenkins' findings, although he raises multiple issues with Mr. Jenkins' report.

[30] The applicant notes that none of the occupants of the vehicle were interviewed by Impact Forensics. However, I am not convinced that this would have impacted Mr. Jenkins' conclusions, as they were based on the physical evidence on the vehicle. The applicant has not explained what information would have been missing from his own sworn testimony, which Mr. Jenkins reviewed, that would have impacted the findings. Although the applicant submits that Mr. Jenkins did not ask Mr. Ali about the presence of paint on the vehicle, he did not explain why that would have made a difference in Mr. Jenkins' conclusions. In any event, in his report, Mr. Jenkins already mentioned the applicant's testimony that there was some grey colour deposited onto the Impala from the van.

[31] The applicant also submits that the report is of questionable accuracy. He points out that in describing the date of the incident, Mr. Jenkins wrote: “It is my understanding that at approximately 10:30 p.m. on May 11, 2017 […]”. However, the applicant described the accident occurring at around 10:30 a.m. I am not convinced that this single error, which involved a mistake of one letter, indicates that the rest of Mr. Jenkins’ report lacks accuracy. The applicant has not identified any other factual errors within Mr. Jenkins’ report. Further, the time of the accident was entirely irrelevant to Mr. Jenkins’ findings.

[32] I note that a report dated July 16, 2018, was also prepared by Mr. Jenkins, which states: “this summary is not intended to be a comprehensive report of my observations and determinations and should not be considered a complete technical document. A comprehensive and detailed report, including the complete basis for my findings, can be provided if required.” The applicant submits that it is troubling that an expert would file a report with such a qualification. I disagree. Unlike the report dated December 14, 2020, this report did not include photographs, was prepared prior to the applicant’s EUO, and includes a summary of findings rather than final conclusions or opinions. Further, Mr. Jenkins did not “file” this report; it was provided to the respondent and sent by the respondent to the applicant at a later date. The applicant has not explained why there is an issue with the preparation of such a document. In any event, as it was not comprehensive, I have not placed any weight on it.

[33] The applicant submits that nowhere in Mr. Jenkins’ reports does he explain the frequency of his reports being presented in court or at a tribunal, or the basis upon which he should be considered qualified as an expert and entitled to file a report of such importance alleging fraud. The applicant has not directed me to any authority for the proposition that an expert must state in their report how often they are present in court or at a tribunal, and in any event, I am not convinced that the frequency of such an attendance is indicative of an expert’s qualifications. Further, the respondent served copies of Mr. Jenkins’ two *curriculum vitae* (“CVs”) at the same time that it filed its reply submissions. I have reviewed the CVs, which indicates that he is an engineer with experience in motor vehicle collision investigations since 2006. He also acknowledges in his report that he has a duty to provide evidence that is fair, objective, non-partisan, and related to areas within his expertise, and that this duty prevails over any obligation owed to any party by whom or on whose behalf he was engaged. I am accordingly satisfied that he is qualified to provide opinion evidence with respect to this matter.

[34] The applicant also states the following:

> Inexplicably in two reports, including the Impact Forensics Report provided to the Respondent Belair dated on or around December 14, 2020, simply concluded that the damage on the vehicle was wholly inconsistent with the Applicant's representation(s) regarding the circumstances and facts of the subject accident. The measurements used shows a manifest difference in calculations.

[35] He then quotes two paragraphs from the report in their entirety, but does not explain why he reproduced the quotes, what specifically he takes issue with, or what differences in measurements he is referring to. It is not clear to me what the applicant's submissions are in this regard.

[36] The applicant argues that Mr. Jenkins improperly made assumptions about the make, mode, and year of the van. In his report, Mr. Jenkins explained that the height and location of the damage to the Impala did not align with the features of any Dodge Caravan model. He indicated that, while it was possible that the applicant mistook the unidentified vehicle for a Dodge Caravan, given the geometrical similarities between the Dodge Caravan and other similar minivans, there was no evidence that the damage was caused by an impact with the front of a minivan. I do not find this particular opinion of Mr. Jenkins to be compelling, as he did not provide the measurements of all similar minivans in light of the applicant's evidence that he was not sure if it was a Caravan. However, this was a separate conclusion specifically regarding the height of the damage, not the speed of the vehicles.

[37] Finally, the applicant relies on *Meade v. Hussein*, 2021 ONSC 7850, which states that expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability. However, the applicant has not provided any evidence or argument to suggest that Mr. Jenkins' report advanced a novel scientific theory or technique. In reaching his conclusions, Mr. Jenkins used software called "PC Crash" which he states is commercially available 3D vehicle collision and dynamics software. The applicant has not made any argument as to whether this software used a novel approach or should not have been used.

[38] In my view, the applicant has not provided a compelling reason for me to discount the findings in Mr. Jenkins' report with respect to the speed of the vehicles and mechanism of the accident. Further, he has not provided an opinion from an expert that would challenge Mr. Jenkins' conclusions, despite admitting that he has been in receipt of this report since May 2021.

[39] I find that Mr. Jenkins' report calls the applicant's testimony into question. His evidence was that the Impala was travelling at 50 or 60 km/hr, and that the van came through the intersection and struck the Impala. In my view, his explanation of the circumstances of the accident is not in line with the van being stationary or Mr. Ali braking heavily at impact. I do not agree with the applicant that these discrepancies were minor; Mr. Jenkins' conclusions are fundamentally at odds with key descriptors of the accident made by the applicant. The applicant has not put forward a compelling theory to reconcile these discrepancies, or provided compelling evidence to corroborate his testimony.

[40] As I am not persuaded by the applicant's version of events, I find that he has failed to adduce compelling evidence that he was in the vehicle when it was damaged. As such, I find that he has not proven, on a balance of probabilities, that the use or operation of the vehicle caused him to sustain injuries, and therefore he has not met his onus to prove that he was involved in an "accident" pursuant to s. 3(1).

Is the respondent entitled to repayment due to wilful misrepresentation or fraud?

[41] Section 53 of the *Schedule* allows an insurer to terminate the payment of benefits if the insured person has wilfully misrepresented material facts with respect to the application for the benefit, and if the insurer provides the insured person with a notice setting out the reasons for the termination. The respondent submits that if a collision occurred involving the vehicles, the applicant wilfully misrepresented material facts concerning the collision, thereby precluding him from entitlement to accident benefits.

[42] Further, the respondent argues that the applicant should be required to repay the benefits provided to him in the amount of $3,806.09 pursuant to s. 52(1)(a) of the *Schedule* as well as applicable interest. Under s. 52(1)(a), a person is liable to repay to the insurer any benefit paid as a result of an error on the part of the insurer, the insured person, or any other person, or as a result of wilful misrepresentation or fraud. In the case of s. 53 and s. 52(1)(a), the onus of proof rests with the respondent on a balance of probabilities.

[43] It is not disputed that the respondent provided a termination and repayment notice to the applicant in a letter dated May 14, 2021. However, the applicant submits that he did not engage in any wilful or material misrepresentation, and that the respondent is not entitled to a repayment or to an order that it may terminate the payment of benefits to the applicant. For the following reasons, I disagree.

[44] As I have stated above, the applicant failed to establish that the collision occurred as he reported. The discrepancies between his evidence and Mr. Jenkins' opinion of how the collision occurred were not minor, and have not been adequately explained. On a balance of probabilities, I find that the respondent has proven that the applicant misrepresented critical facts regarding the collision. This misrepresentation was material, as it allowed the applicant to receive accident benefits from the respondent. The misrepresentation was also wilful, as the applicant actively described an inaccurate version of the collision to the respondent.

[45] I accordingly find that the respondent was entitled to terminate the benefits pursuant to s. 53, and is entitled to a repayment in the amount of $3,806.09.

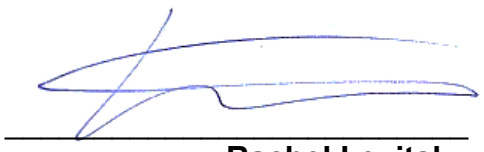
Interest

[46] Section 52(5) and 52(6) of the *Schedule* provide guidance on when an insurer may recover interest when seeking repayment. The insurer may charge interest on the outstanding balance of the amount to be repaid for the period starting on the 15th day after the notice is given and ending on the day repayment is received in full, calculated at the bank rate in effect on the 15th day after the notice is given. Having found that the respondent is entitled to repayment, it follows that it is also entitled to interest on the amount to be repaid pursuant to s. 52(5).

ORDER

[47] The applicant has not established that he was involved in an "accident" pursuant to s. 3(1) of the *Schedule*. The respondent is entitled to terminate the payment of benefits to the applicant pursuant to s. 53, and is entitled to a repayment pursuant to s. 52(1)(a) in the amount of $3,806.09 plus interest in accordance with s. 52(5).

Released: April 2, 2025



Rachel Levitsky
Adjudicator