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LICENCE APPEAL TRIBUNAL

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Safety, Licensing Appeals and Standards Tribunals Ontario

Tribunaux de la sécurité, des appels en matière de permis et des normes Ontario

Tribunal File No.: 18-002820/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.

B E T W E E N:

I.M.

Applicant

-and-

Aviva Insurance Company

Respondent

DECISION
***(Preliminary Issue Hearing*)**

Adjudicator:	**Nidhi Punyarthi**
Date of Decision:	**February 12, 2019**
Appearances:	The Applicant
	Danielle Wilkinson, Counsel for the Respondent
Heard:	**In Writing**

OVERVIEW

[1] On December 19, 2016, the applicant exited her vehicle in the parking lot of her place of employment. The ground was icy. She slipped and fell. A file for workplace safety insurance benefits (WSIB) was opened on her behalf from around that date to February 6, 2017.

[2] The applicant claimed benefits under the *Statutory Accident Benefits Schedule – Effective September 2010 ("Schedule")* from the respondent. The respondent declined to pay the applicant the requested benefits for two reasons. First, it disagreed that the event of December 19, 2016 was an accident, as defined in the *Schedule.* Second, it took the position that the applicant was eligible for workplace safety insurance benefits and declined them for the primary purpose of accessing benefits under the *Schedule.* The respondent relies on sections 3(1) and 61 of the *Schedule* in this regard.

PRELIMINARY ISSUES

[3] The applicant has applied to the Licence Appeal Tribunal ("Tribunal"). Prior to a hearing of the disputed benefits, the following preliminary issues need to be decided.

i. Does the event of December 19, 2016 qualify as an "accident" as defined in Section 3(1) of the *Schedule*?

   a. If the answer to (i) is no, the Tribunal will dismiss the application.

   b. However, if the answer to (i) is yes, the Tribunal will decide the second preliminary issue, which is:

ii. Is the respondent entitled to refuse to pay the applicant benefits pursuant to Section 61 of the *Schedule*?

RESULT

[4] The event of December 19, 2016 is not an accident as defined in the *Schedule*. There is no persuasive evidence with regards to the involvement of an automobile in that event. I have preferred the evidence that is found in documents closest in time to the event and there is no mention of an automobile in those documents.

[5] Given the above finding, I have not proceeded to determine the second preliminary issue. The application is dismissed.

ANALYSIS

[6] An accident has a specific definition under the *Schedule* at section 3(1):

> "accident" means 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.

[7] I am not persuaded, on a balance of probabilities, that the use or operation of an automobile directly caused the applicant's injuries on December 19, 2016, for the following reasons:

i. Around the date of December 19, 2016, a WSIB file was opened for the applicant by her employer. This file contains a number of records that were prepared around that time. These records document the applicant's version of the event, her employer's version, and her caseworker's notes about the incident. There is no mention of an automobile in any of these records.

ii. I find this record of events that was prepared closest in time to the incident more compelling and persuasive compared to:

a. the single treating physiotherapist's note from May 24, 2017 (about six months after the fact) that mentions that the applicant fell to the ground while getting out of her car;

b. the applicant's application for benefits (OCF-1) from March 13, 2017 that contradicts her workplace safety insurance file in many ways; and,

c. the applicant's testimony at her examination under oath (EUO) on August 14, 2017, in which she gave a completely different version of the event and mentioned the role of an automobile. She did, however, repeatedly testify that she fell in the parking lot.

A. Compelling Evidence from the Applicant's WSIB file

[8] The applicant acknowledged during her EUO that her employer had filed a claim for WSIB on her behalf. She indicated that her manager took a report and it went straight to the WSIB.[1]

[9] The WSIB file included a Worker's Report (Form 6). The Form 6 indicates that the accident/illness happened on the employer's property or work site, and that it happened in the parking lot. Under "Details," it indicates: "slipped on ice and fell down in the parking lot." It names two witnesses to the incident, one of which was

[1] Examination under oath of the applicant, August 14, 2017 ("EUO"), Q.132, p.21, l.4-8.

her HR manager.[2] The applicant testified at her EUO that this same HR manager wanted her to keep him up to date on her doctor's visits.[3]

[10] There was also an Employer's Report (Form 7) that was filed. The Form 7 indicates: "employee reports pain in left hand after exiting her vehicle in the parking lot, and slipping and falling."

[11] The WSIB file also includes a memo to file entitled "RMAP – Review, Monitor and Action Plan" and is dated February 6, 2017 from Francois Garofalo, STCM. Under "accident history description," the memo indicates: "in parking lot at work – it rained a lot that day – ground was slushy and icy – not salted, wearing winter boots; - walking towards building – slipped and fell between 2 cars – could not stand up; Fell on side of left arm – left elbow hit the ground first – felt a crack; immediately arm started swelling and couldn't bend elbow or put arm down – significant pain right after and sling provided by AE; Completed accd reports on DOI – after 2 hours she asked AE to go to hospital."

[12] At her EUO, the applicant acknowledged that she had phone conversations with the WSIB but that she could not remember the details.[4] She also testified that there was a less than five-minute walk between her parked car and the office building.[5]

[13] According to these records that were prepared closest in time to the incident and the emergency report from the hospital that day, which simply indicated "fall at work", there is no indication that an automobile directly caused the applicant's injuries.

B. Contrasting Information Months Later

[14] The applicant indicated that she withdrew her WSIB claim.[6] According to Mr. Garofalo's notes, once she did, he explained the impact of a withdrawal to her. He had indicated to her that she had already been approved for the benefits, but she had indicated she was dissatisfied with the process and the timing. This was on February 6, 2017.

[15] On March 13, 2017, an application for benefits under the *Schedule* (OCF-1) was filed on her behalf. Problematically, this form indicates that the accident did not occur while at work, and that no claim with the WSIB was filed. These statements are questionable in light of the WSIB file that had been opened in respect of the applicant from December 19, 2016 until February 6, 2017. The OCF-1 attaches a

[2] EUO, Q.112-113, p.18, l.18-21.
[3] EUO, Q.121, p.19, l.12-15.
[4] EUO, Q.134-136, p.21, l.11-19. [4] EUO, Q.121, p.19, l.12-15.
[4] EUO, Q.134-136, p.21, l.11-19.
[5] EUO, Q.189, pp.31-32, l.24-25, 1.
[6] EUO, Q.137, p.21, l.20-25.

document on which it is typed: “I was driving and had just parked my vehicle. As I was stepping out with one foot still in the car, I fell to the ground.”

[16] On May 24, 2017, there is a physiotherapy note indicating that the applicant fell while exiting from her vehicle. This note is almost six months after the incident of December 19, 2016.

[17] When the applicant testified at her EUO on August 13, 2017, she described:

> 144. [...]
>
> A. Okay, I parked my vehicle. This is before my shift. I parked my vehicle in the parking lot. As I stepped out of the vehicle, there was a lot of snow and ice mixed together. So, as I opened my door and I stepped out, I fell. I fell right on my side and my body. I tried to grab the vehicle -- my door. All of my weight went on my side and part of my body hit the side of my vehicle.

[18] This version of the events markedly differs from the version recorded by the WSIB on or before February 6, 2017. Nonetheless, by her use of the conjunction “So,..”, the applicant appears to state that she fell because there was snow and ice.

C. Comparison and Weighing of the Evidence

[19] I prefer and give greater weight to the evidence contained in the records in the WSIB file that were produced closest in time to the incident of December 19, 2016. These records, dated closest in time to the incident, and documented by the applicant, her employer’s representative, as well as a WSIB representative who interviewed the applicant by phone, all consistently indicate that the applicant slipped and fell on icy ground in the parking lot at her place of work. There is no mention whatsoever of the role of an automobile in these records.

[20] Even when the applicant was examined at her EUO, she repeatedly testified that she “fell in the parking lot”.[7]

[21] I prefer this evidence in the WSIB records and the applicant’s own testimony about her falling at the parking lot at her EUO to any mention that an automobile was involved in her injuries. Any mention of the role of an automobile appears to be self-serving on the applicant’s part.

[22] According to Section 3(1) of the *Schedule*, the use or operation of an automobile has to “directly cause” the impairment in question.

[7] EUO, Q.144, p.23, l.9-16; Q.160, p.26, l.10-15; Q.166, p.27, l.16-23; Q.192-193, p.32, l.9-15.

[23] To analyze whether an automobile has “directly caused” the impairment, the Ontario Court of Appeal in *Greenhalgh v. ING Halifax Insurance Co.* (2004) 72 O.R. (3d) 338 states that the following two questions must be asked:

a. Did the incident arise out of the use or operation of an automobile?

b. Did such use or operation of an automobile directly cause the impairment?

[24] In order to answer (b), *Greenhalgh* states that it is useful to consider:

i. whether the impairment occurred “but for” the use or operation of an automobile;

ii. whether there was an intervening act that cannot fairly be considered a normal incident of the risk created by the use or operation of an automobile; and

iii. whether the dominant feature, or the aspect of the situation that most directly caused the injuries, is the automobile.

[25] Applying these considerations to the evidence before me:

i. The consistent reports of the applicant’s fall on the ice in the parking lot (indicated in her WSIB file and repeated at her EUO) indicate that her injuries did not arise out of the ordinary use and operation of an automobile.

ii. An automobile was not the “direct cause” of the applicant’s injuries, for the following reasons:

a. Even if I were to consider the applicant’s version of events involving an automobile at her EUO (which I have indicated above that I have not preferred), she stated that she was stepping out of her vehicle. She referred to the presence of snow and ice and attributes it to her falling. It follows that if she had stepped out of her vehicle on ground without snow and ice, she would not have fallen and sustained the injuries. The applicant’s injuries were therefore not caused “but for” the use or operation of an automobile.

b. Based on this same report from the applicant at her EUO, the presence of ice and snow which caused her to slip and fall was not a normal incident following the use or operation of an automobile. I am satisfied, on the basis of consistent evidence before me in the WSIB records and the applicant’s answers to other questions at her EUO, that there was ice on the ground in the parking lot which caused her to slip and get hurt. The presence of ice on the ground in the parking

lot can therefore be said to be an intervening act which caused the applicant to fall and get injured.

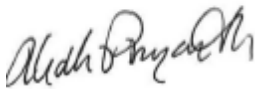
c. The evidence before me demonstrates that the dominant feature behind the applicant's fall and subsequent injury was the presence of ice on the ground in the parking lot. This ice was the dominant feature of the applicant's fall.

[26] I am therefore satisfied, on a balance of probabilities, that the direct cause of the applicant's injuries was not an automobile as contemplated under Section 3(1) of the *Schedule*. The direct cause of her injuries was the icy surface of the parking lot, which caused her to slip and fall.

CONCLUSION

[27] I conclude that the incident of December 19, 2016 involving the applicant does not meet the definition of an accident under Section 3(1) of the *Schedule*. Her application at the Tribunal is dismissed on this basis, and there is no need for me to address the second preliminary issue.

Date of Decision: March 5, 2019



Nidhi Punyarthi
Adjudicator