

Count: -4

Marfo and Mensah and Pafco

Decision Date: **2016-01-25**, Adjudicator: **Louise Barrington**, Regulation: **34/10**, Decision: **Arbitration, Preliminary Issue, FSCO 4774.**

Cases cited: [Azimi and Economical](#) [Azimi and Economical - Expenses](#) [Kwatemaa and Certas Direct](#) [Rizk and Isho and Allstate Insurance](#) [Rizk and Isho and Allstate Insurance - Expenses](#) [Tran, Thi Yen and State Farm - Appeal](#) [Hashi and Ahmed and Allstate](#) [Ahmed and Allstate](#)

FSCO A12-003085 and A12-005351

BETWEEN:

BENJAMIN MARFO and MARGARET MENSAH

Applicants

and

PAFCO INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Arbitrator Louise Barrington

Heard: In person at ADR Chambers on November 11-13, 2015

Appearances: Ms. Angela Comella for Mr. Benjamin Marfo and Ms. Margaret Mensah
Mr. Ari Krajden for Pafco Insurance Company

Issues:

The Applicants, Mr. Benjamin Marfo and Ms. Margaret Mensah, were injured in a motor vehicle collision on December 19, 2010 and sought accident benefits from Pafco Insurance Company ("Pafco"), payable under the *SABS*.^[1] The benefits were denied by Pafco. The parties were unable to resolve their disputes through mediation, and the Applicants, through their representative, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

The issues in this Preliminary Issue Hearing are:

1. This Preliminary Issue Hearing was convened to decide whether Mr. Marfo and Ms. Mensah were involved in an accident on December 19, 2010.
2. I interpret this issue to include the question of whether Pafco was justified in denying their claims for benefits because of wilful misrepresentation.

Result:

1. The Applicants were involved in an accident as defined in the *SABS*.
2. Pafco has failed to prove on the balance of probabilities that the Applicants wilfully misrepresented the facts of their claim, and therefore was not justified in denying benefits.

EVIDENCE AND ANALYSIS:

Because this case very much depends on the credibility of the Applicants, I will describe the factual testimony available in some detail from my Hearing notes. No court reporter was present for the Hearing.

At the Hearing, the Applicants presented the following witnesses:

- a. Mr. Benjamin Marfo, the Applicant driver;
- b. Ms. Margaret Mensah, Applicant passenger and mother of Mr. Benjamin Marfo; and
- c. Mr. Jason Young, forensic expert.

The Insurer presented the following witnesses:

- a. Constable Tyron D'Souza, officer attending the collision;
- b. Ms. Susan Collings, accident investigation expert;
- c. Mr. Sam Kodsi, forensic expert; and
- d. Ms. Lisa Alcaro, senior claims examiner.

Evidence of Mr. Benjamin Marfo, Applicant

Mr. Marfo, whose first language is not English, said that he had occasional difficulties with English, but was content to testify without an interpreter. He was 31 years old at the time of the collision, is unmarried and has one daughter who lives with her mother in Milton. Mr. Marfo testified in his direct examination that he had arrived in Canada in 1988 and now lives in Calgary. He had returned to Toronto in 2010 to spend more time with his then 5-year old daughter and his mother, the Applicant, Ms. Margaret Mensah. Mr. Marfo obtained employment as a forklift operator at Ghana Shipping, the company where his mother worked. At the date of the Hearing, he had returned to live in Calgary.

Mr. Marfo testified that he had not brought his Alberta vehicle to Toronto in 2010, as it would have been too expensive to transport it. After trading his Alberta driver's licence for an Ontario licence, he purchased a 2000 Honda Accord through Kijiji in November of 2010, and insured it with Pafco. Asked by Pafco's counsel about the condition of his Honda, he stated that he had noticed some fresh paint on the hood when he bought it, but had no information about whether the car had been in any previous accident. The car was certified when he bought it.

The collision occurred in the evening, as Mr. Marfo was returning home after a Ghanaian community cultural event at a location known as "The Palace," which he and his mother had attended together. Mr. Marfo testified that they left sometime after 9:00 p.m. at his suggestion, as they were to work the following morning.

He testified that as he was leaving The Palace, Sam, a friend that he had known from playing soccer before he left Toronto, asked him for a drive home because the friend he had arrived with did not wish to leave yet. Mr. Marfo did not know Sam well, and does not know Sam's family name. He would normally have headed to Eglinton Avenue to go home to Scarborough. He was unfamiliar with Sam's address, but agreed to take Sam home if Sam could direct him. Leaving The Palace, Mr. Marfo drove the Honda, with his mother in the front passenger seat and Sam behind. No alcohol or drugs were involved in the incident.

Mr. Marfo testified that he dropped Sam off at an apartment complex of three buildings with a circular drive in front. He had left the complex and was travelling along the road, when a vehicle appeared in his lane from a private driveway on the right, and the collision occurred.

Describing the impact, Mr. Marfo said it was "all of a sudden". The car suddenly appeared and stopped right in front of him; he did not know why. There were lights, it was fast. He said his own speed was 40 to 50 kilometers per hour. When asked about the speed of the other car he replied, "I think I may have said 80 or 90 to the police, but I was upset: I wasn't in that car. I may have been wrong."

Mr. Marfo said that the passenger side of his car struck the front fender of the other car. The car moved, in that it bounced back on impact, but the vehicles were not moved after the accident.

When shown a sketch of the post-collision resting position of the cars in the police report^[2] he indicated that he disagreed with the sketch because it does not show a separation between the cars, and he said that one of the accident victims from the other car was carried between the cars on a stretcher to a waiting ambulance. He also disagreed with the two drawings^[3] based on the description of the other driver, Mr. Mungala, given on March 9, 2011. Mr. Marfo said the drawings were inaccurate because he struck the other vehicle towards the front and the cars did not end up touching when they came to rest after the impact.

Mr. Marfo stated that he shook his mother, but she did not immediately wake up. Someone approached and asked if he was okay. Mr. Marfo called 911 and when the operator asked where he was, he did not know the name of the street and asked the other driver the address. The 911 operator told him someone else had already called. The fire department arrived before the ambulance. Paramedics arrived and took Ms. Mensah on a stretcher to an ambulance.

Asked by Counsel for Pafco about the Honda's airbags, which had not deployed on impact, he replied that he had never enquired about them when he bought the car. At the time of the accident, he did not think to wonder why they had not worked at the moment of the impact. He stated that his mother was at first unconscious and then not well, and he was upset, focussed on her.

The other car was a black Durango, a taller, larger vehicle than Mr. Marfo's Honda. Mr. Marfo stated that the other driver (now identified as Mr. Mungala) apologized to him, saying, "I'm sorry, I didn't see you."

The police officer was the last to arrive at the scene. Mr. Marfo testified that the officer questioned him about how the collision happened, how long he had been driving and where he worked. The officer pointed out a liquid on the ground and said the engine had cracked and was leaking oil. The officer said the car must have been travelling at a high speed to crack the engine. Mr. Marfo's car was towed to the pound. Afterward, he discovered that the engine was fine, and not cracked. The "oil" had come from a broken transmission fuel line. Mr. Marfo was able to drive his car to the body shop to have it repaired.

Mr. Marfo testified that some days later, the officer telephoned him and asked if he knew whether the driver of the other car and his passenger had switched places. Mr. Marfo said he did not know the other driver nor if the occupants of the other car had switched places. The officer asked him to come to the station, Mr. Marfo attended at the police station on December 22, 2010, thinking he was going to pick up his driver's license which the officer had retained. The officer interviewed Mr. Marfo, showed him a police report, and asked if he would testify in a traffic court case against the other driver, Mr. Mungala. Mr. Marfo agreed to do so, and answered the officer's questions.

Mr. Marfo insisted that he did not know Mr. Mungala prior to the accident, nor to his knowledge did his mother know him. Neither did he know Mr. Martin Airen, the passenger in Mr. Mungala's vehicle. According to the police officer, two tow trucks were on the scene when he arrived. Mr. Marfo stated that he did not know the tow truck driver who attended the scene, and that it was not he who called the tow trucks to the scene.

Mr. Marfo reported the accident and gave a statement to Ms. Alcaro of Pafco in February 2011. Referring to this statement, given to Ms. Alcaro,^[4] Mr. Marfo said that the Durango, Mr. Mungala's vehicle, had suddenly come out from the right, and then suddenly stopped right in the roadway. There is controversy about Mr. Marfo's statement of February 24, 2011 which he signed, but partly contradicted at the Hearing. It was handwritten by Ms. Alcaro, with several changes marked and initialled by Mr. Marfo, and then signed by Mr. Marfo at the end and witnessed. One change in particular appears to add the words, "without stopping, straight in front of my car" in describing how the impact occurred. There was discussion about the circumstances in which the statement was taken, with conflicting versions from Mr. Marfo and Ms. Alcaro. I do not consider them material to the decision in this case, as a certain amount of animosity can be reasonably expected when one side is challenging the credibility of the other.

At the Hearing, Mr. Marfo said the driver was signalling a left turn, but suddenly stopped in front of him (Marfo) before making it. According to Mr. Marfo's account at the Hearing, the Durango came "so fast" out of the parking lot drive on his right and then stopped. He heard no screech of brakes, and estimated the Durango's speed at perhaps 40 to 50. He testified that the police officer repeatedly asked him for an estimate of the speed and he said, "I'm not in that car; but it was coming out so fast." Mr. Marfo also recalled that the nearby street light was not functioning and it was very dark.

Mr. Marfo said his mother had dozed off in the car on the way to Sam's apartment and was asleep when the accident occurred. He denied deliberately causing the accident. He confirmed that no charges were laid against him as a result of the collision.

On cross-examination, when asked if he knew the police officer had concerns about the accident being staged, Mr. Marfo said he was not sure until later when after visiting the police station to give a statement, he saw the officer's note "possible staged accident" in the lower section of the accident report.

Mr. Marfo testified that before the evening of accident, he had not seen his passenger Sam for four years as he (Mr. Marfo) had been living in Calgary and they did not stay in touch. They were not close friends but had sometimes played soccer casually. He testified that a 15-minute detour on his way home on a December night to drop off Sam was "no big deal." During the interview the officer indicated that he wanted to speak with Sam. Mr. Marfo testified that at some point he had obtained a number for Sam, and had left messages for the officer about Sam, but the officer never called him back. Mr. Marfo said he had the impression the officer was "not interested" in talking to Sam after all. At some later date, Mr. Marfo no longer had a working number for Sam. It is unclear if he lost the number or if Sam had cancelled the number. Mr. Marfo stated that he asked around but was unable to locate Sam to testify at the Hearing.

Mr. Marfo testified that he did not receive Pafco's denial of his claims until April 22, 2011. He brought a claim in Small Claims Court, but when the Insurer's representative told him the one-year limitation period had passed, and he would lose the case, he agreed to sign a release for \$1 "and walk away". He was unrepresented by counsel at the time.

Evidence of Ms. Margaret Mensah, Applicant

Ms. Mensah testified through an interpreter of the Twi language. She was born in 1960, so was 50 years old at the date of the collision. She had an elementary school education in her native country, Ghana, and came to Canada in 1988. She is married with three sons, one of whom is Benjamin Marfo. Her husband lives in Ghana. She lives in Toronto with one of her sons and his family, and works at Ghana Discount, a used clothing store from 8 to 4, including some weekends. Ms. Mensah had a vague recollection of the day, saying she believed it was a Sunday and that she had not worked that day. She had heard about the party at work.

Ms. Mensah testified that she typically wakens at 4 am because of her grandchild, and so usually goes to bed at 7:30 or 8:30 p.m. when she is working the next day.

Ms. Mensah and Mr. Marfo had attended an event at The Palace, a place where Ghanaians gather. At some time in the evening, she noticed her son speaking with a young man, Sam, whom she did not know. She didn't hear much of the conversation between them, but she did overhear the young man ask Mr. Marfo for a ride home as they were about to leave. She heard her son say, "I don't know that place, but you have to give me directions."

Ms. Mensah was unable to assist with details of the accident. She was in the front passenger seat and wearing a seat belt. She fell asleep almost as soon as she got into the car. She has no information about how the collision occurred. She awoke with someone patting her and saying "Don't get out of the car". She was very scared, so scared that she vomited and lost bladder control. Paramedics took her out of the car and took her to hospital in an ambulance. She had no conversation with the people in the other vehicle. She did not know either the driver, Mr. Mungala, or his passenger.

At the hospital, a police officer asked how she was doing. She had no recollection of the actual accident or how her son got out of the car, or if he spoke to the other driver.

Ms. Mensah was interviewed for a statement by the insurance adjuster, Ms. Alcaro, but did not sign the statement. She claims to have been very rudely and aggressively treated by the interviewer, who "shouted" at her. She said the interpreter was not given the opportunity to read the statement back to her and was at some point asked to leave. She felt "uncomfortable" signing it. No lawyer was present in the interview room.

Ms. Mensah testified that she never heard anything about an arrangement with Benjamin Marfo to orchestrate an accident, and was not warned that there would be an accident.

Evidence of Mr. Jason Young

Mr. Young is owner and founder of Advantage Forensics and has worked in motor vehicle accident reconstruction for 13 years. I accept that he is an expert in this field. He was retained in March 2015 to investigate the accident and issued his report on June 12, 2015.^[5]

Mr. Young had read the report of Mr. Kodsi,^[6] the expert retained by Pafco and Desjardins, Mr. Mungala's Insurer. He had seen the Kodsi photos, which he characterised as excellent, and relied on them in making his report. He also visited the site of the collision prior to testifying.

Mr. Young's report concluded that the damage on the two vehicles was a perfect match. His forensic assessment report puts Mr. Marfo's speed at 40-49 km/h and that of the Durango at "stopped or near-stopped" at impact.^[7] Mr. Young's report mentioned a telephone interview on May 6, 2015 with Mr. Marfo in which he said Mr. Mungala did not stop at the stop sign coming from the private driveway but came to a stop right ahead of him (Marfo), in his lane.

Mr. Young said that it would have been normal for the Honda's airbags to deploy in what he termed "not a minor accident, but not severe either". He testified that there can be a number of reasons for airbags not to function. Airbags have a ten-year lifespan, the age of Mr. Marfo's Honda at the date of the collision, and should be replaced even if they had never been used. If the vehicle had been in a prior accident, the airbags might have been deployed and not replaced, or they might have not been deployed but damaged. It was normal for the Durango's airbags not to deploy, as the impact to that vehicle was from the side, and the airbags are sensitive to longitudinal (front / back direction) impacts.

Mr. Young testified that on a dry road surface, applying the brakes would not necessarily leave skid marks. For example, braking with "ABS" often leaves no skid marks.

Evidence of Constable Tyron D'Souza

Constable D'Souza responded to a call and attended at the scene of the collision. He has been a police officer since 2006 and had worked in 23 Division for four years. At the time of the accident, he was investigating traffic collisions and said he investigated an average of 20 to 25 collisions per month. He has taken advanced training in collision investigation, including review of collision reports and investigations into staged collisions.

Working alone, he arrived on the scene at 10:27 p.m. and questioned both drivers. In his witness statement, the officer stated that he was suspicious because of the position of the vehicles, which didn't make sense based on the speeds the drivers said they were travelling. He made a sketch of the resting position of the two vehicles on his report, showing the layout of the accident scene including the presence of a nearby streetlight. The sketch did not note that the streetlight was not working, and he said he would have noted that if it had been the case.

Turning to the presence of two tow trucks at the accident scene, he then stated, "...it was the [tow] driver that made me suspicious...because of my suspicions I wrote "possible staged collision" on my report."^[8] Constable D'Souza said that he had received training about patterns in staged collisions, including eight factors to look for if an officer suspects a collision has been staged. He said that the presence of a particular towing company on the scene "raised a red flag" as he had seen this company previously, at a staged accident.

His initial suspicion regarding the accident led him to consider the following indicia:

- i. Everyone in both vehicles is injured;
- ii. Time of day – night, no other traffic, no adverse weather;

- iii. Presence of a tow truck company known to the police;
- iv. The mechanics of the collision;
- v. Both vehicles were purchased within the past six months;
- vi. Mr. Marfo's auto insurance policy was recently purchased;
- vii. Both the vehicles were older models; and
- viii. "Vague" or contradictory statements of the drivers involved including how the accident occurred and their reasons for being in that location at that time.

It was these factors that led Constable D'Souza to call both drivers' Insurers, Desjardins and Pafco, to alert them to his suspicions and inform them where the vehicles would be so that their engineers could see the damage for themselves. He also noted on his accident report, "possible staged accident." Constable D'Souza stated that the mechanics of the accident seemed suspicious, the damage suggesting a high rate of speed, and the possibility that the Durango had been "parked" on the road.

Constable D'Souza noted on his accident report that damage to the Honda was code "04" on a scale of 1 to 5, with 5 signifying demolished. He said that typically people would be injured in such a case. He noted Mr. Marfo's driving as code "01" or normal, and that of Mr. Mungala as "08", failing to yield. As a result, Mr. Mungala was later charged with careless driving.^[9] He said that he had Mr. Mungala come to the police station and cautioned him. Mr. Mungala refused to give a statement. Constable D'Souza acknowledged that Mr. Marfo had come to testify in the Mungala case but Mungala did not appear. On his accident report, he stated the Durango's speed as 30 and Mr. Marfo's speed at 60.

On December 22, 2010 Mr. Marfo attended at the police station. Officer D'Souza cautioned him, and made it clear he did not have to give a statement. Mr. Marfo agreed to make a statement. Constable D'Souza testified, "I said, 'I suspect you planned the accident' and he denied it and he gave a statement." Regrettably, Constable D'Souza's notes of that interview have been lost, and the statement of Mr. Marfo is thus unavailable.

Constable D'Souza testified that he did not remember receiving messages from Mr. Marfo later, and that had he done so, he would normally have followed up. He did see Mr. Marfo later, when he came to testify at the aborted Hearing in the Mungala careless driving case. By that time Mr. Marfo had lost track of Sam. Mr. Marfo testified that his brother was sitting with him, chatting outside the courtroom, when Constable D'Souza mistook his brother for Mr. Mungala. At the Hearing, Constable D'Souza did not recall such an incident.

Constable D'Souza stated that this incident was the first and only time he had called Insurers to report a possible staged accident.

Asked about the absence of skid marks, Constable D'Souza said that indicated no significant braking activity. "With that damage it tells me the Durango was in the Honda's path and the Honda struck it. The Honda driver either had no time to stop, or made no attempt to brake."

When Counsel for the Applicants asked if staged accidents always involve two drivers, or if a single driver can put himself in a position to create an accident, Constable D'Souza agreed that that can happen.^[10] He added, "I had my suspicions but I never came to the conclusion it was a staged collision. Now it's up to someone else to decide what happened."^[11]

Evidence of Ms. Susan Collings

Ms. Collings is an accident investigator who was engaged by Desjardins, the Insurer of Mr. Mungala's vehicle. She has worked with the Toronto Police and for the past nearly 20 years in the private sector. She has investigated "hundreds and hundreds" of accidents since staged accidents became a "trend". She has trained police officers in the past. I accept the qualification of Ms. Collings as an expert in the field of accident investigation. Ms. Collings called in Mr. Kodsi to ask him to do a forensic reconstruction of the collision.

Ms. Collings' list of "red flags" which could, when taken together, raise suspicion about an accident was similar to that of Constable D'Souza, but she added "a spotty insurance record", multiple addresses of the occupants of both vehicles, and vehicles which have been involved in prior accidents.

After several attempts, she contacted Mr. Mungala and arranged a series of meetings, who agreed to make a statement, but cancelled twice. She was never able to get a statement from him. Nor did she speak to Mr. Marfo or Ms. Mensah. Her investigations were thus based on conversation with Constable D'Souza, his police report and other documents filed in this matter, but not on first-hand evidence of the incident. On the basis of the information she gathered and Mr. Kodsi's report, she recommended that her client, Desjardins, deny Mr. Mungala's claim as a suspected staged collision.

Ms. Collings stated that her investigation had never produced any evidence connecting Mr. Marfo and Mr. Mungala. Ms. Collings also acknowledged that not all staged accidents involve conspiracy. The driver of one vehicle may deliberately cause a collision without the knowledge or cooperation of the other driver.

Evidence of Mr. Sam Kodsi

Mr. Kodsí is a forensic engineer specialising in accident reconstruction. He has over 20 years of experience with two forensic firms and now is the owner of his own firm. I accept his qualification as an expert in the field of forensic accident investigation. Ms. Collings of Desjardins retained him and he received the police accident report, statements from Mr. Marfo and Mr. Mungala, and photos of Mr. Marfo's Honda. His brief was to compare the damage to the vehicles with the sequence of events reported by the drivers. He noted that without having been at the scene, he gave importance to the resting position of the vehicles as shown on diagrams from the police report or those involved in the accident.

There was some discrepancy between the analyses and ranges of speed found by Mr. Young and Mr. Kodsí, but it does not appear to be material, in that both agree that the Honda was travelling at a rate of around 40 km/h at the time of the impact. Mr. Kodsí's analysis led him to the conclusion that the Honda struck the Durango at an approximately right angle, while the Honda was traveling at maximum 40 km/h and the Durango was stopped. This is within the speed range estimated by Mr. Young who allows the Durango might have been "near stationary". From the reports he had, Mr. Kodsí assumed the Durango would be visible to the Honda driver. His conclusion was that the Honda either hit the Durango at a speed of about 40 with no attempt to slow or stop, or slowed from some faster speed to 40 km/h without "slamming on the brakes", or it could have actually accelerated to 40 km/h to hit the Durango.

Mr. Kodsí's opinion was that the driver of the Durango was driving "atypically", in that he was about to make a left turn at a "T" junction, but had not appreciably turned the car to the left when he apparently stopped in the lane, in the path of the Honda. The computer reconstruction indicated an impact at approximately 90 degrees, but had the Durango's driver started his left turn, the impact should have occurred at closer to 45 degrees. He described the Durango driver's action as not "heuristic". A heuristic reflex is to avoid impact; if the Durango driver saw a vehicle approaching from the left, the normal reflex would be not to suddenly stop, but to accelerate so as to remove himself from imminent danger rather than to stop. He concluded that the crash he reconstructed was "not the crash described by the two drivers."

Testimony of Ms. Lisa Alcaro

Ms. Alcaro is a senior claims examiner with 15 years of experience and works mainly on cases where fraud or misrepresentation is suspected. She took instructions from Ms. Collings to investigate "concerns" with respect to the file. Ms. Alcaro took statements from Mr. Marfo and from his mother Ms. Mensah in February 2011. She interviewed Mr. Marfo first, and said that he would have had the opportunity to review his statement before signing it, while his mother was being interviewed. Ms. Alcaro spoke with Ms. Mensah through an interpreter. Ms. Alcaro believes she would have followed her usual practice of waiting outside the interview room while Ms. Mensah reviewed the statement with the translator. She did receive the two statements before leaving, one signed by Mr. Marfo, and the other which Ms. Mensah had refused to sign, saying she didn't agree with the words used in the statement. Ms. Alcaro also took a statement^[12] from Mr. Mungala, the Durango driver, on March 9, 2011.

Ms. Alcaro had no recollection of any problem with the interviews with Mr. Marfo and Ms. Mensah and said she had certainly never raised her voice or kicked the interpreter out of the room.

She also had no record of any insurance claims history for Mr. Marfo and said if there had been any concerns she would have recorded them in her log notes. Nor did she have any information about any relationship between Mr. Marfo or Ms. Mensah with the occupants of the Durango. After her investigation, Ms. Alcaro recommended denial of the Marfo and Mensah claims.

Analysis

The Insurer has denied coverage to Mr. Marfo and Ms. Mensah on the ground that the collision was staged, thus justifying non-payment of benefits under sections 233(1)(c) of the *Insurance Act* and 53 of the *SABS*.

Was there an Accident?

The *SABS* defines "accident" as "an incident in which the use or operation of an automobile directly causes an impairment or directly causes damage..."

It is common ground that an Applicant has the burden of proving that he or she fits within the scope of coverage.

The Applicants' position is that once the collision is established, the Insurer has the burden of proving that Mr. Marfo misrepresented material facts in order to justify its denial of coverage.^[13] The Applicant referred to the decision in *Hashi and Ahmed and Allstate*^[14] in support.

Counsel for Pafco submitted that the allegation that Mr. Marfo staged that accident does not change the burden of proof, so that the Applicants must refute the allegation of misrepresentation in order to bring themselves within the *SABS* definition of an accident. He relies on the *Azimi and Economical* case. However, in the *Azimi* case, the Arbitrator adopted the words of the expert's report, "there are still unanswered questions about ...whether this collision actually took place." In *Azimi*, evidence of injuries and vehicle suggested that there had been no collision, but that the vehicles had been arranged to simulate a collision.^[15] In *Azimi*, the Arbitrator found that the Applicant had failed to prove that an "incident involving the use or operation of an automobile" had in fact occurred.

In the *Dwumaah and RBC* case, also cited by Mr. Krajden, the Arbitrator found that the vehicular damage did not match the Applicant's description of the alleged collision, nor would it have caused the kind of injuries of which he complained, including a temporary but total loss of sight which the Applicant failed to mention. In that case, the Arbitrator found the Applicant's testimony regarding the accident to be "absurd" and "implausible".^[16]

In the *Rizk and Isho and Allstate* case, the parties agreed that the Insurer had the onus of proving that the Applicants had wilfully misrepresented the facts. In that case, the Arbitrator found that the Insurer had met the burden of proving that the Applicants were not involved in an accident at all, but deliberately reported that they were.^[17]

In the present case, there is no evidence whatsoever contradicting Mr. Marfo's and Ms. Mensah's statements that they were in the Honda at the time of the collision, he as driver and she as passenger. Both Mr. Marfo and Ms. Mensah made claims as a result of this incident. From the factual and forensic evidence produced by both sides, it is undisputed that a collision did take place between Mr. Marfo's Honda and Mr. Mungala's Durango, on December 19, 2010.^[18] Messrs. Young and Kodsi agree that at the time of the collision, the Honda was travelling southbound on Willowridge Road at more or less 40 km/h; the Durango had been exiting a private driveway, heading eastbound, but was stationary, or nearly stationary across the lane; roads were dry; and that the Honda struck the Durango in the area of the front wheel on the driver's side. Minor differences in conclusions regarding the Honda's speed according to the experts are immaterial, and both agreed that although it was not an extremely serious accident, it was not a minor collision, and one would expect injuries and vehicular damage from such an impact. I accept existence of the collision as a fact.

Consequently, I have no hesitation in finding the Applicants have met the burden of proving that "an incident involving the use or operation of an automobile" did occur, and that they were inside the automobile when it happened. There may be disputes regarding causation or the nature and extent of any damage, disability or injury, but not about the occurrence of an accident. The second part of the sentence, "directly caus[ing] an impairment or ... damage" is beyond the ambit of this preliminary decision.

Did the Applicants wilfully make a false statement in respect of their claim?

This brings me to the question of misrepresentation. The Applicants having brought themselves within the *SABS* definition, the onus shifts to the Insurer to prove its allegation of misrepresentation in order to justify non-payment of benefits under section 233(1) of the *Insurance Act*. To allow an allegation of misrepresentation to oblige the Applicants to prove a negative could be pernicious.^[19]

Counsel for the Insurer argues that the accident could not have occurred in the way Mr. Marfo first described it, that he changed his story after seeing Mr. Kodsi's report, and that as a witness he was inconsistent, argumentative and vague. He suggests that Mr. Marfo's testimony was ridiculous and implausible, and thus indicative of a staged accident. He referred to the indicators listed by Constable D'Souza and argued that taken together, on totality, they were sufficient to justify a finding that the accident was staged.

It is useful to examine the indicators cited by Constable D'Souza in light of the evidence adduced.

- i) *Everyone in both vehicles is injured.* Both occupants of both cars made claims to their Insurers but Mr. Mungala's claim was for vehicle damage only. Mr. Young testified that the damage to the vehicles showed that the accident was serious enough to cause injuries.
- ii) *Time of day – night, no other traffic, no adverse weather.* The accident took place just after 10 p.m. in December, with no other traffic, and dry roads.
- iii) *Presence of a tow truck company known to the police.* The presence at the accident scene of a tow truck from a certain company was the "red flag" to the officer.
- iv) *The mechanics of the collision.* Both experts agreed that Mr. Mungala's vehicle was stopped or nearly stopped at the time of impact, which appears to contradict Mr. Marfo's comment at the scene that the other car (the Durango) was travelling "so fast".
- v) In the case of *Tran and State Farm*,^[20] the Director's Delegate accepted the arbitrator's conclusion that it is not surprising that as a participant in a car accident [the Applicant] does not have a specific recollection of every detail concerning the accident. He noted that the arbitrator in that case had implicitly taken notice that participants in accidents have difficulty in recalling the mechanics of the accident, especially matters such as speed and direction.
- vi) *Both vehicles were purchased within the past six months.* Mr. Marfo's testimony that he had recently moved from Alberta and not brought his vehicle to Toronto, reasonably explains the recent acquisition of his vehicle.
- vii) *Mr. Marfo's auto insurance policy was recently purchased.* After arriving in Ontario, Mr. Marfo traded in his Alberta licence for an Ontario licence in order to purchase a vehicle. Prior to that purchase, he would have had no need for auto insurance in Ontario.
- viii) *Both the vehicles were older models.* Mr. Marfo, being a person of relatively modest means, working as a forklift operator, it would not be unreasonable for him to purchase an older vehicle.
 - i) *"Vague" or contradictory statements of the drivers involved.* Mr. Mungala gave a statement on March 9 referred to by Ms. Alcaro.^[21] In it he estimated his own speed at 10-20 km/h and Mr. Marfo's speed at 80-90. Neither of these estimates is borne out by the evidence of the experts, both of whom agree that Mr. Mungala's vehicle was stationary or nearly stationary when the impact occurred, and Mr. Marfo's speed closer to 40. Mr. Young testified that "witnesses are notoriously poor at estimating the speed of other vehicles"^[22] and that investigators do not use their information as a primary source of information. Mr. Marfo's statement to Ms. Alcaro reads, "This guy came out of a parking lot of a building *without stopping straight in front of my car.*" The italicized words were squeezed in above the line in tiny writing and initialed by Mr. Marfo.

The discrepancies with respect to the mechanics of the accident - what the drivers originally reported and what the experts were able to reconstruct - are puzzling. The disappearance of Constable D'Souza's notes of Mr. Marfo's statement is unfortunate, as they might have shed some light on the subject. However, it is important to observe - as did Mr. Young in his testimony - that the experts' reports are computer generated, and can be only as accurate as the information upon which they are based, some of which is assumed.^[23] I find that the discrepancies are not sufficient to make Mr. Marfo's accounts at the time of the accident or in his signed statement ridiculous or implausible.

Mr. Krajden also pointed out that the two drivers had similar jobs, as forklift operators. However, they did not work at the same company, and there is no evidence that they had ever met.

Mr. Krajden pointed out that both drivers were dropping off passengers at the same apartment complex after social events, in neighbourhoods far from their homes. Given the Christmas season date and time of evening, and the fact that the apartment complex was a 3-building high-rise comprising hundreds of apartments, I do not find that this is a particularly notable coincidence.

Counsel for the Insurer rightly points out that Mr. Marfo's narrative is uncorroborated, since Mr. Mungala who drove the Durango, Mr. Mungala's passenger, and Mr. Marfo's friend Sam - the passenger who was the reason for Mr. Marfo's presence on Willowridge Road - have all disappeared and so were unavailable to testify. Even Ms. Mensah herself was asleep at the moment of the impact so cannot offer assistance. Mr. Krajden argued that this is another suspicious factor.

The accident occurred nearly five years prior to the Hearing. Despite attempts to locate them, both the driver and passenger of the Durango involved in the accident have proved impossible to locate.^[24] Toronto is a city of immigrants. Many arrive, stay for a few years, and then move on to other cities or even return to their native countries. According to an investigator, Mr. Mungala's Facebook profile shows him to be living in Belgium, his Ontario driver's licence having expired on August 1, 2015.^[25]

I do not agree that a lack of corroboration necessitates an adverse inference. In the case of *Certas and Kwatemala*,^[26] of seven people involved in an accident, no one but the Applicant testified. The Arbitrator did not draw an adverse inference from the lack of corroboration, because the Applicant had made reasonable attempts to get other witnesses to attend, and there was no evidence to suggest that the Applicant knew the other driver or any of the passengers in the other vehicle involved in the accident. The Arbitrator considered a number of factors and found the Applicant to be a credible witness.

I have assessed the credibility of the Applicants including demeanour, apparent powers of observation, powers of recall, attitude while testifying, ability to resist the temptation of self-interest, inherent plausibility of the evidence within itself and the consistency of that evidence standing alone and as compared to other evidence. I find the Applicant, Mr. Marfo, to be a credible witness. Insofar as she is able to assist, I find that Ms. Mensah is also a credible witness.

From the testimony and evidence presented by counsel on both sides, I conclude that at least three possibilities exist to explain the accident:

- i) The accident was a *bona fide* real accident and the Applicants have not wilfully misrepresented the facts relating to it;
- ii) The accident was "staged" but without the involvement or knowledge of the Applicants, so there was no wilful misrepresentation by the Applicants; or
- iii) The Applicants were knowingly involved in a staged accident and wilfully misrepresented the facts relating to the accident. Only in this case would the Insurer have justification for denying coverage under section 233(1) of the *Insurance Act*.

The evidence in support of the Insurer's allegation of misrepresentation is circumstantial or based on assumptions made by the investigating officer. Those investigating the accident failed to discover any connection between the Applicants and anyone in the other vehicle. The other factors considered to be "red flags" arousing suspicion have been reasonably explained by Mr. Marfo, whose narrative I find to be plausible.

On the basis of the evidence presented, and after weighing the plausibility of the testimony of the Applicants, I find that the Insurer has not discharged its burden of proof. On a balance of probabilities, I am unable to find that the Applicants have wilfully misrepresented the facts pertaining to this incident. Thus the Insurer is not justified in denying benefits under section 233(1) of the *Insurance Act*.

EXPENSES:

I make no order with respect to the Applicants' expenses of this Preliminary Issue Hearing, deferring that decision to the Hearing Arbitrator.

January 25, 2016

Louise Barrington
Arbitrator

Date

BETWEEN:

BENJAMIN MARFO and MARGARET MENSAH

Applicants

and

PAFCO 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. Mr. Benjamin Marfo and Ms. Margaret Mensah were involved in an accident within the definition of the *SABS*.
2. Pafco Insurance Company has failed to prove on the balance of probabilities that the Applicants wilfully misrepresented the facts of their claim, and therefore was not justified in denying benefits.
3. I make no order with respect to the Applicants' expenses of this Preliminary Issue Hearing, deferring that decision to the Hearing Arbitrator.

January 25, 2016

Louise Barrington
Arbitrator

Date

[1] *The Statutory Accident Benefits Schedule - Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

[2] Exhibit 2.

[3] Exhibit 3.

[4] Tab 14 of Exhibit 1, the Joint Arbitration Document Brief. (All Tabs mentioned refer to Exhibit 1.)

[5] Tab 28.

[6] Tab 19.

[7] Tab 17, page 2, Executive Summary.

[8] Tab 16, page 1 and Direct Testimony at the Hearing from Arbitrator's notes of Day 2.

[9] Tab 16, page 1, last line.

[10] Testimony of Constable D'Souza as recorded in Arbitrator's notes of Day 2.

[11] Testimony of Constable D'Souza as recorded in Arbitrator's notes of Day 2.

[12] Tab 15.

[13] **Termination of benefits for material misrepresentation:** An insurer may terminate the payment of benefits to or on behalf of an insured person, (a) if the insured person has wilfully misrepresented material facts with respect to the application for the benefit...O. Reg. 34/10, s. 53.

Misrepresentation or violation of conditions renders claim invalid: 233(1) Where...(c) the insured wilfully makes a false statement in respect of a claim under the contract, a claim by the insured is invalid and the right of the insured to recover indemnity is forfeited.

[14] *Hashi and Ahmed and Allstate Insurance Company of Canada* (FSCO A10-003774 and A11-001819) at page 6, footnote 4.

[15] *TTC Insurance Company Limited and Wootton* (FSCO PO4-00004, November 2, 2004), cited in *Azimi and Economical* (FSCO A08-002596, June 7, 2010). See *Azimi*, page 10, line 14-17 and page 11, line 10-12.

[16] *Dwumaah and RBC General Insurance Company* (FSCO A03-00096, May 3, 2005).

[17] *Rizk and Isho and Allstate Insurance Company of Canada* (FSCO A03-000562 and A03-001119, June 11, 2004).

[18] For example, both Mr. Young and Mr. Kodsí in their testimony referred to matching damage and to a transfer of paint from the Honda to the Durango. See Tab 19 paragraph 6.1 and photos.

[19] See *TTC and Wooten*, cited at note 12.

[20] *State Farm Mutual Automobile Insurance Company and Tran*, FSCO Appeal P03-00020, August 1, 2004, page 7.

[21] Tab 15.

[22] Jason Young direct evidence quoted verbatim in Arbitrator's notes of Day 2 of the Hearing.

[23] To illustrate, Mr. Young testified that Mr. Kodsí had "used the wrong vehicle", the wrong model of Honda, changing the assumed weight of the vehicle by a few hundred pounds, and thereby introducing a 24% error into the computer simulation, resulting in a lower rate of speed in the reconstructed version of the accident. (I do not consider the 24% margin as significant since both experts ended up with a possible range that included 40 km/h.)

[24] Tabs 22, 23 and 24, Investigators' Reports.

[25] Tab 23, Xpera Report.

[26] *Certas Direct Insurance Company and Kwatemala*, FSCO A04-001458 at page 6, citing *Hawley v. Bapoo* [2005] O.J. 4328, QL at para. 6 (Ont. S.C.J.).