Citation: Young v Economical Insurance Company, 2023 ONLAT 21-011454/AABS

Licence Appeal Tribunal File Number: 21-011454/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:

Donald Young

Applicant

and

Economical Insurance Company

Respondent

DECISION

ADJUDICATOR: **Derek Grant**

APPEARANCES:

For the Applicant: Alexandra Victoros, Counsel

For the Respondent: Nivedita Misra, Counsel

HEARD: **By way of written submissions**

OVERVIEW

[1] Donald Young ("D.Y."), the applicant, was involved in an automobile accident on December 7, 2020, and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010 (including amendments effective June 1, 2016)* (the "*Schedule*"). D.Y. was denied benefits by the respondent, Economical, and applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

PRELIMINARY ISSUE

[2] The preliminary issue in dispute was agreed to as follows:

a) Was the incident that occurred on December 7, 2020 an accident as defined by s. 3(1) of the *Schedule*?

ISSUES

[3] The issues in dispute are:

a) Is D.Y. entitled to $564.42 for prescription medication and replacement eyeglasses, submitted on a claim form (OCF-6) dated April 1, 2021?

b) Is D.Y. entitled to interest on any overdue payment of benefits?

RESULT

[4] The incident that occurred on December 7, 2020 does not meet the *Schedule's* definition of an "accident". As statutory accident benefits are payable only as a result of an accident, it follows that D.Y. is not entitled to the benefit in dispute or interest.

BACKGROUND

[5] In the information provided in a written statement dated February 16, 2021, and his Affidavit, sworn January 23, 2023, D.Y. sustained injuries in an incident, which occurred on December 7, 2020 at approximately 9:00am. D.Y. arrived at Elgin Car Wash and pulled around to the building on the north side, where the air pump was located. It was his intention to inflate his tires to sufficient pressure so that he could continue to operate his vehicle safely. He parked his vehicle in a manner which would allow him to access the air pump and to fill his tires, given the length of the air hose.

[6] D.Y. was not aware of any snow or ice as he parked his vehicle. With his vehicle in park and running, D.Y. retrieved the air hose and began filling his tires, starting with the left front tire, moving to the left rear tire, then the right rear tire. When it became apparent to D.Y. that the air hose would not reach all the way around his vehicle to access the front right tire, he walked back around his vehicle, along the driver's side to get to the right front tire. D.Y. was still holding the air hose as he walked around the vehicle.

[7] When D.Y. reached approximately the centre of the car on the left side, he slipped and fell on ice and fell onto his left side. He does not recall if he hit his body on the car as he fell. D.Y. attempted to get himself up; however, he could not use his left arm due to pain. He also sustained a cut over his left eyebrow and broken his glasses. D.Y. was assisted back into his vehicle, driven to Cambridge Memorial Hospital, where he was diagnosed with a fracture at the knob of his humerus bone on his left side.

[8] D.Y. submits that the incident meets the definition of an "accident" as an incident in which the use or operation of an automobile directly causes an impairment or directly causes damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device.

ANALYSIS

Was D.Y. involved in an "accident"?

[9] Section 2(3) of the *Schedule* provides that the benefits set out in the regulation shall be provided in respect of "accidents." Section 3(1) defines an "accident" as "an incident in which the use or operation of an automobile directly causes an impairment […]."

[10] The two-part test for determining whether an incident qualifies as an "accident" under the *Schedule* is well-established and is set out in the seminal case of *Chisholm v. Liberty Mutual Group.*[1] The two parts of the test are known as the "purpose" test and the "causation" test. The test was further analyzed and clarified in *Greenhalgh v. ING Halifax Insurance Company*[2] to the extent that in order for an incident to be an "accident" under the *Schedule*, the insured must satisfy both branches of the test. Regarding the first part of the test:

a) Whether the incident satisfies the purpose test:

[1] 2002 CanLII 45020 (ON CA), at para. 17. ["*Chisholm*"].
[2] 2004 CanLII 21045 (ON CA), at para. 11. ["*Greenhalgh*"].

i. Did the incident arise out of the ordinary and well-known activities for which automobiles are used?

Purpose Test

[11] D.Y. submits that he meets the purpose test, as he was engaged in an activity involving the ordinary and well-known use of a vehicle, as he was walking around his parked, still running, vehicle, attempting to put air in the tires. His position is that putting air in the tires in order to operate a vehicle safely constitutes the ordinary and well-known activities to which automobiles are put.

[12] Economical acknowledges the details of the incident and concedes that D.Y. driving his vehicle to the gas station and filling the tires with air would classify as an ordinary use and operation of a vehicle.

[13] I agree with the parties that the purpose test is met. I now turn to the causation test, as both parts of the test must be met in order to deem the incident an "accident".

Causation Test

[14] The second part of the test, set out in *Greenhalgh*:

a) Whether the incident satisfies the causation test:

i. Did the use and operation of the automobile directly cause the impairment?

ii. Was there an intervening act or acts that resulted in the injuries that cannot be said to be part of the "ordinary course of things"?

[15] For clarification, the second branch of the causation test concerns whether it can be said that the use or operation of the vehicle was a "direct cause" of the applicant's injuries. In *Greenhalgh*, the Court also considered "but for", "intervening act" and "dominant feature" to analyze the causation test.

The "but for" consideration

[16] D.Y. submits that "but for" having to put air in his tires and "but for" having to walk on certain areas of the parking lot due to the air hose length restrictions, he would not have fallen.

[17] Economical does not specifically address the "but for" aspect of the test, and I agree with D.Y. that, "but for" does not conclusively establish legal causation. As such, I turn to the next branch of the test for analysis, the intervening act.

The "intervening act" consideration

[18] D.Y. relies on *Chisholm v. Liberty Mutual Insurance Group*, 2002, CanLII 4520 (ONCA), in support of his claim. In *Chisholm*, the Court determined that reasonably foreseeable risks related to operating a motor vehicle will not break the chain of causation. Specifically at paragraph 29 of *Chisholm*, the Court stated:

> An intervening act may not absolve an insurer of liability for no-fault benefits if it can fairly be considered a normal incident of the risk created by the use or operation of the car—if it's "part of the ordinary course of things."

[19] D.Y. submits that in considering whether there was an intervening act, factors such as time, proximity and risk are relevant.

a) Time and proximity – D.Y. exited his vehicle, to put air in the tires. In order to put air in the tires, D.Y. was required to walk around the vehicle; and

b) Risk – Notably, D.Y. did not specifically address any risk factors.

[20] Economical argues that the use or operation of the parked car was not a direct cause of D.Y.'s injuries. Its position is that the fall on the ice outside the automobile caused the injuries, thus is a break in the chain of causation. It further submits that it is not sufficient that the automobile that brought D.Y. to the location of the incident and the car was the reason why D.Y. was at the location where the incident occurred.

[21] To this end, Economical relies on *Porter v Aviva Insurance Company of Canada*, 2021 ONSC 3107 ('*Porter*'); *RM v Certas Direct Insurance Company*, 2019 CanLII 94132; *Khamis v. Unifund Assurance Company*, 2021 CanLII 19498; *Davis v. Aviva General Insurance Company,* 2022 CanLII 45273; and *Delores Buckley v. Wawanesa*, 2022 CanLII 106443. Economical submits that in the "ice cases" above, it was determined that there was an intervening act (the ice) that the use and operation of a vehicle was not the direct cause of the injury.

[22] Economical argues that similar to the "ice cases", D.Y. admitted to slipping on ice, which it argues, the Tribunal has determined to be an intervening act. It

posits that establishing that the use and operation of a vehicle brought D.Y. to the location of the incident is insufficient to meet the causation test. It further submits that the use and operation of a vehicle must not just be a cause of the injuries, but that it be a direct cause, as established in *Chisholm*.

[23] I am persuaded by the case law provided by Economical and find that D.Y. was not involved in an accident as a result of an intervening act. For the purpose of completeness, I now turn to the dominant feature component of the causation test.

The "dominant feature" consideration

[24] D.Y. submits that the dominant feature of this incident was the ordinary and well-known use or operation of a vehicle while putting air in the tires, which forced him to walk on an icy patch of asphalt.

[25] The facts before me are that D.Y. was injured as a result of slipping and falling on ice at the gas station. The location plays little into the direct cause of his injuries as he was not injured by the location; rather, he was injured falling on ice. I agree with the Court's consideration in *Chisholm* at paragraph 34, that "the use or operation of his vehicle was at best ancillary."

[26] I am further persuaded by the Tribunal decision, *Ritchie v. Wawanesa*, 2021 CanLII 134534 (ON LAT), where the Vice Chair concluded:

> Rather, falling on ice is a foreseeable and common risk when walking in parking lots in the winter, regardless of whether a motor vehicle is involved. Put another way, the ice in this matter was the dominant feature of the fall, not the use or operation of the motor vehicle.

[27] Exiting a vehicle with ice present on the ground is a risk that one assumes when driving. Further, falling on ice is also a foreseeable risk when walking in a parking lot in the winter. I find that the ice was the dominant feature of the fall, which created an intervening event, breaking the chain of causation.

[28] I conclude that the circumstances of slipping and falling on the ice would have occurred, as the icy surface was present whether a vehicle was involved or not. The vehicle did not cause or contribute to the icy conditions, it was a factor of the current weather conditions at the time of the incident. Accordingly, D.Y.'s injuries were not as a result of an "accident" as defined in the *Schedule*.

ORDER

[29] Having determined that D.Y. was not involved in an accident, D.Y. cannot rely on any provision under the *Schedule*. Consequently, an analysis of whether D.Y. is entitled to any of the disputed benefits is not required.

[30] The application is dismissed.

Released: June 1, 2023

Derek Grant
Adjudicator