

**IN THE MATTER OF AN ARBITRATION PURSUANT TO
Section 148.2 (1) of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83
("the Regulation")**

And

The Arbitration Act, R.S.B.C. 1996, c. 55

BETWEEN:

IKWAL BIRYAH

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATION AWARD

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Date/Place of Hearing: September 14, 15, and 18, 2020

Vancouver, BC

Arbitrator: Jim A. Doyle

Date of Award: February 25, 2021

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INTRODUCTION

1. The claimant, Ikwah Biryah (the Claimant) seeks a determination of entitlement to Underinsured Motorist Protection (UMP) coverage in relation to a motor vehicle accident that occurred on August 15, 2010, at or near eastbound Highway I-580, west of 167th Avenue in unincorporated Alameda County, in the State of California in the United States of America. The claimant was a rear-seat passenger in a 1998 Mercury Sable, California license plate number 5SW B717 (the "Vehicle"). The Vehicle was operated by Timothy Ryan McDaniels, a California resident, and owned by Paul Edward Scruggs and/or Barbara Scruggs, California residents. McDaniels lost control of the vehicle, which left the Highway and collided with a pole (the Accident). As a result of the Accident, the claimant sustained personal injuries and other losses and damages.
2. At this stage of the arbitration, there is only one issue to be decided. By agreement of the parties the issue is framed as:

By obtaining a California "Class C" driver's license issued March 13, 2008, were Mr. Biryah's British Columbia driver's license and driver's certificate suspended, revoked, cancelled or surrendered, such that he is not entitled to UMP coverage pursuant to Part 10 (division 2) of the Insurance (Vehicle) Regulation?
3. The evidence at the hearing was made up of:
 - a. Exhibit 1: An Agreed Statement of Facts, with 15 tabs of documents appended (ASOF);
 - b. Exhibit 2: The Claimant's book of expert reports (Melanie L. Skehar);
 - c. Exhibit 3: The Respondent's book of expert reports (David A. Serrano);
 - d. Oral evidence of the Claimant;
 - e. Oral evidence of the Claimant's expert, Ms. Skehar;
 - f. Oral evidence of the Respondent's expert, Mr. Serrano.

RULING ON SUBMISSIONS

4. Following the evidence, the following written submissions were provided:
 - a. Closing Submissions of the Claimant, made September 18, 2020.
 - b. Closing Submissions of the Respondent, dated September 25, 2020.
 - c. Reply Submissions of the Claimant, presented on October 2, 2020.
 - d. Respondent's Reply to Claimant's Reply, dated October 9, 2020.
5. The Claimant seeks a ruling that no consideration be given to the Respondent's Reply to the Claimant's Reply on the basis that the submissions introduce new cases that should have been raised in the Respondent's Closing Submissions and that the Claimant would be prejudiced by this further submission.
6. The Respondent says that the further Reply was dealing with matters first raised by the Claimant in his Reply and that it would have been impossible to deal with the points in the Respondent's initial submission without knowing they were going to be raised as an issue.
7. The Claimant's Reply addressed two issues: credibility and surrender. In addressing credibility, the claimant raises the rule in *Browne v Dunn* and also the *collateral evidence* rule. Neither rule had been addressed by the Respondent.
8. The Respondent's Reply to the Claimant's Reply discusses the rule in *Browne v Dunn* as well as the *collateral evidence* rule.
9. There are circumstances where reply to a reply (surreply) is appropriate. I find this is such a circumstance.

AGREED FACTS

10. Certain facts contained in the ASOF, not including details of the Claimant's attendance at the California Department of Motor Vehicles, are:
 - a. The Claimant is a Canadian citizen, born September 14, 1983. In 2001 he graduated from high school in Invermere, BC.

- b. The Claimant moved to Vancouver, BC and intermittently attended Langara College in the fall term of 2001 and summer term of 2007 during which he also worked at various jobs.
- c. On September 13, 2006, the Claimant renewed his BC driver's license (BCDL). The expiry date was September 14, 2011.
- d. In the summer and fall of 2007, the Claimant attended a program at New College of California, in San Francisco, California, to increase his grade point average.
- e. On November 21, 2007, the Claimant applied to attend Life Chiropractic College West in Hayward, California (Life Chiropractic).
- f. Life Chiropractic accepted the Claimant's application and on January 2, 2008, the Claimant entered the United States pursuant to a United States Form 1-20 Certificate of Eligibility for non-immigrant student (Certificate of Eligibility). A permit for entry to the United States was affixed to his Canadian passport. The Certificate of Eligibility included references that:
 - i. the Claimant was expected to "complete studies no later than 06/30/2012";
 - ii. the Claimant's parents were to be his main "means of support";
 - iii. the Claimant certifies that "I seek to enter and remain in the United States temporarily and solely for the purposes of pursuing a full course of study at Life Chiropractic College West".
- g. The Claimant started his full time program at Life Chiropractic during the winter quarter of 2008. The last term the Claimant completed prior to the Accident was the spring term of 2010 in July 2010. He started the summer term which started the following month.
- h. Prior to the Accident, while the Claimant was attending his studies at Life Chiropractic:
 - i. he was not registered to vote in California;
 - ii. he did not pay residential tuition in California;
 - iii. he did not file a California home owners' tax exemption;

- iv. he did not obtain a California or United States Social Security Card;
 - v. he filed Canadian tax returns;
 - vi. he lived in rental accommodation in California.
-
- i. On March 3, 2008, the Claimant applied for a California's driver's license at the California Department of Motor Vehicles (DMV).
 - j. The Claimant's Class C temporary driver's license was issued on March 3, 2008 and his driver's license card was issued on March 13, 2008, both bearing license number D811028.
 - k. After the Accident, the Claimant lost his California's driver's license. On December 3, 2010, he applied for a replacement California's driver's license at the California DMV.
 - l. The Claimant's BCDL number 6829666, originally issued April 12, 2000, was renewed under the same number on September 13, 2006, with an expiry date of September 14, 2011.
 - m. The Respondent received no communication from the California DMV regarding the fact that the Claimant had obtained a California driver's license.
 - n. The Respondent, in the ordinary course of business, is not advised by the State of California when a holder of a BCDL obtains a California's driver's license.
 - o. Following the Accident, the Respondent sent a letter to the Claimant dated July 30, 2011, with the heading "It's time to renew your BC driver's license". This letter also states that "We'd like to remind you that your current driver's license expires on September 14, 2011."
 - p. On August 22, 2011, the Claimant renewed his BCDL with an expiry date of September 14, 2016.
 - q. The Claim File Report on the Respondent's file, under "Claim number P004184-4" dated September 16, 2010 reads, *inter alia* "DL6829666" and "DL stat: Active"

CREDIBILITY OF THE CLAIMANT

11. In addressing the evidence of the Claimant, the Respondent submits that the Claimant's evidence lacks credibility with respect to:

- a. his claim that he did not present his BCDL to the DMV;
- b. where he lived and with whom he lived in California;
- c. his evidence that he earned no income while he went to Langara in Vancouver and spent his time in California;
- d. his dealings with the police officer in February 2008;
- e. his review of the application form at the DMV on March 3, 2008; and,
- f. his dealing with the DMV employee on March 3, 2008.

12. While there may be some variance between what the Claimant said at his discovery in May 2016, and his evidence at the hearing, the differences do not amount to a basis upon which I would find the Claimant lacks credibility. I say this for the following reasons:

- a. It is accepted that the Claimant suffered personal injuries as a result of the 2010 accident. When challenged about his memory during the cross examination, he said he had a severe trauma with a brain injury and was handicapped physically. He further said that his condition had improved since 2016.
- b. Some of the examples used to show lack of credibility related to what I consider to be incidental matters, including his time before he went to California and where he was living when he was in California.
- c. In what is described as being of significant relevance to the question to be determined in the arbitration, the Respondent suggests a contradiction between what he said at the hearing and his discovery evidence. In particular:
 - i. In his direct evidence, he said he showed the police officer his BC license and F-1 student visa. In Question 201 from his discovery, when asked about why he applied for a California driver's license, he said "I believe I was pulled over and the police officer asked

what I was doing in America driving a Canadian car, and I showed him my student visa, and he told me someone in my position needs to apply for a California driver's license." I do not see this as a contradiction.

- ii. The Claimant's evidence at the hearing that he sat in the DMV reception and wrote down his BCDL is said to be in contrast with his evidence at the discovery and, in particular, Question 214, where he said he did not remember that he pulled the license out and wrote it down. At the hearing, Questions 210-213 were also put into evidence where the Claimant said that he was not asked to produce his BCDL, that he provided the BCDL number and that he wrote it himself. This is not a contradiction in any material sense.
- iii. At the hearing, the Claimant said with respect to page 2 of the application (Exhibit 1, Tab 10, page 2), he took a quick glance but did not understand it. At his discovery (Questions 215-217), he was equivocal as to whether he read a portion of page 2 of the Disclosure Statements on the application. He said that he did not read the portion of the Certification at the bottom of that page, which reads, "I understand I may have no more than one driver's license in my possession or under my control in accordance with California Vehicle Code... 12511." Overall, this was consistent with what he said at the hearing.
- iv. In his evidence, the Claimant said he would have shown the DMV employee his F-1 student visa but does not recall any other conversation. The Respondent says "It should be noted the DMV file for the March 2008 application does not contain a copy of the F-1 student form." This is correct but I cannot conclude that the absence in the file means the F-1 student form was not shown.
- v. It is asserted that the Claimant must have received a temporary driver's license when he attended the DMV in March 2008 and that "It is inconceivable that the DMV would have issued this temporary license and had mailed him his driver's license card without having him produce his British Columbia driver's license to prove that he had previously been qualified to drive. Otherwise, a road test would have been conducted." As will be discussed below, this submission is not borne out by the evidence. In particular, there was no evidence directly from anyone at the

DMV. Also, there was expert opinion evidence from certain California lawyers, which will be discussed below.

13. The balance of the credibility points raised by the Respondent deal with the Claimant's misplaced wallet and his attendance at the DMV in 2010. Apart from the fact that he seems to have a better recollection of his attendance at the DMV in March 2008 than when he was examined for discovery, I cannot draw any conclusions that would affect my view of his credibility.
14. Overall, while there were variances in his recollections, the Claimant struck me as forthright. The fact that he was well prepared for the hearing does not give rise to an adverse credibility finding.

THE CLAIMANT'S EVIDENCE

15. In addition to what is set out under the heading "Agreed Facts", the following evidence was given by the Claimant.
16. The cost of attending Life Chiropractic was \$224,044. He did not plan to work while attending school.
17. The tuition he paid was as an international student, not as a California resident. He commenced the program in January 2008.
18. After the Accident, the Claimant was academically dismissed as of October 12, 2012.
19. While attending school, he lived in Hayward, California on a month-to-month rental period.
20. Upon completion, his intention had been to return to BC and not work in California or the United States. He maintained his Canadian Social Insurance Card.
21. When he first went to Life Chiropractic, he had a 1996 Honda Civic that he brought from BC.
22. In February 2008, he was stopped by police in Hayward at a designated road side check. He showed his BCDL and F-1 student visa. The male police officer said he needed to get a California driver's license.
23. In March 2008, the plaintiff attended the DMV office in Hayward, California, where he applied for a California driver's license based on what he had been told by the police officer.

24. He met a woman at the DMV office who gave him forms to be filled out. He took the forms to the waiting room where the application was filled out. On the form, he used his BC driver's license number "6829666" and for State or Country he wrote "Canada". He wrote the expiry date of his BCDL, being September 14, 2011.
25. He returned the form to the woman he was dealing with. He does not recall her asking him anything, including the driver's license number or province where he was from. He would have shown her his F-1 student visa but does not recall any other conversation.
26. He did not show or hand over his BC driver's license to the woman at the DMV office. It was left in his wallet in his pocket and that is where it was when the Accident occurred.
27. The Claimant subsequently received a California Class C license in the mail.
28. After his attendance at the DMV, he did not receive a letter or any indication that his BCDL had been suspended or cancelled.
29. Sometime after the Accident, the Claimant misplaced his wallet which included his California driver's license, BCDL and credit cards. He applied for a replacement California license in December 2010. This time he used the number on his California driver's license. He was given a temporary driver's license and was later mailed his permanent license. It showed an expiry date of June 30, 2012, which coincides with when he was to be finished in his studies in accordance with his F-1 student visa.
30. The Claimant moved back to British Columbia after he left California. He received a letter from ICBC dated July 30, 2011 which said that his BCDL needed to be renewed. The BCDL was renewed (Exhibit, 1 Tab 14.)
31. In cross examination, the claimant confirmed his signature at Item 3 and Item 9 on page 1 of the DMV Driver License Application (Exhibit 1, Tab 10.)
32. He agreed that when he signed at Item 9, he was saying that he read the back of the form but admitted that he did not read the Disclosure Statements, the Advisory Statement or the Certifications on the back page.
33. Various passages from the claimant's examination for discovery were put to him, as noted above, and, while there were some variations, none were significant.
34. Throughout, he maintained that he did not present his BCDL to the DMV.

EXPERT EVIDENCE

35. The Claimant relies on the expert reports of Melanie Skehar dated March 23, 2020 and June 16, 2020. Ms. Skehar is a licensed attorney in the State of California having been admitted to the California State Bar in 2005 where she is familiar with all aspects of the California Vehicle Code (the CVC) and in particular, Section 12511 and its application
36. Ms. Skehar's reports are contained in a binder marked as Exhibit 2.
37. The Respondent relies on the expert reports of Mr. David Serrano dated February 12, 2020, August 7, 2020 and August 13, 2020. Mr. Serrano is a licensed California attorney in the State of California and was called to the State Bar of California in December 2013. He has practiced in a broad range of legal areas including product liability matters, consumer warranty matters, international trades and shipping disputes, and occupational safety and health administration. He has relatively limited experience with the California Vehicle Code.
38. Mr. Serrano's reports are contained in a binder marked as Exhibit 3.
39. Generally, there was an agreement between the experts on the following points:
 - a. California law does not permit an individual to possess a California license and another driver's license from any other jurisdiction.
 - b. the claimant was not a California resident and therefore was not required to have a California driver's license.
 - c. the advice provided by the male police officer in February 2008 that the claimant needed a California driver's license was wrong.
 - d. references in the California Vehicle Code to the Driver's License Compact do not apply to licenses issued in a foreign jurisdiction including British Columbia.
 - e. there is no evidence in the DMV file (Exhibit 1, Tab 10) that a temporary driver's license was issued on March 3, 2008.
40. The experts disagree on the following points:
 - a. Mr. Serrano's evidence is that signing the Driver's License Application (Exhibit 1, Tab 10, pages 1 and 2) amounts to surrender of the BC driver's

license and the Claimant's BCDL would not be valid once the California driver's license has been issued.

- b. Ms. Skehar's evidence is that the BCDL was not surrendered because surrender requires a physical handing-over of the driver's license and signing the application does not effectively surrender the driver's license. Further, since the Claimant was a non-resident, he was not entitled to receive a California driver's license.

DISCUSSION AND ANALYSIS

41. The parties agree that the question to be answered is whether:

By obtaining a California driver's license on March 3, 2008, were Mr. Biryah's BC driver's license and driver's certificate suspended, revoked, cancelled or surrendered such that he is not entitled UMP coverage pursuant to Part 10 (Division 2) of the Insurance (Vehicle) Regulation?

42. Shortly put, the Claimant's position is that the Claimant's BCDL was not surrendered when he applied for the California driver's license.
43. The Respondent says "that the presumption must be that by applying and receiving a driver's license in either jurisdiction, one effectively would have surrendered the prior held driver's license".
44. The difference between the two positions turns, in part, on the opinions of the experts.
45. As noted, Mr. Serrano says that signing the driver's card application amounts to surrender of the BCDL and the claimant's BCDL would not be valid once the California driver's license has been issued.
46. Ms. Skehar says the BCDL was not surrendered because it requires a physical handing over of the driver's license and signing of the application does not effectively surrender the BCDL.
47. For the reasons that follow, I find that the Claimant's BCDL was not surrendered when he applied for or was issued a California's driver's license.

California Legislation

48. CVC section 12805 states:

(a) The department shall not issue a driver's license to, or renew a driver's license of, any person:

(6) Who holds a valid driver's license issued by a foreign jurisdiction unless the license has been surrendered to the department, or is lost or destroyed.

49. This paragraph does not speak to suspension, revocation, or cancellation. It addresses only surrender to the department. Further, it puts the burden on the department, not the applicant.

50. There is no evidence that the Claimant handed over or even showed his BCDL. He says he did not. Exhibit 1 Tab 10 does not contain a copy of his BCDL. There was no direct evidence from the DMV.

51. It was agreed between the experts that the Claimant was not a California resident and therefore was not required to have a California driver's license. He had received incorrect advice from the police officer which precipitated his attendance at the DMV.

BC Legislation

52. The Claimant comes within the definition of an 'insured' under Section 42(1) of the Insurance (Vehicle) Regulation (the Regulation) since he held a BCDL and was a BC resident. As such, he is entitled to UMP coverage under Section 148.1(2), unless Section 43(1)(a.1) of the Regulation applies. It states:

43(1) For the purposes of the Act and this regulation,

(a) A driver's certificate is deemed to be incorporated in every valid and subsisting driver's license

....

(a.1) unless suspended, cancelled, or revoked under the Act or this regulation...

53. “Surrender” is not included in the exceptions in Section 43(1)(a.1). To address whether a driver’s certificate is “suspended, cancelled or revoked” one looks to Section 39(2) of the Insurance (Vehicle) Act (the Act), which states:

39(2): The suspension, revocation, cancellation or surrender, under any law, of a driver’s license, permit or other authority, to drive issued, to a person under The Motor Vehicle Act, automatically suspends, revokes, or cancels, as the case may be, the driver certificate in which that person is named and that corresponds to that license, permit, or other authority to drive.

54. Sections 25(4) and (5) of The Motor Vehicle Act state:

(4) If the applicant for the driver’s license has at any time before making the application held a driver’s license under this Act or in another jurisdiction, the applicant must, at the time he or she is issued a driver’s license under this Act, surrender the last driver’s license or duplicate of it held by him or her, unless the Insurance Corporation of British Columbia on cause shown to the corporation’s satisfaction, dispenses with its production.

(5) At the same time that he or she has a driver’s license issued under this Act, person must not have a driver’s license issued under another jurisdiction or have another driver’s license previously issued under this Act.

55. I find that Section 39(2) does not apply because the Claimant’s BCDL had not been suspended, revoked, cancelled or surrendered under any law.

56. Further, Section 25(5) deals with an application for a BCDL. It does not state that a BCDL is deemed to have been suspended if a license is obtained in another jurisdiction.

57. I have not been directed to any BC legislation that would deem a BCDL to be considered invalid or lapsed and the CVC does not have that effect.

58. Contrast this with Section 37(4) of the Act, which states:

37(4): An owner’s certificate is deemed to have lapsed and is void immediately when the vehicle, for which the owner’s certificate was issued, is registered and licensed in another province or state.

59. It is clear that, Section 39 of the Act requires that the driver's license be suspended, revoked, cancelled or surrendered under any law for there to be an automatic suspension, revocation, or cancellation.
60. ICBC considered the Claimant to have a valid BCDL when he renewed his license in 2011.

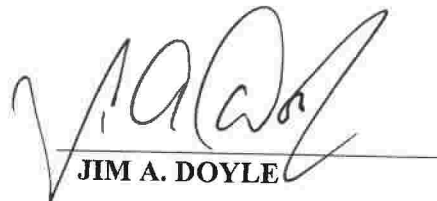
Caselaw

61. I have not been provided with any caselaw that is directly on point on the single issue to be determined in this Arbitration.
62. The Respondent says that arbitrator James Carfra, Q.C. dealt with a similar issue in *Yewchuk v ICBC*. It is my view that *Yewchuk* is distinguishable. The issues there were whether the owner's certificate was null and void when issued. The arbitrator found that it was, on the basis that the claimant was a resident of Oregon, and not a resident of BC. The key was the vehicle was required to be registered and licensed in Oregon, when all of these events were in place at the time of the application.
63. Further, the comments on the BC driver's license are *obiter*. It was one of the examples used by the arbitrator to show the interplay between the Motor Vehicle Act and the Insurance (Motor Vehicle) Act.

CONCLUSION

64. The Claimant was a resident of BC. He was not applying for a BCDL. The Respondent considered him to have a valid driver's license when they sent the renewal notice on July 30, 2011.
65. In answer to the single issue to the address, I find that in obtaining a California driver's license, the Claimant's BCDL and driver's certificate were not suspended, revoked, cancelled or surrendered.
66. In the result the Claimant is entitled to UMP coverage pursuant to Part 10 (Division 2) of the Insurance (Vehicle) Regulation.

Dated: FEB 25, 2021


JIM A. DOYLE