Citation: Vintimilla v. Co-operators General Insurance Company 2023 ONLAT 23-001131/AABS-PI

Licence Appeal Tribunal File Number: 23-001131/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:

Rosaria Vintimilla

Applicant

and

Co-operators General Insurance Company

Respondent

PRELIMINARY ISSUE HEARING DECISION AND ORDER

ADJUDICATOR: **Ulana Pahuta**

APPEARANCES:

For the Applicant: Kristy Kerwin, Counsel

For the Respondent: Peter Durant, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] Rosaria Vintimilla, the applicant, was involved in an incident on December 19, 2019 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (the "Schedule")*. The applicant was denied certain benefits by the respondent, Co-operators General Insurance Company, the respondent, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal") for resolution of the dispute.

PRELIMINARY ISSUE IN DISPUTE

[2] The preliminary issue to be decided is:

i. Was the applicant involved in an "accident" as defined in s. 3(1) of the *Schedule*?

RESULT

[3] The applicant's injuries did not result from an "accident" as defined in s. 3(1) of the *Schedule.*

PROCEDURAL ISSUES

[4] Both parties raised procedural issues, to be addressed prior to hearing of the preliminary issue.

Page limit of the respondent's submissions

[5] The applicant argues that contrary to the Case Conference Report and Order ("CCRO") dated September 8, 2023, the respondent has effectively doubled the length of its written submissions by single spacing them and reducing the font size. The applicant submits that she has clearly been prejudiced by the respondent's breach of the CCRO, and that the respondent's submissions past page five should be struck and not considered by the Tribunal.

[6] The respondent submits that its written submissions were prepared prior to the issuance of the CCRO, and that the page limit and font were not discussed at the case conference. Further, the respondent argues that a number of pages consist of a description of evidence and caselaw, which would be excluded from submission length. As such, it argues that the applicant has not established how she has been prejudiced by the inclusion of caselaw and evidence into the body of the submissions rather than it being appended. Finally, the respondent asserts

that the applicant's submissions also exceeded the page limits, particularly as she filed separate submissions on the procedural issue of page limits.

[7] Pursuant to Rule 3.1 of the *Licence Appeal Tribunal, Animal Care Review Board and Fire Safety Commission's Common Rules of Practice and Procedure*, I have considered the respondent's full submissions. I note its argument that the applicant has also exceeded the page limits due to providing separate procedural submissions, that some of its additional pages were due to the inclusion of evidence and caselaw, and that the applicant has not specified the prejudice she has suffered. While I am prepared to consider the full length of the submissions in this instance, I note that pursuant to ss. 23(1) and 25.0.1 of the *Statutory Powers Procedure Act*, it falls directly within my discretion to strike any submissions in excess of the 10-page limits laid out in the CCRO. Although, in this case, I am prepared to admit these non-compliant submissions, and to assign them whatever weight I deem appropriate.

Late-filed affidavits

[8] The respondent disputes the applicant's filing of two affidavits, that of the applicant and her husband, with her written submissions for this hearing. It argues that the CCRO explicitly stated that the parties had agreed that no affidavits would be submitted as evidence and that any documents that the parties intended to rely on, shall be exchanged no later than seven days from the case conference. It submits that it is clearly prejudiced by the inclusion of these affidavits, as it has not been permitted to cross-examine the applicant or her husband on these affidavits.

[9] The applicant argues in a subsequent letter to the Tribunal dated October 13, 2023, that at the case conference, she had never agreed that affidavit evidence would not be permitted at the hearing. She submits that there is no principled reason to exclude this key evidence and that it is needed to refute the respondent's characterization of her evidence at her recorded telephone statement. At a minimum, the applicant requests that the exhibits to the affidavits be included, as these documents had been previously provided to the respondent.

[10] I find that the applicant's affidavits are not admissible. I agree with the respondent that the CCRO explicitly stated that no affidavits would be filed. Although the applicant argues that she did not agree to this at the case conference, it appears that the CCRO was sent to the parties on September 8, 2023. The affidavits were executed on October 3, 2023 and the applicant's submissions were provided on October 4, 2023, both well-after the CCRO was

issued. As such, the applicant would have been aware that affidavits were not to have been filed for almost a month prior to the filing of her submissions. She does not direct me to any evidence that she raised the issue with the respondent or the Tribunal. Nor did the applicant bring a motion to the Tribunal to request either an amendment to the CCRO, or permission to file an affidavit. Further, the CCRO stated that the parties must exchange all documents that they intend to rely on, by no later than seven days after the case conference.

[11] I agree with the respondent that it has suffered prejudice as a result of being unable to cross-examine the parties to the affidavits. I further am not persuaded by the applicant's argument that the exhibits to the affidavit should be admitted. It appears that almost all of the exhibits are already part of the evidentiary record, being part of the applicant's or respondent's evidence brief for this hearing. To the extent that any exhibits are not similarly included in the briefs, I find that they are not admissible. I rely on Rule 9.4 of the Tribunal's Rules, which states that a party may not rely on a document if it fails to comply with a Tribunal order, without the consent of the Tribunal. The applicant has not provided any evidence that she sought the Tribunal's permission to include these affidavits. As such, the applicant's affidavits are not admissible in this hearing.

BACKGROUND

[12] The parties disagree as to the factual circumstances of the applicant's alleged accident on December 19, 2019. The applicant submits that she fell while climbing into her husband's motor vehicle. She states that she had opened the vehicle door, lifted and placed her left leg onto the vehicle floor, when she suddenly fell, sustaining serious impairments. While the applicant concedes that there was ice or snow in the location of her fall, she argues that she was actively entering into the vehicle at the time of her fall.

[13] The respondent disputes the applicant's characterization of the incident. Rather, it submits that the applicant was not entering into the vehicle at the time of her fall, but rather that she was "near" her vehicle. It contends that the applicant has consistently reported that she slipped and fell on ice, and that she has provided contradictory reports of her location at the time of the fall.

ANALYSIS

Law

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

[15] The onus is on the applicant to establish on a balance of probabilities that the use or operation of an automobile directly caused her injuries, despite this preliminary issue being raised by the respondent.

Was the incident an "accident"?

[16] I find that the applicant was not involved in an accident as defined in s. 3(1) of the *Schedule*.

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

i. Purpose test: did the incident arise out of the use or operation of an automobile? and

ii. Causation test: did the use or operation of an automobile directly cause the impairment?

[18] 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?

[19] 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 satisfying the following considerations in sequential order:

i. The "but for" consideration;

ii. The "intervening act" consideration, which may be used to determine if some other event took place that cannot be said to be part of the ordinary course of use or operation of the vehicle; and,

iii. 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".

Purpose Test

[20] I find that the applicant's injuries resulted from the use or operation of the vehicle, and as such, she has met the purpose test.

[21] With respect to the circumstances of the incident, there is a dispute as to the applicant's proximity to the car at the time of her fall. The applicant takes the position that she was actively engaged in climbing into the vehicle and had placed her left foot into the car. However, I find that she has not led sufficient evidence to establish this chain of events.

[22] I agree with the respondent that the applicant has provided contradictory statements as to the circumstances of her fall. To establish her claim that she had already placed one foot into the car and was climbing in, the applicant relies in large part on her and her husband's affidavits dated October 3, 2023. However, as previously noted, these affidavits are not admitted into evidence for this hearing. The only other reference to the applicant having placed her foot into the car, is found in her husband's February 4, 2020 telephone statement. In all of the applicant's remaining reports of the accident, to the hospital, medical providers, assessors and the adjuster, the applicant does not reference placing her foot into the vehicle. In some reports she discussed opening the car door and slipping on ice. In others she reported attempting to climb into the car prior to falling. In other reports the applicant mentioned only slipping and falling, without referencing a vehicle.

[23] I note the respondent's argument that the applicant had filed a Statement of Claim against the City of Toronto, McDonald's and maintenance companies for negligence in failing to maintain the area where she had fallen. In her Statement of Claim, the applicant describes the incident without any reference to climbing into the vehicle, stating that she was walking out of McDonald's and "was approaching her husband's vehicle when suddenly and without warning she slipped and fell on a patch of ice on the sidewalk". The applicant further characterized her accident as a "slip/trip and fall".

[24] The applicant argues that her Statement of Claim is not properly evidence as it merely sets out broad allegations that must still be proven in Court. I am not persuaded by the applicant's argument. While I recognize that pleadings of fact in a Statement of Claim have not yet been proven true, at a minimum, they provide the applicant's perspective of the circumstances surrounding the incident. As such, the applicant's position that she was actively climbing into her husband's vehicle at the time of the fall, is undermined by her contradictory statements. However, the respondent concedes that at a minimum, the applicant was near her husband's vehicle with the intention of entering it and appears to concede that the applicant may have opened the car door.

[25] I am satisfied that even accepting the respondent's characterization of the incident, the purpose test has been met. At a minimum, the applicant was either approaching her husband's vehicle with the intention of entering it, or may have opened the car door. There was a clear intention to enter the vehicle, when the applicant slipped and fell.

Causation Test

Would the alleged injuries have occurred "but for" the use or operation of the automobile?

[26] I find that the applicant has established that she has met the "but for" test. Based on the evidence before me, the applicant would not have sustained her injuries "but for" her need to enter the vehicle. However, I agree with the parties that the "but for" test does not establish legal causation. As noted in *Chisholm,* the purpose of the "but for" test is exclusionary, so it serves to "eliminate from consideration factually irrelevant causes. It screens out factors that made no difference to the outcome…the but for test does not conclusively establish legal causation." However, legal entitlement according to *Chisholm,* also "requires not just that the use or operation of the car be a cause of the injuries but that it be a direct cause."

Was there an intervening act?

[27] I find that the applicant's injuries were not directly caused by the use or operation of the vehicle. Rather, I find that the applicant's injuries were caused by an intervening act, namely, the fall on the ice.

[28] The applicant argues that the mere involvement of snow or ice does not break the chain of causation. She relies on Tribunal decisions *CKD v. Wawanesa Mutual Insurance*, 2020 CanLII 80305 (ONLAT), *Seung v. Cooperators General Insurance Co*., 2023 CanLII 47510 (ONLAT), *V.B. v. Economical Insurance Company*, 2020 CanLII 87992 and *Clementina Pinarreta v. ING Insurance Company of Canada,* 2005 ONFSCDRS 162 (CanLII) in support of her position. The applicant submits that in these decisions, the slip and falls were not viewed as intervening acts, but as part of a continuous chain of events that began once the applicant began walking towards, exiting or loading a vehicle. In *Seung,* the snow and ice were found to be an inextricable factual element of the claimant's use of his automobile.

[29] The respondent submits that the applicant's slip and fall stemming from the weather and walking surface conditions, was an intervening act which broke the

chain of causation between the applicant's use and operation of the vehicle, and her alleged injuries. It relies on Tribunal decisions where adjudicators found that ice leading to slips and falls were independent intervening acts which were the cause of the alleged injuries, see *Kosiner v. Economical Insurance Company*, 2023 CanLII 65800 (ONLAT), *Sinnicks v. Northbridge General Insurance* Company, 2022 CanLII 109481, *Parsons v. TD General Insurance Company*, 2023 CanLII 32794 (ONLAT), *Cesario v. Intact Insurance Company*, 2023 CanLII 23583 (ONLAT). The respondent further relies on the Divisional Court decision *Porter v. Aviva Insurance Company* 2021 ONSC 3107.

[30] I am persuaded by the decisions cited by the respondent and find that the applicant's injuries did not result from the use or operation of the vehicle. Rather, I find that the injuries were directly caused by an intervening act, namely, the slip and fall on the ice. I note that in the Divisional Court decision *Porter,* the Court found that while the location of the car in the icy driveway could be said to have led to the claimant's injuries, the use and operation of the car did not directly cause her injuries.

[31] Moreover, I note that some of the decisions cited by the applicant, *CKD, V.B.* and *Pinarreta* were decided before the Divisional Court decision *Porter,* which is binding upon me. I further agree with the respondent that *Seung* is distinguishable on its facts, as in that matter, the applicant was actively engaged in loading the truck of his car. As such, I am persuaded by the respondent's position and find that the applicant's slip and fall on the ice constituted an intervening act that broke the chain of events and was the direct cause of the applicant's injuries.

Was the use or operation of the vehicle the dominant feature of the incident and the resulting injuries?

[32] I find that the use or operation of the motor vehicle was not the dominant feature of the applicant's injuries. Rather, the dominant feature that physically caused the applicant's injuries was the slip and fall due to ice or snow.

[33] The applicant submits that even if snow or ice contributed to her fall, it does not negate the fact that her attempt to enter the vehicle was the dominant feature of the incident. She contends that the Tribunal has held that there can be multiple dominant factors which caused an accident, and that an accident can occur even when ice plays a prominent role, see *Harland-Bettany v. Aviva Insurance* Canada, 2022 CanLII 78879 (ONLAT). The applicant further cites the Divisional Court decision *Madore v. Intact,* 2023 ONSC 11, where the Court found that a direct cause need not be an only cause, and that a subsequent contributing

cause may not break the chain of causation if it is part of the ordinary course of things.

[34] The respondent argues that the use or operation of the automobile was not the dominant feature of the incident. It submits that the Tribunal has regularly held that the use and operation of a motor vehicle may be ancillary to an injury even if a claimant is actively involved in the use or operation of a motor vehicle at the time of injury, citing a number of Tribunal decisions. It further distinguishes *Madore,* as in that decision, the Divisional Court found that the causal link was not broken, as there was no evidence to suggest that the fall was caused by any unforeseen event.

[35] On the evidence, I am not persuaded that the use or operation of the vehicle was the dominant feature in this incident. The applicant indicated herself in her Statement of Claim that her fall was due to a "patch of ice on the sidewalk", without any reference to the motor vehicle. I further agree with the respondent that *Madore* is distinguishable, as in that decision, it was unclear whether there was an intervening act. However, in the matter at hand, the applicant herself identifies the intervening cause. Further, in *Harland-Bettany,* it was not disputed that the applicant was actively engaged in the act of exiting the vehicle. This can be distinguished from the matter at hand, where the applicant gave conflicting reports of her proximity to the vehicle.

[36] Similarly, I note that the applicant distinguishes a number of the Tribunal decisions cited by the respondent, on the basis that they involve fact patterns where the claimant was just approaching or near a vehicle or had simply opened a car door. She asserts that the present matter is entirely different, as she was already entering the interior space of the vehicle and had placed her left foot in the car when she fell. However, as previously noted, I have found that due to the applicant's contradictory statements as to the circumstances of her fall, she has failed to establish that she was in the process of entering the vehicle with her left foot. As such, I am not persuaded by the applicant's argument on this point.

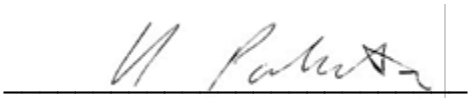
[37] For the foregoing reasons, I find that the dominant feature of this incident was the applicant's fall due to the ice or snow.

CONCLUSION AND ORDER

[38] The applicant has not established that the incident that took place on December 19, 2019 was an "accident", as defined in s. 3(1) of the *Schedule.*

[39] The application is dismissed.

Released: December 12, 2023



Ulana Pahuta
Adjudicator