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Ontario

2019 CanLII 119750 (ON LAT)

RECONSIDERATION DECISION

Before: Susan Mather, Vice-Chair

Date: November 5, 2019

File: 18-001607/AABS & 18-003343/AABS

Cases Names: [R.C.] vs. Economical Insurance Company &
[C.C.] vs. Intact Insurance Company

Written Submissions By:

For the Applicant (R.C.): Siona V. Sullivan, Counsel

For the Applicant (C.C.): Roelf A.M. Swart, Counsel

For the Respondent (Economical Insurance Company):
Gerald S. George, Counsel
Gurpeet Farmaha, Counsel

For the Respondent (Intact Insurance Company):
Douglas A. Wallace, Counsel

OVERVIEW

[1] The applicants are brothers who suffered serious life-threatening burns as a result of an explosion and fire that occurred on January 16, 2016. The explosion and fire happened while the applicants were working on changing the fuel pump of a vehicle belonging to their brother in [R.C.'s] garage.

[2] Both Intact Insurance Company ("Intact") and Economical Insurance Company ("Economical") denied the applicants' claims for benefits pursuant to the Statutory Accident Benefits Schedule- - *Effective September 1,2010 (the "Schedule")* on the basis that their injuries were not the result of an accident within the meaning of the *Schedule.*

[3] I considered the question of whether their injuries were a result of an accident within the meaning of the *Schedule* at a written hearing on this preliminary issue. In my written decision released on June 12, 2019, I found that their injuries were not as a result of an accident within the meaning of the *Schedule* and for that reason the applicants were not entitled to the benefits available under the *Schedule.*

[4] Both [C.C.] and [R.C.] have requested a reconsideration of my decision on the basis that I violated the rules of natural justice or procedural fairness and on the basis that I made significant errors of law and fact such that I would likely have reached a difference conclusion if there errors had not been made.

[5] These grounds are criteria set out in Rule 18.2(b) of the Licence Appeal Tribunal (LAT) Rules of Practice and Procedure, Version 1 (April 2016) (the "LAT Rules") which are the Rules applicable to this reconsideration.

[6] [C.C.] and [R.C.] ask for an order setting aside the decision and replacing it with a new decision that finds the Purpose Test has been met and the applicants were involved in an accident within the meaning of the *Schedule.* They seek a full reconsideration of all issues and the ability to apply for further reconsideration.

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[7] Economical and Intact oppose these requests for reconsideration. They ask me to dismiss the requests arguing that I did not violate the principle of natural justice and procedural fairness and I did not make an error of law or fact such that I would have reached a different conclusion.

[8] Pursuant to s. 17(2) of the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*[1], I have been delegated responsibility to decide this matter in accordance with the applicable LAT Rules.

RESULT

[9] For the reasons provided below the request for reconsideration is dismissed.

NATURAL JUSTICE AND PROCEDURAL FAIRNESS

[10] It is settled law that that the determination of whether there has been an accident within the meaning of the *Schedule* requires the consideration of two questions.[2]

Purpose Test

1. Was the use or operation of the vehicle a cause of the injuries?

Causation Test

2. If the use or operation of a vehicle was a cause of the injuries was there an intervening act or intervening acts that resulted in the injuries that cannot be said to be part of the "ordinary course of things"? In that sense, can it be said that the use or operation of the vehicle was a "direct cause" of the injuries?

[11] The applicants argue that the rules of natural justice and procedural fairness are violated when a decision does not provide sufficient reasons to allow for a meaningful appellate review of the proceedings. They argue

[1] S.O. 2009, c. 33, Sched. 5.

[2] *Citadel General Assurance Co. v. Vytlingam* [2007] 3. S.C.R. 373 ("*Vytlingam")* ; *Greenlaugh v. ING Halifax Insurance Co*. [2004] O.J. No. 3135(CA)

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that my decision does not provide a meaningful basis for appellate review on the issues in dispute because once I found that they had not met the Purpose Test I failed to go on and consider the Causation Test.

[12] The appellants also argue that my decision may violate the rules of natural justice and procedural fairness because it was possibly not reached independently or was influenced or amended by my colleagues or superiors. They state that they are awaiting a response to a Freedom of Information Act request which they may want to have taken into account once it has been received.

[13] For the reasons provided below I am not satisfied that my decision violates the rules of natural justice or procedural fairness and I am not prepared to cancel or vary the decision or order a rehearing of the preliminary issue.

[14] In my decision, I first consider the Purpose Test as I was required to do. I found that the use or operation of the motor vehicle was not a cause of the applicants' injuries and for that reason the applicant had not been involved in an accident within the meaning of the *Schedule.* I did not go on to consider the Causation Test because if the Purpose Test is not met the law is clear that there cannot be an accident within the meaning of the *Schedule.*

[15] The applicants argue that by not going on to consider the Causation Test I breeched the rules of natural justice and procedural fairness because the decision does not provide a complete record for an appellate Court.

[16] I do not agree. While I could have gone on to say what my conclusion would be on the Causation Test if I was wrong in my conclusion on the Purpose Test, I did not do so. The appellants have not provided me with any case law to support their argument that an adjudicator is required to go on and consider the Causation Test if the Purpose Test is not met and violates the principles of natural justice and procedural fairness if he/she does not do so.

[17] With respect to the applicant's submission that the Tribunal's decision-making process is flawed, I agree with the submissions of Intact and

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Economical. The *Shuttleworth*[3] case is a singular instance and the Court of Appeal decision in *Shuttleworth* does not render the whole Tribunal inherently bias. The applicants have not provided any evidence to support a finding that I did not reach my decision independently or that my decision was amended or influenced by my colleagues.

ERORS OF FACT AND LAW

[18] The appellants argue that I made the following errors of fact and law:

i. I relied on facts not in evidence.
ii. I misapprehended the evidence and I misdirected a legal principle.
iii. I made an error of law in distinguishing the case of *Umer v. Non-Marine Underwritiers, Lloyd's London.*[4]
iv. I made an error of law in concluding that repair and maintenance was not use of an automobile for motoring purposes.
v. I gave undue consideration to the assumption that the vehicle was not being used for motoring purposes in the several days before the repair was undertaking.
vi. I gave undue consideration to my assumption that what the brothers were doing was complex or unusual.
vii. I failed to give due consideration to the fact that for the brothers this was an easy ordinary repair from their perspective.
viii. I gave undue consideration to my assumption that [R.C.'s] only relationship to the vehicle was that of repairman.
ix. I gave more weight to assumptions than facts.
x. I did not give due consideration to the description in the amended agreed statement of facts about the repair undertaken.
xi. I considered my own expectations instead of those of the parties to the contract.
xii. I failed to consider the characteristics of the vehicle.
xiii. I failed to interpret consumer protection legislation broadly.
xiv. I erred in law by agreeing with and relying on *Khan v. Certas Direct Insurance Co.* [5]
xv. I failed to give a broad or wide interpretation of the policy.

[3] *Shuttleworth v Ontario (Safety, Licensing and Appeals and Standards Tribunal)* 2019 ONCA 518
[4] 2003 CarswellOnt649`(FSCO)
[5] 2008 CarswellOnt 4541(FSCO)

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xvi. I misapprehended the evidence because I had a misapprehension of the legal principles.
xvii. I failed to resolve the ambiguity in the contract in favour of the applicants.
xviii. I erred in the interpretation of *Vytlingam.*
xix. I relied on tort interpretation.
xx. I intermingled the Cause and Purpose test confusing their application to the facts of this case.

[19] Economical and Intact argue that a reconsideration is a chance for the Tribunal to fix an error that would lead to a different conclusion or address a violation of procedural fairness. They ague that the applicants are simply seeking to recharacterize the agreed facts and reargue the case. They argue that I did not rely on facts not in evidence in considering the subject vehicle to be inoperable and in finding that replacing a fuel pump in a vehicle is not a usual repair.

[20] I do not agree with the appellant that I relied on facts not in evidence when I reached the conclusion that the vehicle repaired was inoperable during the time it was in [R.C.'s] garage waiting to have the its fuel tank replaced. As Economical and Intact submit it was a reasonable and logical conclusion based upon the Amended Agreed Statement of Facts of the parties.

[21] I do not agree that I made an error of law in distinguishing the case of *Umer v. Non-Marine Underwriters ("Umer")*[6]. The arbitrator was not required to determine whether the repair in *Umer* was an ordinary use of an automobile. The arbitrator may have found differently if she had been asked to determine the issue.

[22] The appellants argue that I failed to consider the fact that the replacement of a fuel pump was an easy task for them. I agree with the submissions of Intact and Economical that this is an irrelevant consideration as it is subjective and ignores the objective nature of the purpose test.

[23] In my view the appellants have not identified any errors of fact or law made by me in the decision that if I had not made would have led to a

[6] FSCO A02-000721, 2003)

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different conclusion. They do not accept my conclusion that the automobile was inoperable at the time of the repair and that the brothers' connection to the automobile was only that of repairmen and they do not accept my application of the Purpose Test. Their submissions on this request for review have not convinced me otherwise.

[24] The purpose of a request for reconsideration is not to allow parties to reargue their case. Most of the arguments raised by the appellants go to the amount of weight I gave certain evidence. The weight to be given to evidence is in a matter to be determined by an adjudicator. The appellants submissions do not change my view of the evidence.

[25] For the reasons provided above the request for reconsideration is dismissed.

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Susan Mather
Vice-Chair
Tribunals Ontario – Safety, Licensing Appeals and Standards Division

Released: November 5, 2019

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