Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A12-007756

BETWEEN:

ASSOUYOUTI MOUSTAPHA

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Arbitrator Jeff Musson

Heard: In person at ADR Chambers on May 25, 26, 27 & 28, 2015 and June 18, 2015

Appearances: Mr. Joel Dick for Mr. Assouyouti Moustapha
Mr. Timothy Crljenica for State Farm Mutual Automobile Insurance Company

Issues:

The Applicant, Mr. Assouyouti Moustapha, was injured in a motor vehicle accident on March 31, 2010 and sought accident benefits from State Farm Mutual Automobile Insurance Company ("State Farm"), payable under the *SABS*.[1] Various disputes arose and the parties were unable to resolve their disputes through mediation, and Mr. Moustapha applied for arbitration at the

[1] Effective September 1, 2010, the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "new *SABS*") came into force. The transition rules in the new *SABS* provide that, subject to certain exceptions, benefits that would have been available pursuant to the *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996* (the "old *SABS*") shall be paid under the new *SABS*, but in amounts determined under the old *SABS*. As a result, both the old *SABS* and the new *SABS* are applicable to accidents that occurred on or after November 1, 1996 and before September 1, 2010 and both should be considered.

Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

At the Pre-Hearing discussion, held on December 18, 2013, it was determined that a Preliminary Issue Hearing would be held before this Application would be heard in an Arbitration Hearing in order to determine if a motor vehicle accident as defined by the *SABS* occurred.

The issues in this Preliminary Issue Hearing are:

1. Was the Applicant involved in an "accident" as defined in Section 2(1) of the *SABS*?
2. If an accident was determined to not have occurred, is the Applicant liable to repay to State Farm various benefits received, pursuant to Sections 52 and 53 of the *SABS*?

Result:

1. The Applicant was involved in an "accident" as defined in Section 2(1) of the *SABS* on March 31, 2010 and this Application for Arbitration can proceed to a Hearing.
2. The Insurer has not proven its claim for repayment.

EVIDENCE AND ANALYSIS:

BACKGROUND

At the time of the accident, the Applicant, Mr. Assouyouti Moustapha was 50 years old, living in Toronto, Ontario. On March 31, 2010, the Applicant, the Applicant's wife, Ms. Nasra Ibrahim, and the Applicant's friend, Mr. John Chernet, travelled to Hamilton, Ontario in order for Ms. Ibrahim to visit a friend and offer her condolences on a recent death of her friend's relative. They travelled in a 1999 Dodge Caravan owned by Ms. Ibrahim, but being driven by Mr. Chernet. Mr. Chernet was asked to drive the vehicle as, of the three occupants, he was the only one who had an unrestricted driver's license allowing him to drive on a highway with posted speed limits of 100 km/h and after midnight. Ms. Ibrahim did not have a license allowing her to

do this, she only had a G1 license, and the Applicant's driver's license was suspended, therefore making it illegal for him to drive to Hamilton.

On the way back to Toronto, the vehicle that the Applicant was in exited the 401 highway at Avenue Road. It was at this off-ramp where the accident occurred. The Applicant's vehicle, the 1999 Dodge Caravan driven by Mr. Chernet, rear-ended a 1999 Honda Civic driven by Ms. Gaynell Zamora-Galaites.

Toronto Police, Fire and EMS were dispatched to the scene. Due to the collision, both vehicles were rendered undriveable and were towed from the scene.[2]

On December 11, 2012, the Applicant filed for accident benefits from State Farm, and thereafter received the following benefits and amounts: $15,795.94 in Medical/Rehabilitation Benefits, $8,742.86 for Housekeeping and Home Maintenance Benefits, $7,829.85 for Attendant Care Benefits, $860.00 for replacement of personal items. The Insurer also paid directly to the clinics, $34,853.23 for Insurer's Examinations. On February 13, 2013, State Farm sent a letter to the Applicant terminating benefits and requesting repayment under Section 52 and 53 of the *SABS*.

The Law

In Section 2(1) of the *SABS*, an accident is defined as an "incident in which the use or operation of an automobile directly causes an impairment or directly causes damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device".

Prior case law has established that the burden of proof lies with the Applicant on a balance of probabilities to establish that there was an accident within the meaning of the *SABS*. However, in some cases, the Arbitrator has ruled that the onus of proof is on the Insurer to prove that an accident did not occur. In my opinion, the situation does not change simply because the Insurer challenges the facts upon which the claim is based. It remains up to the Applicant to bring

[2] Joint Evidence Brief, Tab 8, pg. 55.

forward credible evidence in support of their claim.[3] In this case, it is up to Mr. Moustapha to bring forward credible evidence that an accident as defined by the *SABS* occurred.

Applicant's Position

The Applicant asserts that a motor vehicle accident took place on March 31, 2010 and that he was sitting in the front passenger seat when it occurred. The Applicant is not denying that there were some inconsistencies in his examination for discovery, however, proper interpretation was an issue at these examinations. In fact, on one of the days, his counsel at the time asked for an adjournment in order to have an Arabic interpreter with the proper dialect present.[4] Regardless, the Applicant is of the opinion that the information that is material and directly related to this accident has been consistent throughout these proceedings including the Preliminary Issue Hearing. The evidence provided shows that the person driving, how many people were in the vehicle, and the time of day the accident occurred has never changed. The topics about which there have been some inconsistencies are all, in the Applicant's opinion, not material as it relates to whether the motor vehicle accident occurred on March 31, 2010.

Insurer's Position

State Farm asserts that an accident did not take place on March 31, 2010 as described. It submits that there was no accident within the meaning of the *SABS*. State Farm relies heavily on its expert accident reconstruction report conducted by Mr. Rob Seaton ("the Seaton Report") that concluded that an accident did not take place as described. State Farm also relies on inconsistencies in the Applicant's examinations for discovery and the inconsistencies in the other individuals' examinations for discovery, mainly Mr. Chernet and Ms. Ibrahim. Together, State Farm takes all of these factors and is of the opinion that they are material to the accident and that they discredit any testimony and evidence provided by the Applicant in this case. All of these inconsistencies and evidence should be taken at face value and when added together,

[3] *Azimi and Economical Mutual Insurance Company* (FSCO A08-002596, June 7, 2010), pg. 2.
[4] Joint Evidence Brief, Tab 14, pg. 271.

the Applicant's Application for Arbitration should be dismissed. For purposes of this Preliminary Issue Hearing, State Farm also submits that the evidence provided by the Applicant is misleading and contradictory which ultimately undermines the probability that an accident had occurred as described in this case. As a result, State Farm is asking for full repayment of all benefits paid to the Applicant to date.

THE EVIDENCE

Throughout this case, as has been noted, there were many inconsistencies among the people testifying. In my opinion, it is important to separate the testimony that is material to this accident from the testimony that is not. Eight witnesses were called in this matter. Their testimony is summarized below.

The Testimony of Mr. Assouyouti Moustapha

I found Mr. Moustapha to be an educated man who had some understanding of the English language but had trouble comprehending it, especially when it came to the different meanings of words. As was noted, there are many different Arabic dialects and it is important to have an interpreter who is able to not only translate the proper words between English and Arabic, but just as important to comprehend them as used in a particular dialect.

The Applicant testified that he married Ms. Ibrahim in 1990, when they were in Sudan and together they have 4 children ranging in age from 11 years old to 22 years old. He immigrated to Canada in 1994 from Sudan. At the time of the accident, the Applicant and his wife were separated. Mr. Moustapha originally owned the 1999 Dodge Caravan but he transferred the vehicle into his wife's name after they separated because the 4 children from the marriage lived with her. The transfer history was confirmed by the Insurer's record search of the vehicle's prior history.

The Applicant testified at the Preliminary Issue Hearing that his driver's licence was suspended. This explained why Mr. Chernet was driving and why he was the only one of the 3 people in the

1999 Dodge Caravan who could legally drive on a four-lane highway to Hamilton. The Applicant testified that he was seated in the front passenger seat of the vehicle and the Applicant's wife, Ms. Ibrahim, was seated in the back. Mr. Moustapha also stated that on returning to Toronto after being in Hamilton, he and Mr. Chernet were going to meet with some individuals (musicians) who were potentially interested in playing at Mr. Chernet's restaurant. Both men were going to meet these musicians at a fast food restaurant which is why they were exiting the 401 at Avenue Road. This testimony aligns with the testimony of Mr. Chernet at the Hearing.

When asked at the Hearing, the Applicant testified that he did not know how fast the 1999 Dodge Caravan was travelling at the time of impact. His response was that he didn't know because he was not driving and all he could remember was that Mr. Chernet collided with the 1999 Honda Civic. Mr. Moustapha also testified that he doesn't know the driver of the 1999 Honda Civic that they rear-ended or anyone related to her. Mr. Moustapha testified in his testimony that after the accident, the 1999 Dodge Caravan was in an undriveable condition and as such, had to be towed away from the scene of the accident.

The Applicant didn't go to the hospital on the night of the accident; instead, he waited until 10 a.m. the following morning to visit his family doctor (Dr. Obaji). The Applicant complained of pain in his neck and back after the accident. He also experienced some vomiting the night of the accident after he went home. After seeing his doctor, Mr. Moustapha began treatment as part of the accident benefits claim. It was noted in the evidence that the Applicant's injuries are consistent with how this accident was described as taking place.[5] His family doctor referred him to a specialist named Dr. Kekosz and the Applicant proceeded to get an MRI as part of his treatment plan.

Within that framework, I found Mr. Moustapha's testimony to support the major details related to this case, however, there were many inconsistencies as to how they got to Ms. Ibrahim's house and the reasons for the Applicant being in Hamilton with Mr. Chernet and Ms. Ibrahim. The inconsistencies continued as to what happened in Hamilton and who attended the wake. There

[5] Exhibit 3, p. 4 & 5.

were further inconsistencies in terms of the reason for meeting the band members late at night which was why the 1999 Dodge Caravan driven by Mr. Chernet was exiting the 401 at Avenue Road. Having said that, when it came to details as to who the occupants were in the car, where they were, who was driving the other car, and if there was any relationship between the occupants in both cars, the answers of the Applicant and the other people testifying all are similar. In my opinion, these are all questions which are most material to this case.

The underlying dispute seems to have arisen in large part from Mr. Chernet giving evidence at the scene of the accident, saying that he was travelling at 60 km/h on impact, which appears inconsistent with the other evidence at the Preliminary Issue Hearing. Mr. Moustapha didn't give this evidence; the driver, Mr. Chernet, did. In this regard, I note the testimony of Constable Mogan, who stated that sometimes the details of accidents provided by witnesses do not necessarily reflect the actual event details for a variety of reasons.

If the situation were different and Mr. Moustapha was the person driving and he gave evidence that he was travelling at 60 km/h, then the Applicant could be held to a higher threshold since he would be the one in control of the vehicle at the time and therefore, should be aware of his speed. However in this case, the Applicant was seated in the front passenger seat. In my opinion, the Applicant should not be held to the statement given by Mr. Chernet as it related to speed because Mr. Moustapha didn't state that the vehicle was going 60 km/h at the time of the accident; in fact, Mr. Moustapha's testimony was that he did not know.

As for the service providers, the Applicant testified that Mr. Yahya and Mr. Ahmed were providing housekeeping and attendant care services for him as he was recovering from the accident. Beginning in April of 2010, right after the accident, he also testified that Mr. Yahya stopped providing services about 6 months after the accident and ultimately, Mr. Yahya left the country. Mr. Ahmed continued to provide services after that time. The Applicant testified that he required help dressing and undressing, shaving and with other personal care needs. He further stated in his evidence that he also required cooking, cleaning and general tasks to be completed around his residence.

When it came to financial questions, Mr. Moustapha was asked if he pays child or spousal support to which he replied no. He was asked if he purchased a new vehicle after the accident and he said no.

Finally, the Applicant as part of his testimony was asked if he along with Ms. Nasra Ibrahim (his wife) and Mr. John Chernet planned for the accident to take place, he replied no.

The Testimony of Mr. John Chernet

Mr. John Chernet was the person driving the 1999 Dodge Caravan. He had testified that he has known the Applicant for the past few years and first met him at a restaurant that Mr. Chernet owned. I found Mr. Chernet to have a flare for the dramatics, such as when he put his medication bottles on the table towards the end of his testimony. Before commencing his examination in chief, Applicant's counsel asked Mr. Chernet if he had taken any medication that would affect his ability to testify. Mr. Chernet responded no. Mr. Chernet testified that he had never been in a motor vehicle accident prior to this one. I never heard evidence from the Insurer or others in this case which contradicts his statement.

I found Mr. Chernet to be overly emotional, a poor historian and his recollection of facts was vague to say the least. As an example, he was shown pictures of both the vehicle that he was driving and also pictures of the vehicle that he rear-ended. Although there was no disputing the fact that these pictures were in fact the two vehicles involved in the collision, Mr. Chernet testified that the 1999 Honda Civic in the pictures presented to him was not the vehicle that he rear-ended, as it was the wrong colour, and the picture of the 1999 Dodge Caravan was not the vehicle he was driving. Clearly, this wasn't accurate because everyone from the OPP Constable, to the Insurer, to the Applicant all agreed that the 1999 Honda Civic picture shown (License ADWN 638) was in fact the car that was rear-ended and the picture of the 1999 Dodge Caravan (License BAKB 324) was the vehicle that caused the accident.[6]

[6] Joint Evidence Brief, Tab 9, pp. 61-91.

It is important to note that Mr. Chernet was not the Applicant in this Preliminary Issue Hearing; he was only a witness who was summonsed to testify by Applicant's counsel. Much of his testimony concerned the reason for being in Hamilton before the accident. What did he along with Mr. Moustapha do after dropping off Ms. Ibrahim at her friend's residence? Was Ms. Ibrahim dropped off in a parking lot or in the driveway of the building? Were Mr. Chernet and Mr. Moustapha to meet the band members at a Tim Horton's or a McDonald's when they returned to Toronto later that day? In my opinion, these details were not dispositive to this accident. If on the other hand, the Insurer provided evidence that could tie these details together to show that a plan was concocted to stage an accident, then they would have greater relevancy, but that was not how the evidence was presented. All these inconsistencies showed was that Mr. Chernet is an individual who has a wild imagination and is someone whose story telling skills were exceedingly better than his driving skills.

In his statement to Constable Mogan at the accident scene, Mr. Chernet stated that he was driving 60 km/h when he collided with the 1999 Honda Civic.[7] As noted above, I find this unlikely based on other evidence provided at this Preliminary Issue Hearing. However, I don't think he intentionally lied. If anything, I think he held a foggy recollection of events and his evidence is only as valuable to the extent verified by other means.

As part of his testimony, Mr. Chernet corroborated the reason he was driving Ms. Ibrahim's vehicle. Mr. Chernet also testified that he was the driver who hit the 1999 Honda Civic; that the accident occurred around 10:30 p.m.; that there were 2 other passengers in the 1999 Dodge Caravan that he was driving and where they were seated; that the accident occurred on the off-ramp of the 401 and Avenue Rd exit. All of these facts are confirmed by other evidence and are consistent with the other passengers in the 1999 Dodge Caravan's evidence and the Police Statement at the scene.

In my opinion, the most important testimony that Mr. Chernet gave was that he did not know the other driver of the other car and that he testified that he did not plan to cause or stage an

[7] Joint Evidence Brief, Tab 6, pg. 47.

accident ahead of the collision that occurred on March 31, 2010. Again, the Insurer did not provide evidence to the contrary.

The Testimony of Ms. Gaynell Zamora-Galaites

Ms. Zamora-Galaites was the driver of the 1999 Honda Civic which was rear-ended by Mr. Chernet. According to her testimony, she happened to be on the off-ramp where she was rear-ended because she was driving east on the 401 and missed her exit. She decided to get off at the Avenue Rd exit to turn around and get back on the 401 heading back to her original exit which would have been Keele and the 401. She was travelling with her husband who was the passenger in the front seat and Ms. Zamora-Galaites' sister who was the passenger in the rear seat.

Ms. Zamora-Galaites testified that she was stopped at the traffic light at the 401 off-ramp and Avenue Road. It is here, while stopped, that she was rear-ended by the 1999 Dodge Caravan driven by Mr. Chernet. Ms. Zamora-Galaites was taken by ambulance to North York General Hospital. She testified that she never met or knew the other people in the 1999 Dodge Caravan that hit her car. The Insurer did not provide evidence to the contrary. Ms. Zamora-Galaites also testified that all the damage to her car was a result of the accident.[8]

I found her to be a pleasant witness who gave her testimony related to the accident to the best of her ability. I did not have the impression that she was hiding any details or misleading anyone in terms of what happened the night of the accident, even though during her testimony, I found her recollection of events to be vague and sometimes inaccurate. For example, she testified that the police officer attending the scene was a male and yet the surrounding evidence establishes that the attending police officer was a female. This is not to say, that she intentionally was trying to mislead, rather, in my opinion, it was more a factor of having poor recollection.

The important information that came from her testimony corroborated that she was driving the

[8] Joint Evidence Brief, Tab 9, pp. 61-91.

vehicle rear-ended on the off-ramp at Avenue Rd and the 401, that she had never met the Applicant prior to this accident, and that she did not know Mr. Chernet or Ms. Ibrahim in the 1999 Dodge Caravan. She also confirmed in her testimony that the damage in the pictures of her vehicle was caused as a result of being rear-ended by the 1999 Dodge Caravan driven by Mr. Chernet.

In my opinion, it was bad fate and complete randomness that brought her to the Avenue Road off-ramp of the 401 on the night of March 31, 2010.

The Testimony of Mr. Raffi Engeian, Expert Witness for the Applicant

Mr. Raffi Engeian is an accident collision reconstructionist and has been employed with Giffin Koerth Inc. since June 2013. He testified on behalf of the Applicant in regards to the motor vehicle accident that took place on March 31, 2010. Mr. Engeian was engaged to review the physical circumstances of the incident and specifically determine if a rear impact collision occurred between the 1999 Dodge Caravan in which the Applicant was a passenger and the 1999 Honda Civic which was the vehicle that was rear-ended. In addition, he was also given the task to review and comment on the accident reconstruction report authored by the Insurer's expert, Mr. Robert Seaton.

Mr. Engeian was presented as an expert by the Applicant in the area of accident reconstruction. He is a member in good standing with the Professional Engineers Ontario, the Society of Automotive Engineers and a member of the Canadian Association of Technical Accident Investigations and Reconstructionists. Mr. Engeian graduated with an engineering degree from the University of Windsor in 2002 and also completed his MBA from the University of Windsor in 2004. He has a specialized professional competence in the area of motor vehicle collision investigation and reconstruction. Mr. Engeian also has significant knowledge in the area of design and development of automotive sub-assemblies. He testified that he continually upgrades his skills through course work and conference participation on an annual basis.[9] The

[9] Joint Evidence Brief, Tab 11, pg. 149.

Insurer's counsel had no objection to having Mr. Engeian testify as an expert witness. I accept Mr. Engeian as qualified to give his expert opinion in this case.

Unfortunately, due to the fact that the vehicles in question were no longer available for examination, for his report, dated February 20, 2015, Mr. Engeian had to rely on secondary evidence. This included the motor vehicle accident report of March 31, 2010, the transcripts for discovery of Mr. Chernet, Ms. Zamora-Galaites, Mr. Galaites and Mr. Moustapha (both June 24 & June 25, 2013), pictures, automotive specifications for a 1999 Dodge Caravan and a 1999 Honda Civic, along with widely accepted automobile collision reconstruction techniques.

I found Mr. Engeian's testimony to be highly credible and his knowledge in the area of accident reconstruction to be extensive. His oral testimony expanded on and clarified the documentary evidence. His findings in his report state that in his expert opinion, these two vehicles were in fact involved in a rear-end accident on March 31, 2010. Mr. Engeian methodically explained in great detail how he came to his conclusions. He explained the damage to the vehicles and identified damage to the vehicles which could not be explained.

As part of his report, Mr. Engeian included an Insurance Institute for Highway Safety (IIHS) crash test to explain how the damage or lack thereof to the trunk of the 1999 Honda Civic could have happened and why, based on the physical evidence, he felt that the trunk of the car opened, which would explain the lack of crush damage.[10] From the outset, he acknowledged that the vehicles in this IIHS crash test were different than the vehicles involved in the accident on March 31, 2010; however, the value of this test and related photographs was to show what happens in a rear-end collision. This IIHS crash test report was used for background information to show that the possibilities exist that in a rear-end collision, it is common for trunk latches to release on impact when the components are damaged from the collision.

Mr. Engeian testified that based on his experience, analysis and the information that he was provided as it related to the accident on March 31, 2010, the closing speed of the vehicles was

[10] The Giffin Koerth Report [Mr. Engeian's Report], Tab 11, pg. 135.

less than 40 km/h as opposed to 60 km/h. Nonetheless, there was a motor vehicle rear-end accident that occurred between both the 1999 Dodge Caravan and the 1999 Honda Civic.

Mr. Engeian also testified that in the photographs, the airbags deployed in the 1999 Dodge Caravan. He was asked if this was to be expected. Mr. Engeian testified that in a motor vehicle accident, when the speed differential rate changes between 15km/h – 25km/h or more, typically a collision over 25 km/h, that it will trigger airbag deployment which would be consistent with the findings of this accident happening at a speed less than 40km/h. In this case, because he viewed the photographs of the airbags deployed, he concluded that the impact most likely happened at a speed greater than 25 km/h.[11]

Under cross-examination by the Insurer's counsel, Mr. Engeian's testimony came across as authoritative and thorough. He was able to answer questions in a clear and concise manner. In addition, he was able to provide commentary on the Seaton Report and the areas which he thought lacked proper analysis. In reviewing the Seaton Report, Mr. Engeian testified that there was no supporting or sufficient evidence to say that the two vehicles involved in this accident did not come into contact. Ultimately, Mr. Engeian concluded that the damage observed on both vehicles was consistent with a rear-end collision between them.

The Testimony of Mr. Monir Ahmed

Mr. Monir Ahmed was the last witness to testify in this Preliminary Issue Hearing for the Applicant. He testified that he has known the Applicant for a while. Mr. Ahmed said he performed housekeeping and home maintenance tasks along with attendant care tasks for the Applicant after the accident. In my opinion, I believe that Mr. Ahmed was providing some level of support to the Applicant. As for what level of service, that can be left to the actual Hearing.

Mr. Ahmed testified that he remembered the phone call with Ms. Loureiro from State Farm where he hung up on her. He remembered that she asked him questions and he had concerns as

[11] The Giffin Koerth Report [Mr. Engeian's Report], Tab 11, pg. 137.

to who he was talking to on the other end of the phone, so he panicked and hung up. He also testified that he was never contacted after the hang-up phone call. I believe that Mr. Ahmed got unnerved with this phone call, not so much because it was State Farm verifying the service provider support he was giving the Applicant, but because he didn't know who the person was on the other end, being Ms. Loureiro. Mr. Ahmed testified that English wasn't his native language and commented on an overall distrust when it came to talking to people on the phone.

The Testimony of Ms. Maria Loureiro from State Farm

Ms. Maria Loureiro was called to testify in this case on behalf of the Insurer. She has been an employee of State Farm for over 9 years and of those, 4 years with the Special Investigation Unit ("SIU") at State Farm. I found her testimony to be credible. I am of the opinion that she answered questions honestly, even though she appeared to have some trouble understanding Applicant's counsel's questions at points during the cross-examination. Ms. Loureiro testified that according to the log notes on this claim, State Farm decided on April 20, 2010 that the 1999 Dodge Caravan, which they insured, was a total loss and proceeded to pay out the value of the vehicle to Ms. Ibrahim and then the vehicle was cleared for auction by State Farm for salvage.[12]

It should be noted that Ms. Loureiro first became involved with this claim in January 2012, a little less than two years after the vehicle was sold for scrap. In going through the log notes at the Hearing, she explained the various entries. I found her testimony extremely relevant because it was important to know why the Insurer felt that this accident was staged and/or fraudulent. When asked why this file was flagged for further investigation and ultimately a Section 52 and 53 termination, she explained what the triggers for a fraud investigation were and that triggers were listed in her log notes. She explained how and why State Farm felt that this motor vehicle accident did not occur as described. One trigger causing State Farm to look into this accident a little more closely was that the insurance policy for the 1999 Dodge Caravan that was issued on March 24, 2010, only 1 week prior to this accident. The second trigger was that the Applicant had obtained legal representation shortly after the accident. The third was

[12] Joint Evidence Brief, Tab 22, pg. 946.

that the 1999 Dodge Caravan had a prior salvage record/or previous claim history, and the final trigger was that in State Farm's opinion, the facts of loss reported were inconsistent with the damage.[13]

In starting her investigation, Ms. Loureiro had discovered that a Carfax Report was already on file with this claim, although it was never turned over to Mr. Seaton or Mr. Engeian as part of their reconstruction analysis. The report showed that the 1999 Dodge Caravan was involved in two prior accidents, in 2003 and 2004; however, the car was repaired and was certified to be road worthy up until the date of the accident on March 31, 2010.[14]

On approximately January 25, 2012, Ms. Loureiro ordered a VIN history on the 1999 Dodge Caravan. Around the same time, in going through the claim, she also asked for a signed OCF-5 in order to have it on file since there was not one at the time. When the VIN Report was received a couple of weeks after it was ordered, there were no anomalies found. In continuing to investigate, Ms. Loureiro discovered that Ms. Ibrahim cancelled the insurance policy after the accident once the 1999 Dodge Caravan was deemed a total loss. Amongst other searches, Ms. Loureiro ran the names of Mr. Moustapha and Ms. Ibrahim in the computer system and no records of prior issues were found. She also ran a search on Mr. Chernet and nothing was found.

On February 15, 2012, Ms. Loureiro phoned Certas, Ms. Zamora-Galaites' auto insurance carrier, to verify information. According to her testimony, for approximately the next two weeks, both Ms. Loureiro and Mr. Tim Dudley from Certas were in contact as it related to this accident.

After completing the searches on the 1999 Dodge Caravan and the occupants, Ms. Loureiro began to evaluate the claim for benefits, specifically as it related to the service providers being Mr. Yahya and Mr. Ahmed. Here, Ms. Loureiro found some issues which made her take notice.

[13] Joint Evidence Brief, Tab 22, pg. 804.
[14] Exhibit 8, The Carfax Report for the Ibrahim 1999 Dodge Caravan.

One, Mr. Yahya's contact information was no longer current and two, the receipts provided to State Farm were missing information. With Mr. Ahmed, Ms. Loureiro was able to contact him, however, the information that he provided only heightened Ms. Loureiro's doubts as well. As an example, there was phone call placed by Ms. Loureiro to Mr. Ahmed on or about February 15, 2012. Ms. Loureiro phoned Mr. Ahmed to confirm details of his work as a service provider for Mr. Moustapha. Ms. Loureiro began asking questions of Ms. Ahmed which ended when Mr. Ahmed hung up the phone.[15]

Although this may appear to constitute rude behavior, I can understand why in today's day and age people do not want to give details over the phone, especially since there is no way of verifying who they are talking to on the other end. With the actions of Mr. Ahmed hanging up the phone on Ms. Loureiro, it did nothing to put her suspicions at ease. In fact, the behavior of both the housekeeping and home maintenance and attendant care service providers further raised State Farm's suspicion instead of alleviating it. Mr. Yahya's and Mr. Ahmed's behaviour did nothing to help the Applicant's case.

What was interesting to note with Ms. Loureiro's testimony was not so much what she said triggered the investigation, but what she didn't say as part of her testimony. Ms. Loureiro never testified that the investigating OPP Officer (Constable Mogan) contacted her to suggest that she felt as the investigating officer, that this accident was not as it appeared, similar to how the investigating Constable testified in the case of *Azimi and Economical Mutual Insurance Company*.

Ms. Loureiro never provided evidence that the Applicant had a pre-existing relationship with any of the other businesses associated with this accident including the tow truck operator, the medical clinics, and the other driver of the car that was rear-ended. There was no evidence as part of the testimony presented by Ms. Loureiro that would show a potential financial enrichment as a reason for this accident to be staged or fraudulently reported.

[15] Joint Evidence Brief, Tab 22, pg. 804.

The only issue that came to light in her testimony was that this accident involved a set of triggers that individually, would not have amounted to much scrutiny, but together raised awareness inside of State Farm. Based on the evidence presented to them, State Farm suspected that a fraudulent/staged accident took place on March 31, 2010.

Having said that, in my opinion, there are many times in an investigation where an investigator already has jumped to conclusions and only views evidence, circumstantial or otherwise, through a pre-determined conclusion. In this case, I feel State Farm already had determined that they were dealing with a fraudulent claim, albeit 21 months after the accident and 19 months after the evidence (the 1999 Dodge Caravan) was scrapped. I believe, from that point moving forward, State Farm was looking at evidence to add to their fraud investigation instead of looking at evidence through an unfiltered lens.

The Testimony of Mr. Robert Seaton, Expert Witness for the Insurer

Mr. Robert Seaton is an expert in the area of accident reconstruction. He is currently employed as an accident reconstructionist and has been performing collision reconstruction work since 1992. He has worked in this capacity for the past 15 years. Prior to this, he was a police officer for 23 years, having worked on the City of Toronto police force for 10 years and then for 13 years as a member of the OPP. In his role at the Ontario Provincial Police ("the OPP"), he started doing accident reconstruction work towards the end of his policing career. Mr. Seaton has been retained by a number of investigative firms, insurance companies and does work for civil litigation and criminal law firms. He also provides training in the area of accident reconstruction and is continually upgrading his skill set in this area as well.[16] Counsel for the Applicant had no objection to Mr. Seaton being called as an expert witness. Based on the qualifying evidence led and Applicant's counsel not objecting to Mr. Seaton as an expert witness, I accept that Mr. Seaton is qualified to give his expert opinion in this matter.

Mr. Seaton was given 2 assignments. The first was to provide analysis of the collision sequence

[16] Joint Evidence Brief, Tab 10, pg. 114.

of events and the second was to provide an opinion or rebuttal of Mr. Engeian's report along with providing commentary on Mr. Engeian's conclusions.[17]

Mr. Seaton was given the same evidence as Mr. Engeian to review and write his report but, while Mr. Engeian concluded that the evidence provided conclusively shows that a rear-end accident occurred between both the 1999 Dodge Caravan and the 1999 Honda Civic, Mr. Seaton only concluded that "[t]he profile, elevation and extent of damage to the frontal aspect of the 1999 Dodge Caravan are not consistent with the profile, elevation and extent of damage to the rear aspect of the 1999 Honda Civic and are not consistent with the collision sequence of events as reported, specifically the reported speed of 60 km/h for the Dodge".[18] His report did not comment if there was an accident or not, it only commented if the accident happened as reported at 60 km/h. In addition, as I previously noted, there was airbag deployment in the 1999 Dodge Caravan. Mr. Seaton's report could not explain how or why the air bags were deployed in the vehicle if there was not a collision.

It was interesting to note that the second part of Mr. Seaton's assignment was to rebut and comment on Mr. Engeian's report. Mr. Seaton states that "Giffin Koerth [Mr. Engeian's Report] was engaged on Aug 8, 2014 to access the likely physical circumstances of the incident. Specifically, we [Mr. Seaton's Report] were asked to determine if the collision occurred between the vehicles in the manner reported".[19] Mr. Seaton explained that he and Mr. Engeian were being asked to answer two different questions in each of their reports.

In my opinion, this is the point upon which the whole case hinges. Did an accident occur as defined in Section 2(1) of the *SABS*? Mr. Engeian's report concludes that it in fact did. The Seaton Report didn't address the question of if an accident occurred as defined in Section 2(1) of the *SABS*, it addressed another question, which was, did the rear-end accident occur as reported at 60 km/h. The question put before me in this Preliminary Issue Hearing was, "did an

[17] The Seaton Report, Joint Evidence Brief, Tab 12, pg. 156.
[18] *Ibid.*, Tab 12, pg. 183.
[19] *Ibid.*, Tab 12, pg. 183.

automobile accident as defined under the *SABS* occur", not what was the specific speed at which this accident occurred? In fact, when questioned by Insurer's counsel, "Is it possible that these vehicles did make contact?", Mr. Seaton responded "It is possible, there was just insufficient evidence to validate with 100% certainty" that these vehicles were in a rear-end collision. Afterwards, Mr. Seaton was asked to comment on the Mr. Engeian's report. Insurer's counsel asked, "Does the damage indicated on the front end of the Dodge suggest that it struck the rear of the Honda in an offset orientation?" He replied it is possible that they hit in an offset configuration.

In his report, Mr. Seaton only states that the rear-end accident didn't happen at the reported speed of 60 km/h. He also testified that he couldn't validate with 100% certainty that both vehicles did not come into contact.

The Testimony of OPP Officer, Ms. Laurie Mogan

I found Constable Mogan's testimony to be clear and concise. She has no stake in the outcome of this Hearing. Constable Mogan has been with the OPP since August 2008. She testified that she attended the scene of the accident at Avenue Road and the 401. Constable Mogan also stated that both the 1999 Dodge Caravan and the 1999 Honda Civic were at the scene of the accident. Constable Mogan testified that she has attended to over 200 accidents in her career. When asked about her experience with the factual validity of eyewitness estimates of speed and distance provided by individuals involved in motor vehicle accidents, she commented that the participants' recollection of events can be way off when compared to the evidence of the scene and other times, the estimates are correct.

What was interesting to note, was that she never testified that she suspected that this accident was fraudulent or that it didn't appear to happen the way in which it was reported. In some instances, when a police officer suspects something is not right at an accident scene, they take notice. I note as an example, in the case *Azimi and Economical Mutual Insurance Company*, that was provided by Insurer's counsel, Constable Moretti testified that as the investigating officer, he found no evidence of contact between these two cars. With Constable Mogan being

the investigating officer in the accident in which Mr. Moustapha was involved, no such testimony was given by the officer.

THE ANALYSIS OF THE EVIDENCE

In my opinion, I believe the onus is on the Applicant to prove on the balance of probabilities that he was involved in a motor vehicle accident. Based on the overall weight of the evidence, I am of the view that the Applicant was involved in an accident as defined in Section 2(1) of the *SABS* and that this matter can proceed to a full Arbitration Hearing.

With Preliminary Issue Hearings such as this where the validity of the motor vehicle accident comes into question, I tend to put more weight on fact based testimony as opposed to recollection based testimony. In cases like this, it is also important to separate the facts which are presented and verified with proof, from other evidence that is presented. Although accident reconstruction reports are not without mistakes, I find the reports by both experts to be well done. The difference between the reports centers on the question being asked and answered. In the Mr. Engeian's report, he was asked to determine if an accident took place. In the Seaton Report, he was asked if an accident took place at 60 km/h based on Mr. Chernet stating that he was driving 60 km/h at the point of impact, not if an accident occurred.

It is for this reason that I prefer the expert evidence of Mr. Engeian's report over Rob Seaton's report. Mr. Engeian's report is centered on the specific question for the Preliminary Issue Hearing, i.e. whether or not there was a motor vehicle accident that took place between a 1999 Dodge Caravan driven by Mr. Chernet with the Applicant as an occupant in the front passenger seat and the 1999 Honda Civic driven by Ms. Zamora-Galaites.

Neither expert was able to examine the vehicles first hand, so neither side was at a disadvantage in terms of coming to their conclusions. From the evidence provided, it is clear that there was a motor vehicle collision that occurred at the traffic light at Avenue Rd and the 401 off-ramp. I find that from the testimony and photographs that airbags deployed in the 1999 Dodge Caravan. Both experts testified that at a speed differential anywhere between 15km/h and 25km/h and/or

if the vehicle is travelling over 25 km/h, that airbags will deploy from an impact. As it turned out, both reports were quite similar, but what made each expert come to different conclusions was that each answered different questions with the evidence presented. Mr. Engeian's report stated clearly that these two vehicles were involved in a collision on March 31, 2010.

One final point with respect to this case which is worthy to note, Mr. Seaton was asked as part of his testimony if he assumes that there is an "accident" when doing an investigation. He replied that he never assumes that there is an accident. Mr. Engeian was asked the same question, but answered it a bit differently. Based on the evidence provided to him at the beginning of his review, he assumed that there was a collision. The Insurer's counsel emphasized this as a point of contention.

In my opinion, it was not without reason to assume that a collision took place as a starting point for his report since Toronto Fire, Police and EMS attended the scene. When first responders show up at an accident scene, especially when it was noted that Toronto Fire was dispatched by the onsite Ambulance,[20] there is a reason for them to attend. In my opinion, it was not a stretch to start with the hypothesis that a motor vehicle accident took place, especially when the motor vehicle accident report written by Constable Mogan did not have any notations that she suspected a fraudulent or staged accident.

Now, having said that, there have been cases argued where two vehicles were involved in a collision and to the average observer, nothing looked out of the ordinary, but in those cases there was evidence provided that the accident was a premeditated decision for one or more parties to cause a collision. In this case, however, no such evidence was provided by the Insurer.

The expert evidence in this case must be assessed and weighed together as presented but as part of the overall case. The second part of this case before me revolves around a willful "material" misrepresentation, which means that it was a deliberate or intentional act to misrepresent the facts in this case.

[20] Joint Evidence Brief, Tab 8, pg. 55.

Throughout the Hearing, I kept anticipating evidence to be presented by the Insurer which would provide a motive for staging a motor vehicle accident and there was none presented. Instead, the Insurer presented evidence of multiple inconsistencies that surfaced in the various examinations of discovery of the various participants in this accident and there were many inconsistencies to note. The inconsistencies were related to why the occupants in the 1999 Dodge Caravan were in Hamilton and ultimately driving back to Toronto where the accident occurred. Inconsistencies included who attended the wake in Hamilton and who waited outside of the residence and where did they go? How many times were they in Hamilton before March 31, 2010? What road did they take there and back? Why were they going to meet musicians when they were back in Toronto? If, for example, the Insurer provided proof that both drivers met in Hamilton at the same wake and coincidently got into an accident together on the way back, then it would material, but that was not the case.

I believe to some extent, the inconsistencies in testimony among the examinations for discovery and the testimony at the Preliminary Issue Hearing can be attributed to language and translation issues. Translating from English to Arabic is not easy, especially with the various dialects. Even though the people involved in this accident have been in Canada for a few years, they have modest use of the English language. When it comes to questioning in an examination of discovery, it is not only the interruption of language that matters but just as important is the comprehension. I believe that these individuals who were examined as part of discovery have had issues with comprehension to a certain degree. As an example, when Mr. Moustapha was asked why his wife didn't drive to Hamilton, he replied through an interpreter, it was because she had a "small license". In reality it is not a "small license", but a limited G1 license which has restrictions over a standard driver's licence in the Province of Ontario.

In my opinion, other than confirming that all these participants have poor memories, the inconsistencies were not particularly material to the accident. When it came to details related to the accident, all participants gave similar evidence in terms of their relationship or lack thereof with each other, where did the accident occur, who was driving, what vehicle hit what vehicle and who was seated where in the vehicles. There were no discrepancies or separate versions among

these details which I consider most material to this case. There was consistency in the testimony that the people in both cars didn't know each other. There was no relationship between the clinics and the Applicant. The treatment that the Applicant received was consistent with injuries one would expect to incur in such an accident as the one described on March 31, 2010.

I also found throughout the evidence that no motive was shown, a factor that often appears in fraudulent claims. In most cases, people do not stage accidents without a motive, financial or otherwise as a way to profit. From the evidence provided, there was nothing presented which would show a financial tie in to enrich the Applicant or others who were involved with this accident. There was no commonality presented before me between the vehicles, the drivers, clinics or tow truck operators which would lead me to believe that the occupants of each car knew each other. In addition, unlike some prior fraudulent related cases like *Azimi and Economical Mutual Insurance Company* in which evidence was provided showing that there was pre-mediated intention to get into an accident with an innocent victim, there was no evidence provided that Mr. Chernet drove with the intention of hitting Ms. Zamora-Galaites.

Finally, the last and most compelling reason why I am of the opinion that there was a motor vehicle accident that took place was that the evidence that was presented at the scene of the accident would be nearly impossible to fake without raising suspicion from multiple places.

In essence, if the vehicles weren't in an accident, how did they get there? Both vehicles were undriveable after the collision and had to be towed from the scene of the accident.[21] If this accident didn't take place, it would have required both vehicles to be towed and placed on the exit ramp (since both vehicles were undriveable). The airbags in the Dodge would have had to be deployed ahead of time and the parties would have had to know each other to pull this all off. Also, it would have had to be completed at approximately 11 p.m. on March 31, 2010 without anyone noticing the two tow trucks positioning the cars at a busy 401 off-ramp.

[21] Joint Evidence Brief, Tab 6, pg. 47.

I believe the Applicant has proven beyond the balance of probabilities that a motor vehicle accident occurred on March 31, 2010 on the off-ramp of the 401 at Avenue Road. Even though there were reasons for State Farm to suspect that this was a fraudulent claim, once the evidence was provided, in my opinion, it became clear that this collision was a case of bad driving by a person who rear-ended another vehicle on the way back from Hamilton.

The question that was paramount in this case was, "Did an accident occur as defined by Section 2(1) of the *SABS*?" In my opinion, the evidence produced showed that an accident did occur under this definition and as much as the Insurer put forward the position that benefits should not be paid on this claim because it was determined that the vehicle with the Applicant as a passenger was not going 60 km/h as stated, it was nonetheless an accident. Mr. Chernet stated that he was travelling at 60 km/h, when the evidence establishes otherwise. It is my opinion that this does not constitute fraud, it constitutes bad guess work. For the Applicant to be held accountable for the guess work of Mr. Chernet is not fair or proper under the *SABS*. The Applicant in his testimony at the Preliminary Issue Hearing stated that he did not know how fast the 1999 Dodge Caravan was going at the time of impact. He never asserted that the vehicle, in which he was riding in, was going 60 km/h when the vehicles collided.

Lastly, insurance companies, including State Farm, do not provide coverage based on speed, they cover all accidents. Because Mr. Chernet said he was going 60 km/h but may have been going less than 40 km/h, does not constitute fraudulent behaviour. In this case, the alleged discrepancy of speed should be irrelevant because insurance covers accidents regardless of speed. The only way insurance coverage would be voided in this case is if the accident wasn't an accident and in this case, we have evidence beyond the balance of probability that an accident occurred, and little evidence that it was staged.

CONCLUSION

For these reasons, I conclude that the Applicant was involved in an accident as defined in Section 2(1) of the *SABS*. His Application for Arbitration can now proceed to a Hearing. Since it was

determined that the Applicant was found to be involved in an accident, Mr. Moustapha is not required to repay to the Insurer the benefits he has claimed to date.

EXPENSES:

The parties made no submissions on expenses. If they are unable to resolve this issue, either party may make an appointment for me to determine the matter in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*.

Jeff Musson Arbitrator	September 28, 2015 Date

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A12-007756

BETWEEN:

ASSOUYOUTI MOUSTAPHA

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended, it is ordered that:

1. The Applicant was involved in an "accident" as defined in Section 2(1) of the *SABS* on March 31, 2010 and this Application for Arbitration can proceed to a Hearing.
2. The Insurer has not proven its claim for repayment.

September 28, 2015

Jeff Musson
Arbitrator

Date