Tribunals Ontario
Licence Appeal Tribunal

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Tribunal d'appel en matière de permis

Ontario

Citation: Khamis v. Unifund Assurance Company, 2021 ONLAT 19-013760/AABS

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

Between:

Shiraz Khamis

Applicant

and

Unifund Assurance Company

Respondent

DECISION

ADJUDICATOR: **Lindsay Lake**

APPEARANCES:

For the Applicant: Julia De Carli, Counsel

For the Respondent: Geoffrey Keating, Counsel

HEARD **By way of written submissions**

OVERVIEW

[1] Shiraz Khamis, the applicant, was injured on February 21, 2019 when he sustained a fracture to his left elbow and other injuries to his left hand, left shoulder and left hip.

[2] As a result of his injuries, Mr. Khamis sought accident benefits from Unifund Assurance Company ("Unifund"), the respondent, pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*.[1]

[3] A case conference was held on August 24, 2020 and Unifund raised the issue of whether or not Mr. Khamis' injuries arose as a result of an accident, as defined in the *Schedule*. The matter proceeded to a written hearing to determine this issue along with Mr. Khamis' entitlement to an award under s. 10 of *O. Reg. 664*.

ISSUES

[4] The following issues are to be decided:

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

(ii) Is Unifund liable to pay an award under s. 10 of *O. Reg. 664* because it unreasonably withheld or delayed payment of benefits to Mr. Khamis?

RESULT

[5] I find that Mr. Khamis was not involved in an "accident" as defined in s. 3(1) of the *Schedule*. Mr. Khamis is also not entitled to an award under *O. Reg. 664*.

FACTS

[6] The facts in this matter are, for the most part, not in dispute between the parties.

[7] On February 21, 2019, Mr. Khamis was the driver and sole occupant of his Honda CR-V. Mr. Khamis drove his vehicle from his residence into a parking lot near Marino's Auto Group where he worked.[2] Mr. Khamis then parked his vehicle, turned the engine off, took off his seat belt and opened the front driver's side door.[3] Mr. Khamis then put his left foot down on the ground outside of his vehicle and, with his right hand on the steering wheel, attempted to stand to exit

[1] O. Reg. 34/10 (the "*Schedule*").
[2] Transcript of the Examination Under Oath of Mr. Khamis dated July 30, 2019, Applicant's Submissions, tab 1, page 7.
[3] *Ibid*. at pages 8-9.

his vehicle.[4] His left foot then slipped on the ice in the parking lot and he fell outside of his vehicle with the left side of his body hitting the parking lot surface.[5] Mr. Khamis claims that his right shoulder also hit his vehicle during the fall[6] whereas Unifund disputes this claim. In any event, Mr. Khamis used his vehicle to pull himself to a standing position because "otherwise it was too icy to get up."[7] Mr. Khamis then attended at Marino's Auto Group[8] and attempted to work despite his injuries.[9]

ANALYSIS

[8] The Ontario Court of Appeal established the following two-part test to determine whether an incident is an "accident" for the purposes of the *Schedule*:[10]

(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.

[9] If it can be established that the use or operation of an automobile was the cause of the injuries, then the applicant must establish that there was "no intervening act(s) that resulted in the injuries that cannot be said to be part of the course of the 'ordinary course of things."[11] The question is whether it can be said that the use or operation of the automobile was a "direct cause" of the injuries."[12]

[10] In its submissions, Unifund conceded that Mr. Khamis' February 21, 2019 slip and fall satisfied the purpose test.[13]

[11] For the following reasons, I find that Mr. Khamis has failed to satisfy his burden of proving on a balance of probabilities that the February 21, 2019 incident meets the causation test. Therefore, I find that Mr. Khamis' February 21, 2019 slip and fall is not an "accident" for the purposes of the *Schedule*.

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[4] *Ibid*. at pages 9-10.
[5] *Ibid*. at pages 11-12.
[6] *Ibid*. at pages 13-14.
[7] *Ibid*. at page 15.
[8] *Ibid*. at page 19.
[9] *Ibid*. at page 21.
[10] *Chisholm v. Liberty Mutual Insurance Group*, 2002 CanLII 45020 (ONCA) at para. 18 ("*Chisholm*").
[11] *Greenhalgh v. ING-Halifax Insurance Company*, 2004 CanLII 21045 (ONCA) at para 36 ("*Greenhalgh*"); *Economical Mutual Insurance Company v. Caughy*, 2016 ONCA 226 (CanLII) at para 14 ("*Caughy*").
[12] *Caughy* at para. 14.
[13] Written Submissions of the Respondent, para. 12.

Did the use or operation of an automobile directly cause Mr. Khamis' impairment (the causation test)?

[12] Within the causation test, the following three-point analysis has been set out by the Ontario Court of Appeal:[14]

(i) whether the incident would have occurred "but for" the use or operation of the automobile;

(ii) whether there was an intervening act that cannot be said to be part of the ordinary course of the use or operation of the automobile; and

(iii) whether the use or operation of the automobile was the dominant feature.

[13] I find that Mr. Khamis has failed to satisfy the causation test such that the use and operation of the minivan did not directly cause Mr. Khamis' impairments because there was an intervening act that occurred in this matter – namely, Mr. Khamis' slip and fall on the icy parking lot.

The Intervening Act

[14] To satisfy the intervening act consideration of the three-part analysis of the causation test, an applicant must establish that there was an unbroken chain of events involving the use or operation of a vehicle that led to their injuries. Where an intervening act falls outside the normal risk associated with the use and operation of a vehicle, it will break the chain of causation.

[15] I find that the icy parking lot was an intervening cause and not a foreseeable risk of motoring that broke the chain of causation in this matter between the use and operation of the vehicle and Mr. Khamis' fall and resulting injuries.

[16] Both parties submitted numerous decisions from the Tribunal and its predecessor, the Financial Services Commission of Ontario ("FSCO"), in support of their respective positions. While I am not bound by these decisions, I find the Tribunal's decision in *18-000468 v. Certas Direct Insurance Company*,[15] which was upheld upon reconsideration in *R.M. v. Certas Direct Insurance Company*,[16] persuasive and of assistance in determining whether or not Mr. Khamis has met his burden of satisfying the causation test.

[14] *Chisholm*, *Greenhalgh* at paras. 33-35.
[15] 2019 CanLII 22204 (ON LAT) ("*18-000468*").
[16] 2019 CanLII 94132 (ON LAT).

[17] In *18-000468*, the applicant walked towards her parked car in a parking lot, unlocked it using a key fob, placed her hand on the car door handle and, at that point, slipped on ice and fell beside the driver's side door.[17] In this decision, the Tribunal found that the ice in the parking lot was an intervening cause of the applicant's fall which broke the chain of causation as the icy parking lot was not a foreseeable risk of motoring.[18] Further, the Tribunal affirmed this finding upon reconsideration and added, "although injuring oneself as a result of falling may not be an abnormal or unforeseeable risk, it is a foreseeable risk of falling, not a foreseeable risk of motoring."[19]

[18] Similar to *18-000468*, there is no evidence before me that Mr. Khamis' vehicle contributed in any way to his fall or to his injuries. The only evidence that is before me is Mr. Khamis' testimony at his Examination Under Oath ("EUO") on July 30, 2019. At his EUO, Mr. Khamis testified that he slipped on the ice and fell outside of his vehicle[20] and that he used the vehicle to pull himself up because it was so icy.[21] Therefore, I find that Mr. Khamis' act of exiting his vehicle did not cause his fall. Rather, the ice in the parking lot caused Mr. Khamis' fall and it was his fall that caused his injuries.

[19] Additionally, even though the parties do not agree on whether or not Mr. Khamis hit the right side of his body on his vehicle during his fall, a determination on this dispute would not impact on my finding because any alleged impact with the vehicle on the right side of Mr. Khamis' body resulted in no injuries. The only evidence that I have before me indicates that all of Mr. Khamis' physical injuries were to the left side of his body, which is the side that hit the ground.[22]

[20] The decisions that Mr. Khamis has submitted in support of his position for the hearing are also distinguishable on the facts. For example, in *Webb v. Wawanesa*,[23] the applicant had exited their vehicle, locked their door and walked towards and across the front of the vehicle when a slip and fall occurred on ice.[24] Similarly, in *18-001537 v. TD Insurance Meloche Monnex*,[25] the applicant drove to a hospital, parked, exited his vehicle and then slipped and fell on black ice and

[17] *Supra* note 15 at para. 6.
[18] *Ibid*. at para. 30.
[19] *Supra* note 16 at para. 22.
[20] *Supra* note 2 at pages 8, 11 and 29.
[21] *Ibid*. at page 15.
[22] *Ibid*. at page 38.
[23] [2012] O.F.S.C.D. No. 102 (FSCO) ("*Webb*").
[24] *Ibid*. at para. 3.
[25] 2019 CanLII 27893 (ON LAT) ("*18-001537*").

broke his leg. In both of these decisions, the incident was determined to not be an "accident" for the purposes of the *Schedule*.

[21] Mr. Khamis concedes that the decisions in *Webb* and *18-001537* are distinguishable on the fact that the applicants in both matters had completely exited their vehicles.[26] However, Mr. Khamis relied upon this distinction to support his position that his slip and fall was in fact an accident because there was no signaling of the end of one chain of events and the start of another as there was in *Webb* and *18-001537*. Mr. Khamis also argued that because he was in the process of exiting his vehicle that there was no temporal distance to separate the act of exiting the vehicle and the act of falling like there was in *Webb* and *18-001537* and, therefore, the events of February 21, 2019 occurred seamlessly as one unbroken chain of events.

[22] I do not agree. Simply because a person is in the midst of exiting their vehicle when an incident occurs that causes injuries does not in and of itself make the incident an "accident" for the purposes of the *Schedule*. That is, simply because Mr. Khamis had not completely exited his vehicle when he fell does not on its own determine that his incident was an "accident." If I were to accept Mr. Khamis' argument, I would be ignoring whether or not Mr. Khamis' vehicle directly contributed or even contributed in any way to Mr. Khamis' fall, as discussed in *18-00468*.

[23] Mr. Khamis also relied upon the FSCO decisions of *Pinarreta v. Ing Insurance*[27] and *Mariano v. TTC Insurance Company Limited*.[28] In *Pinarreta*, the applicant was getting off of a bus by placing her feet onto a snow bank present at the bus stop when she slipped and fell.[29] In *Mariano*, the applicant fell after having to disembark from a bus at a location other than the usual bus stop due to an illegally parked vehicle.[30] In both decisions the snow bank and the illegally parked vehicle were found to be external conditions rather than an intervening act and, as the applicants' injuries in both matters were found to be within the realm of risks associated with motoring and, in particular, with the use of a public transit, an "accident" was found to have occurred in both matters.

[24] I find that *Pinarreta* and *Mariano* are both distinguishable because both decisions involved the use of a bus and not a personal vehicle and there is no evidence that Mr. Khamis was compelled to exit his vehicle in any particular location in the

[26] Applicant's Submissions, para. 14.
[27] FSCO A04 B 001734 ("*Pinarreta*").
[28] FSCO A 05 002112 ("*Mariano*").
[29] *Pinarreta* at paras. 1, 6 and 12.
[30] *Mariano* at paras. 5, 27 and 28.

parking lot. *Pinarreta* is also distinguishable as the arbitrator in that matter found that even if the snowbank contributed in some way to the applicant's injuries that the act of disembarking the bus also caused her to slip and fall.[31] There is no evidence in this matter, as discussed above in paragraph [18], that Mr. Khamis' vehicle contributed in any way to causing his fall or to his injuries.

[25] I also agree with Unifund that the decision of *GR v Economical Mutual Insurance Company*,[32] which was also relied upon by Mr. Khamis, is distinguishable. In *GR*, the applicant was clearing snow from his vehicle when he slipped and fell on that same snow.[33] The Tribunal found that the applicant's fall was not an intervening act and, therefore, there was no break in the chain of causation which led to the applicant's injuries.[34] The Tribunal also found that the act of clearing snow from the vehicle is an act which is considered a part of the normal use of the vehicle.[35]

[26] In considering the decision in *GR*, I agree with Unifund that there is no evidence in this matter that Mr. Khamis created the hazard (icy parking lot) on which he fell. Moreover, this matter is also distinguishable from *GR* as I have found that Mr. Khamis' use or operation of his vehicle did not contribute to his fall or injuries and that there was an intervening act in this matter, the icy parking lot which, in accordance with *18-000468*, is not a foreseeable risk of motoring.

[27] For all of the reasons set out above, I find that Mr. Khamis' use and operation of his vehicle was not the direct cause of Mr. Khamis' impairments as there was an intervening act of an icy parking lot that is not a foreseeable risk of motoring. Therefore, Mr. Khamis' February 21, 2019 slip and fall is not an "accident" for the purposes of the *Schedule*.

Award

[28] Section 10 of *O. Reg. 664* provides that, if the Tribunal finds that an insurer has unreasonably withheld or delayed payment of benefits under the *Schedule*, the Tribunal may award a lump sum of up to 50 per cent of the amount in which the person was entitled.

[29] Given my finding that Mr. Khamis' slip and fall was not an "accident" pursuant to s. 3(1) of the *Schedule*, Mr. Khamis is not entitled to any benefits under the

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[31] *Supra* note 29 at para. 19.
[32] 2019 CanLII 122726 (ON LAT) ("*GR*").
[33] *Ibid*. at para. 27(d).
[34] *Ibid*. at para. 20.
[35] *Ibid*.

Schedule. Therefore, s. 10 of *O. Reg. 664* has no application and Mr. Khamis is not entitled to an award.

CONCLUSION

[30] I find that Mr. Khamis was not involved in an "accident" as defined under s. 3(1) of the *Schedule* as he failed to meet the causation test. Mr. Khamis is also not entitled to an award under *O. Reg. 664* and this application is dismissed.

Date of Issue: February 22, 2021

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Lindsay Lake
Adjudicator