1999 CarswellOnt 5452
Financial Services Commission of Ontario (Arbitration Decision)

Wupori v. Western Assurance Co.

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Clayton Wupori, Applicant and Western Assurance Company, Insurer

Novick Member

Heard: July 16, 1998
Heard: October 30, 1998
Judgment: January 25, 1999
Docket: FSCO A97-002200

Counsel: Andrew R. Kerr, for Mr. Wupori
Nestor E. Kostyniuk, for Western Assurance Company

Subject: Insurance

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Insurance

XII Automobile insurance
XII.6 Catastrophic impairment
XII.6.d Miscellaneous

Headnote
Insurance --- No-fault automobile insurance — Threshold issues — General

Table of Authorities

Cases considered by *Novick Member*:

Alchimowicz v. Continental Insurance Co. of Canada (1996), 37 C.C.L.I. (2d) 284, 22 M.V.R. (3d) 41, 1996 CarswellOnt 3153 (Ont. C.A.) — considered

McCormick v. Economical Mutual Insurance Co. (October 2, 1991), Doc. A-000139 (Ont. Insurance Comm. Dir. of Arbs.) — followed

Panasy v. Commercial Union Assurance Co. (1997), 1997 CarswellOnt 3977 (Ont. Insurance Comm.) — referred to

Tran v. Pilot Insurance Co. (August 16, 1995), Doc. A-005207 (Ont. Insurance Comm.) — referred to

Statutes considered:

Insurance Act, R.S.O. 1990, c. I.8
Generally — referred to

s. 282 — referred to

s. 282(11) [rep. & sub. 1996, c. 21, s. 38(4)] — referred to

Regulations considered:

Insurance Act, R.S.O. 1990, c. I.8
Automobile Insurance, R.R.O. 1990, Reg. 664

s. 12

Statutory Accident Benefits Schedule — Accidents after December 31, 1993 and before November 1, 1996, O. Reg. 776/93

Generally

s. 1 "accident"

s. 59

***Novick Member*:**

Issues:

1 The Applicant, Clayton Wupori, fractured his left ankle and tibia when he fell off of a fence he was climbing outside his father's home on July 21, 1995. He applied for statutory accident benefits under the *Schedule* [1] from Western Assurance Company ("Western") in July of 1997, claiming that he was injured during the course of assisting his father in parking his car and his injuries were therefore caused by an "accident," as that term has come to be defined under the *Schedule*. Western took the position that the Applicant's injuries were not caused by an accident, as defined in the *Schedule*. The Insurer also claimed that the Applicant was not entitled to benefits because he did not provide notice or apply for benefits in a timely manner. The parties were unable to resolve their dispute through mediation, and Mr. Wupori applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

2 The preliminary issues to be decided at this stage are:

1. Did Mr. Wupori's injuries arise from an "accident" within the meaning of section 1 of the *Schedule*?

2. Is Mr. Wupori's application for arbitration barred because he failed to notify Western and apply for benefits in a timely fashion, pursuant to section 59 of the *Schedule?*

Result:

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1. Mr. Wupori's injuries did not arise from an "accident" as defined in section 1.

2. I need not determine whether his application should be barred for failing to notify the Insurer and not applying for benefits in a timely manner, in light of my findings with respect to issue number one.

Background:

4 This hearing took place in two distinct parts, over the course of two days, and proceeded in a somewhat unusual manner. I will first outline the chronology of events and then set out the evidence upon which my findings are based.

First day of Hearing:

5 The hearing of this application was scheduled to take place on July 16, 1998, in Sudbury. A representative from Western and its counsel appeared at the appointed time with three witnesses. While counsel for the Applicant was present, the Applicant himself did not appear and could not be reached by telephone. Mr. Wupori's counsel advised that he had spoken to the Applicant the prior evening and that he had indicated that he would be attending. Counsel also indicated that Donat Laferriere, a witness that he had intended to call on the Applicant's behalf, was inexplicably absent.

6 After waiting approximately one hour beyond the scheduled 10:00 a.m. starting time, it was decided that the Insurer would proceed with its evidence and that if the Applicant had still not appeared when that was completed, I would hear submissions from both counsel regarding how to proceed further. The Insurer called three witnesses, whose evidence will be outlined below. We then took a break. Applicant's counsel advised after the break that he had spoken to Mr. Wupori's roommate, who indicated that the Applicant had injured himself the previous evening and was taken to hospital. Counsel then called the two main hospitals in Sudbury, but was advised that neither one had any record of Mr. Wupori having been admitted.

7 After soliciting counsel's comments on how to proceed further, I ruled that I would hear their final submissions on the preliminary issues raised based on the evidence of the three witnesses called by the Insurer. I also stated that I would consider reopening the matter if Applicant's counsel contacted me within ten days of the hearing and provided a reasonable explanation for the Applicant's non-attendance at the hearing. The parties then proceeded to make their final submissions.

Request to Reopen:

8 On July 27, 1998, I received a letter from Applicant's counsel setting out the reasons for Mr. Wupori's non-attendance at the hearing. He explained that after the Applicant learned that the Insurer intended to dispute the evidence he would be giving at the hearing about the circumstances that led to his climbing the fence that he fell from, he attempted to track down a witness who could corroborate his evidence that the carport attached to his father's home had a front door. Counsel advised that Mr. Wupori had travelled to Espanola and then to Whitefish Falls, another town in the area, for this purpose during the evening prior to the hearing. While at the home of a potential witness, the Applicant apparently slipped and fell while descending some stairs and injured his back and leg. Counsel advised that Mr. Wupori went to a medical clinic in Espanola where he was given pain medication, and that he spent that night and the following day at a friend's home in the area as he was unable to travel back to Sudbury due to the pain he was experiencing. The home he was staying at apparently did not have a telephone, and Mr. Wupori claimed that he had been unable to travel anywhere else to make a phone call.

9 Counsel for the Applicant also advised that he had spoken to Mr. Laferriere, the witness that had failed to appear on the day of the hearing. He stated that Mr. Laferriere reported being involved in a minor accident while driving into Sudbury with a friend to attend the hearing, and that given the delays experienced as a result of the accident, his friend decided that he could no longer drive him into town.

10 Counsel for the Insurer responded the following day, opposing the request that the matter be reopened and asserting that the Applicant had no proper excuse for not attending.

11 On August 4, 1998, I wrote the parties and advised that while I found certain aspects of the reasons provided for Mr. Wupori's non-attendance at the hearing to be less than persuasive, I was not prepared to deny him an opportunity

to present evidence that would clearly be relevant to his potential entitlement to benefits. I advised that I would grant Applicant counsel's request to reopen the matter to permit Mr. Wupori to testify, and would permit Mr. Laferriere to testify if some evidence was provided to corroborate his claim that he had been involved in a motor vehicle accident on the day in question. No such corroborating evidence was provided.

12 Rule 39.1 of the *Dispute Resolution Practice Code* ("the *Code*") provides that an arbitrator may reopen a hearing at any time before he or she makes a final order disposing of the arbitration. Although this provides arbitrators with a seemingly wide discretion to reopen hearings, the rule has generally been applied in a fairly narrow manner. In most cases in which this provision has been raised, a party has come across a document after the hearing has ended that supports its position, and seeks to reopen the matter so that the arbitrator may consider it. In large part these requests have been denied, in the interest of finality of the process and on the basis that the new evidence was of limited probative value and could have been raised at the hearing. [2]

13 The facts in this case are different, however. The request to reopen the hearing by Applicant's counsel was made in order to afford the Applicant the opportunity to provide evidence on the issues relating to the preliminary matters in this application. As opposed to a document or other piece of evidence that is discovered after the hearing is over, the relevance and materiality of the Applicant's evidence is unquestionable. Firstly, as the party who initiated the proceeding, he is entitled to provide evidence on the matters in issue. In addition, while the Insurer called three witnesses who testified indirectly about the relevant issues, the Applicant was the only one present at the time of the events in question, aside from his father who has since died and Mr. Laferriere, who did not attend for the reasons set out above, and he is therefore uniquely positioned to provide direct evidence on the points in issue.

14 Although I harbour some doubts about the reasonableness of the excuse offered for Mr. Wupori's non-attendance at the hearing last July, a refusal to reopen the matter would deprive him of the opportunity to put forth his version of the events which led up to his injuries, which could arguably amount to a denial of natural justice. In my view, the circumstances of this matter differ significantly from those facing the arbitrators in the cases cited above and justify a different result.

15 The hearing subsequently resumed on October 30, 1998, at which point I heard the Applicant's evidence and received revised submissions from both counsel based on that evidence.

Evidence and Findings:

The Evidence:

16 The Applicant claims that he injured himself when he fell from the top of a fence he had been climbing to get into his father's backyard. He explained that he, his friend Donat Laferriere, and his father were returning to his father's home in Espanola after travelling to Sudbury in his father's car. He stated that after his father drove into the driveway, he got out of the car to open the front door of the carport that was attached to the house, so that his father could park the car in the carport. Mr. Wupori explained that the latch on the front door of the carport was stuck, and that the only way the car could be parked inside it was if the door was opened from the inside. He explained that he went around to the back of the property with the intention of climbing over the fence to get into the backyard and enter the carport from there, and that while climbing, he fell off of the fence.

17 As mentioned above, the Insurer called three witnesses. Each witness was familiar with the setup of the carport at the Applicant's father's home and testified that it was open at the front and did not have a door that needed to be opened in order to park a car inside it. Daniel Fleming is an investigator retained by the Insurer who took various photographs of the house in question in February of 1998. The photographs show a carport made of wooden boards, fibreglass and chip-board attached to the left outside wall of the house. It has an angled roof, a wall on the left side and a rear wall with two doors - a screen door leading out to the back yard, and a solid door that appears to lead into the house. The

structure is open at the front, and no sign of a door or any hinges or brackets that may have supported a door is evident from the photos.

18 Raymond Owl testified that he built the carport for Vic Wupori, the Applicant's father, in 1991. He stated that he did not build a front door on it as Mr. Wupori had not wanted one and explained that the frame of the structure, which was made of cheap materials, could not have supported something that heavy. Mr. Owl stated that he visited the Applicant's father occasionally from 1991 until approximately one year before he died in 1996, and never saw a front door on the carport.

19 John Gillespie, the current owner of the home, also testified on behalf of the Insurer. He stated that he had purchased the home through an estate sale after Vic Wupori's death and confirmed that the attached carport did not at that point have a front door. Mr. Gillespie testified that there are no nail holes or patch jobs on the side of the house to which the carport is attached, as well as no indication of the ceiling being levelled out, all of which would be evident if a door had ever been attached to the structure.

20 The Applicant testified that he was living at his father's home in Espanola in July of 1995. He recalled that his father owned a 1988 Celebrity, which he parked in the carport attached to his home. He testified that the carport structure that had been built was beginning to separate from the house and that a wooden prefab door was installed during February or March of 1995. He explained that his father had wanted to install a front door on the carport so that there would be no direct access to the backyard (through the carport) from the street. He testified that he had been under the impression that Ray Owl had built the door for his father, and stated that he had only used it three times. He also stated that he had left his father's house to move to Sudbury in September of 1995, and that some time after that the front door of the carport was removed by his brother Archie, at his father's request.

21 Mr. Wupori recalled that after pulling into the driveway on the evening in question, his father had asked him to go around to the back of the house and jump over the backyard fence so that he could enter the carport from the rear and unlatch the hook from the inside. He stated that when he exited from the car, the engine was running and the headlights were still on. He explained that he had walked down to the end of the street, up a sidestreet to a back alley that parallels the street, and then back down the alley to the back of his father's property where he proceeded to climb a six-foot fence that bordered the back yard. The Applicant estimated that he travelled a distance of approximately 500 feet before beginning to climb the fence. He explained that he was able to climb to the top of the fence without incident, but that when he turned around at the top he lost his balance and fell down, landing on his left foot on uneven ground. He stated that he fell over, tried to stand up and then lost consciousness. He was taken to the Espanola General Hospital and was transferred the next morning by ambulance to Laurentian Hospital in Sudbury where he underwent surgery to repair a severe fracture of his left ankle and tibula.

22 The Applicant stated frankly that he had not considered making a claim for accident benefits from the Insurer until almost two years after this incident, when he consulted his lawyer about another matter. He also stated that both his father and his fiancé had died in the year following the events outlined above, and that most of his attention had been directed to recovering from those traumatic events and to rehabilitating himself from his injuries.

23 Letters filed during the course of the hearing indicate that counsel for the Applicant first provided notice of the claim to the Insurer in late June of 1997, and after being advised that the Insurer was rejecting the claim for the Applicant's failure to comply with the time limits set out in the *Schedule*, he instructed the Applicant to complete an application for accident benefits. The

24 Application is dated July 29, 1997, but the small print appearing at the top of the document indicates that part of it was faxed out on October 29 and the remainder on November 19, 1997.

Findings:

25 Having considered all of the evidence I have concluded that the Applicant is not entitled to benefits under the *Schedule* as his injuries did not result from an "accident," as defined in section 1. I am not persuaded, on either a factual or a legal basis, that the Applicant has satisfied the onus he must meet in order to be entitled to benefits.

The facts:

26 The Applicant's evidence with respect to the physical description of the carport is at odds with that of the three Insurer witnesses. Mr. Owl, who built the carport for the Applicant's father, stated that he did not put a front door on the structure and that the materials that were used to construct it were not strong enough to support such a door. Mr. Gillespie, the current owner of the home, stated that there was no front door on the carport when he purchased the property and that there are no signs of any supporting mechanism on the walls or ceiling of either the carport or the house. A review of the photographs taken by the investigator do not reveal any evidence of a front door having been attached. The Applicant claims that the door was constructed at his father's request, he presumed by Mr. Owl, in March of 1995 and was subsequently taken down some time in September of that year, after he had left the house to move to Sudbury.

27 On the evidence before me I cannot accept the Applicant's contention that there was a front door on the carport at the time in question. I find Mr. Owl's evidence that he did not build such a door and that the structure that he built would not have supported one to be conclusive on this point. While it is possible that Vic Wupori had hired someone else to do the job, it is unlikely that the

28 Applicant, who was living at the house at that time, would not have been aware of that. In addition, the Applicant's evidence that he only used the door three times strikes me as unusual, given that he lived at his father's house for almost the entire six month period that the door was allegedly attached to the carport, and testified that the main access into the house was not through the front door, but rather by going through the carport into the backyard and then into the kitchen.

29 While I acknowledge that none of the other witnesses were able to provide any direct evidence contradicting the Applicant's assertion that a door had been installed on the carport from March until September of 1995, the fact that two witnesses with no interest in the outcome of this proceeding could not find any signs of a door having been attached persuades me that the Applicant's evidence on this point cannot be accepted. Mr. Owl and Mr. Gillespie both testified that they examined the walls and the ceiling of the structure and saw no evidence of hinges, brackets or any other mechanism that would be required to support a door covering the front of the carport. Mr. Gillespie testified that he uses the carport daily and has closely examined the corner of the house onto which a door would have had to attach. He stated that he was unable to find any sign of a patch job or nail holes that would suggest that another structure had once been attached.

30 I note that the photographs filed by Mr. Fleming, the investigator, show a four-foot fence running along the left side of the property, separating the back yard from the neighbour's yard. While the Applicant claimed that the fence had been altered and is lower now than when he had lived there, Mr. Gillespie testified that the height of the fence, as shown in the photographs, was the same as when he had purchased the property. This raises the question of why, if there was a front door on the carport, the Applicant chose to take the circuitous route to enter the backyard that he did, as opposed to simply climbing the fence on the left side, which, according to Mr. Gillespie, was two feet lower than the fence running along the backyard.

31 I also note that in the "Details" section of his application for accident benefits, Mr. Wupori indicated that he "came home with my father, drove into the carport." The Applicant was not cross-examined on this point and while it is possible that a reasonable explanation exists for this inconsistency, as well as the fact that the hospital records produced from Laurentian Hospital in Sudbury indicate that his injuries were caused by a fall he took as he was going downstairs

at a friend's house early in the morning on the day in question, these statements all shed doubt on the veracity of the Applicant's testimony.

The law:

32 Section 1 of the *Schedule* defines an "accident" as an incident "in which directly or indirectly, the use or operation of an automobile causes an impairment." Consequently, in order to qualify for benefits under the *Schedule*, the Applicant must prove that the incident causing his injuries involved the use or operation of an automobile. He argues that because he fell from the fence as he was attempting to assist his father in parking the car, his injuries resulted from the "use or operation of an automobile." I cannot agree with this assertion. Even if I had accepted the Applicant's evidence that there was a front door on the carport and that the only way that the car could be parked inside the carport was if he somehow gained access to it from the backyard and unlatched the door from the inside, I would find the connection between the injuries he sustained falling off of the fence and the operation of an automobile to be too remote to fit within the definition of "accident" set out in the *Schedule*.

33 While I agree with Applicant counsel's submission that the act of parking a car is integral to its use or operation, I cannot agree that injuries that are sustained in the course of climbing a fence some 500 feet away from the vehicle in question result from the vehicle's use or operation.

34 The Applicant also argues that the use of the phrase "directly or indirectly" appearing in the definition indicates that a broad approach should be taken in considering whether a sufficient causal connection exists, and asserts that the facts outlined fall within the boundaries contemplated. While I agree that the use of the word "indirectly" in the definition signals that an expansive approach should be taken to this question, I simply cannot see how an individual who allegedly falls from a fence he is climbing can be said to have sustained injuries caused by the use or operation of an automobile. As the Court of Appeal stated in *Alchimowicz v. Continental Insurance Co. of Canada* [1996 CarswellOnt 3153 (Ont. C.A.)] (unreported decision, released September 4, 1996), at p.3:

> As liberally as one may choose to interpret legislation which provides benefits to persons who are injured, it must be remembered that this is automobile legislation.

35 While I am not suggesting that the facts in this case parallel those in *Alchimowicz* , where the Applicant injured himself while diving off a dock 25 minutes after he had been driven to a beach, I am persuaded that even if I accepted the Applicant's evidence on the existence of a front door on the carport, the facts of this case would not constitute indirect causation, as that notion has been interpreted under the *Schedule*.

Timeliness issue:

36 Given my findings that the Applicant's injuries did not result from an "accident" within the meaning of section 1 of the *Schedule*, he is not entitled to benefits and I therefore need not consider the parties' submissions on whether his application should be barred for failing to provide notice to the Insurer and apply for benefits in a timely manner.

Expenses:

37 The Application for Arbitration in this matter was received after November 1, 1996, when section 282(11) of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, was repealed and replaced by section 38(4) of the *Automobile Insurance and Rate Stability Act*, S.O. 1996, c.21. This new provision gives an arbitrator the discretion to grant expenses to either the insured person or the insurer, according to the criteria set out in the Expense Regulation (section 12 of Ontario Regulation 464/96, which also came into force on November 1, 1996).

38 Two of these criteria, which are also set out in section 73.2 of the *Code*, are each party's degree of success in the outcome of the proceeding and whether the proceeding or any position taken by a party during the proceeding was manifestly unfounded, frivolous, vexatious, fraudulent or an abuse of process.

39 I have found that the Applicant is not entitled to any benefits under the *Schedule*. In keeping with the reasoning of Arbitrator Naylor in *McCormick v. Economical Mutual Insurance Co.* (October 2, 1991), Doc. A-000139 (Ont. Insurance Comm. Dir. of Arbs.) I would not deny the Applicant his expenses or award the Insurer its expenses on this basis alone. However, I have found that his evidence relating to the existence of a front door on the carport attached to his father's home is not credible and that his version of the events that led up to his falling from the fence flies in the face of common sense. Suffice it to say that on the whole, I found that the Applicant's evidence did not have "the ring of truth" to it.

40 I have further stated that even if I accepted this evidence, I would have found that the connection between the injuries he sustained from falling off the fence and the use or operation of a vehicle was too remote to fit within the definition set out in the *Schedule*. While I believe that parties should generally not be faulted for attempting to stretch a statutory or regulatory definition to fit their set of facts or for making arguments that push the outer limits of accepted jurisprudence, I find the Applicant's arguments in this case to be well outside of what could reasonably be defined as an "accident" under the *Schedule*. In light of my rejection of the Applicant's assertions both on the facts and the law, I am satisfied that the initiation of this proceeding was manifestly unfounded.

41 I therefore find it appropriate to exercise my discretion to deny the Applicant his expenses and award the Insurer its expenses of the hearing. If the parties are unable to agree on the proper amount to be paid to the Insurer, they should follow the procedure set out in section 77 of the *Code*.

***Novick Member*:**

42 Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Mr. Wupori's application for accident benefits is dismissed, as his injuries do not arise from an "accident" within the meaning of section 1 of the *Schedule*.

2. Mr. Wupori shall pay Western's expenses related to the hearing.

Footnotes

1 The *Statutory Accident Benefits Schedule - Accidents after December 31, 1993 and before November 1, 1996*, Ontario Regulation 776/93, as amended by Ontario Regulations 635/94, 781/94 and 463/96.

2 See *Tran v. Pilot Insurance Co.* (August 16, 1995), Doc. A-005207 (Ont. Insurance Comm.) and *Panasy v. Commercial Union Assurance Co.*[1997 CarswellOnt 3977 (Ont. Insurance Comm.)] (OIC A96-000314, September 9, 1997).