Citation: Zeid v. Economical Insurance, 2024 ONLAT 23-006484/AABS-PI

Licence Appeal Tribunal File Number: 23-006484/AABS

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act,* RSO 1990, c I.8, in relation to statutory accident benefits.

Between:

Fahed Abou Zeid

Applicant

and

Economical Insurance

Respondent

PRELIMINARY ISSUE HEARING DECISION AND ORDER

ADJUDICATOR: **Kate Grieves**

APPEARANCES:

For the Applicant: Anne Jayatilake, Counsel

For the Respondent: Angelo G. Sciacca, Counsel

Heard: **By Way of Written Submissions**

OVERVIEW

[1] Fahed Abou Zeid ("the applicant") was involved in an incident on March 9, 2023 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016)* (*the* "*Schedule*"). The applicant was denied benefits by Economical Insurance ("the respondent") and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

PRELIMINARY ISSUE IN DISPUTE

[2] The preliminary issue to be decided is whether the applicant was involved in an "accident" as defined in section 3(1) of the *Schedule*.

RESULT

[3] The applicant was not involved in an "accident" as defined in s. 3(1) of the *Schedule*.

ANALYSIS

Background

[4] On March 9, 2023 the applicant was driving his vehicle for Uber. He was picking up a passenger and reversed into the driveway. He exited the vehicle intending to help the passenger put some bags in the trunk. While walking towards the rear of the vehicle to open the trunk, he slipped and fell on the icy driveway and fractured his arm.

[5] The applicant submits that he was involved in a motor vehicle accident as per the definition of an "accident' in the *Schedule*. The applicant submits that helping passengers lift their luggage into the trunk of his vehicle was an everyday operation of an automobile. As an Uber driver, he was required to assist customers with loading and unloading luggage, and since the activity and actual driving of the vehicle were complementary to each other, it fell under the same "umbrella" that constitutes driving as a profession.

[6] The respondent submits that the applicant has failed to prove that the use and operation of an automobile directly caused his injuries as required by s. 3(1) of the *Schedule*.

Was the incident an "accident"?

[7] I find that the applicant was not involved in an "accident" as defined by s. 3(1) of the *Schedule*, for the following reasons.

[8] Section 3(1) of the *Schedule* defines "accident" as "an incident in which the use or operation of an automobile directly causes an impairment".

[9] The onus is on the applicant to establish on a balance of probabilities that the use or operation of an automobile directly caused his injuries.

[10] In *Economical Mutual Insurance Company v. Caughy*, 2016 ONCA 226 (CanLII), the Ontario Court of Appeal confirmed the two-part test to determine whether an incident is an "accident" as follows:

1. The purpose test: Did the incident arise out of the use or operation of an automobile? and,

2. The causation test: Did the use or operation of an automobile directly cause the impairment?

[11] The purpose test is a determination of whether the incident resulted from "the ordinary and well-known activities to which automobiles are put." See: *Greenhalgh v. ING Halifax Insurance Company*, (2004), 2004 CanLII 21045 (ONCA). Put another way, for what "purpose" was the vehicle being used at the time of the incident?

[12] The causation test then requires the adjudicator to determine if these "ordinary and well-known activities" were the direct cause of the applicant's impairments by focusing on the following considerations:

1. The "but for" consideration;

2. The intervening act consideration, which may serve to break the chain of causation where some other intervening events cannot be said to be part of the ordinary course of use or operation of the vehicle; and,

3. When faced with a number of possible causes, the "dominant feature" consideration focuses on whether the ordinary and well-known activity is what most directly caused the injury.

The Purpose Test

[13] The respondent concedes that the purpose test has been met. On that basis, I find that the purpose test is satisfied.

The Causation Test: Would the injuries have occurred "but for" the use or operation of the automobile?

[14] Having considered the evidence before me, I find that the applicant would not have sustained these injuries "but for" the need to get out of the vehicle to access the trunk. However, the "but for" test does not conclusively establish legal causation, the cause that attracts legal liability. As noted by the Court of Appeal in *Chisholm v. Liberty Mutual Group*, 2002 CanLII 4520 (ON CA) ("*Chisholm*") the purpose of the "but for" test of causation is an exclusionary test which serves to "eliminate from consideration factually irrelevant causes. It screens out factors

that made no difference to the outcome […] but the but for test does not conclusively establish legal causation.

[15] The analysis must next turn to a consideration of whether there was an intervening act that severs the chain of causation.

Was there an intervening cause?

[16] The applicant's sur-reply submissions indicate that at the time of the incident, the applicant was offloading a passenger that he was dropping off, that he was moving with the intent to offload the passenger's luggage, and that the chain of causation between the injury and the use of operation of the automobile was unbroken. I note that the transcript from the Examination Under Oath indicates that the applicant testified he was actually picking up a passenger, who indicated that they wanted to load bags in the trunk.

[17] In any event, I agree with the respondent that the cause of the applicant's injuries was the icy surface on the ground leading to a slip and fall. The respondent relies on *Porter v. Aviva Insurance Company of Canada*, 2021 ONSC 3107 ("*Porter*"), *Cesario v. Intact insurance Company,* 2023 CanLII 23583 (ON LAT) ("*Cesario*"), *Singh v. Aviva Insurance Company,* 2023 CanLII 122930 (ON LAT) ("*Singh*"), *Vintimilla v. Co-operators General Insurance Company*, 2023 CanLII 119791 (ON LAT) ("*Vintimilla*"), and *Bartlett v. RSA Insurance Company*, 2023 CanLII 107253 (ON LAT) ("*Bartlett*") in support of its case.

[18] The Divisional Court held in *Porter* that although the location of the car in the driveway could be said to have led to the applicant's injuries, the use and operation of the car could not be said to be a direct cause of the injuries. The court held that "more is required than establishing that the car brought the applicant to the location of the incident, and more is required than the car being the reason why Ms. Porter was at the location where the incident occurred". I am bound by the reasoning in this decision.

[19] In *Cesario, Singh, Vintimilla* and *Bartlett*, the Tribunal found that the applicant's injuries were not a consequence directly caused by the use or operation of the automobile, but rather, resulted from an intervening cause: slipping and falling on ice.

[20] I am persuaded by the line of authorities raised by the respondent and find that the applicant's injuries were not a consequence directly caused by the use or operation of the automobile. The ice caused the slip and fall that led to the applicant's injuries. Although the vehicle was physically near the ice, it did not cause the slip and fall.

[21] I am not persuaded by the applicant's argument that there was an unbroken chain of causation. The ice on the ground and the applicant's subsequent slip and fall on that ice constitutes an intervening event that broke the chain of events. The ice and resulting slip and fall occurred independent of the

automobile's use or operation. The ice on the driveway and the applicant's slip and fall caused the applicant's injuries.

Was the use or operation of the automobile a dominant feature of the applicant's injuries?

[22] As described in *Greenhalgh*, the dominant feature consideration requires a determination of what element of an incident is "the aspect of the situation that most directly caused the injuries". For instance, in *Greenhalgh*, the incident involved an insured person who suffered from severe frostbite after getting her vehicle stuck on a country road. The court held that "the 'dominant feature' of the insured's injuries could be best characterized as exposure with the elements, and that the use of the motor vehicle was ancillary to that injury."

[23] In *Caughy*, the claimant tripped and fell over a motorcycle that was parked on a walkway. The court found that the temporary parking of the motorcycle on the walkway was the dominant feature of the incident, and not ancillary to it, and that this was an accident within the meaning of the *Schedule*. The Court of Appeal upheld this finding.

[24] The applicant submits that the use or operation of his automobile was a dominant feature of the incident given that he was an Uber driver, and was walking toward the trunk to load luggage of a passenger. The applicant submits that the use of the vehicle did not end after stopping the vehicle, but continued as he was going to open the trunk.

[25] The respondent submits that the dominant feature of the injury was the slip and fall on the ice, and the motor vehicle was only ancillary to the incident. The chain of causation was broken by the intervening event.

[26] I find that the use or operation of the automobile was not the dominant feature of the applicant's injuries. As in *Porter,* the dominant feature that caused the applicant's injuries was the icy driveway. Direct causation requires more than the motor vehicle simply being the reason as to why the applicant was present at that location when the slip and fall occurred. If the ice was removed from the equation, he would not have slipped and been injured. Regardless of whether an automobile is involved, falling on ice is a foreseeable and common risk when walking outdoors in winter.

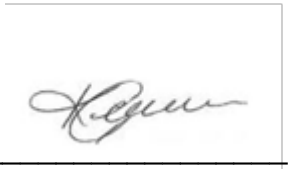
[27] In find that the use or operation of the vehicle did not directly cause the applicant's injuries. This incident does not meet the definition of an "accident" pursuant to s. 3(1) of the *Schedule.*

ORDER

[28] The applicant has not demonstrated that the incident on March 9, 2023 constituted an "accident" as defined in s. 3(1) of the *Schedule*.

[29] The application is dismissed.

Released: February 2, 2024



Kate Grieves
Adjudicator