

Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *A.C. v. Saskatchewan Government Insurance,*
2005 SKAIA 031

Date: 20050518

File: 138 of 2003

BETWEEN

A.C., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:

A.C., Applicant

Jane Wootten, for the Respondent

Before: **Ann Phillips, Q.C., Chair**
Beverly Cleveland, Commission Member
Darleen Topp, Commission Member

THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL AND HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

Heard at Regina, Saskatchewan
August 19, 2004

DECISION

[1] A.C., the Appellant, appeals two decisions of Saskatchewan Government Insurance (SGI) contained in letters dated September 22, 2003.

[2] The first decision related to his claim for income replacement benefits. He had been injured in a motor vehicle accident on March 2, 2000, but was able to continue working while undergoing rehabilitation. In August 2001, he started a new job, which paid salary and commissions. His condition caused by the accident deteriorated and in 2003, it became apparent that he would require surgery to correct an L5 disc impinging on the sciatic nerve. He was off work for two and one-half months and received income replacement benefits.

[3] The Appellant argued that income replacement benefits should take into account that, for the period during which his condition deteriorated to the point where he required surgery, his performance (and therefore his income) was adversely affected by the need to take physiotherapy at inconvenient times for his busy schedule. He said that he could have earned more in the months preceding his “relapse”, and that his income replacement benefit should be based on the substantially greater commissions he could have earned.

[4] The second decision from which the Appellant appealed was SGI’s denial of his claim for reimbursement of his cell phone expenses for the months during which he received income replacement benefits. The cell phone was in the Appellant’s name, but his employer normally reimbursed him for the significant (about \$320 per month) expense, which he incurred in the course of his employment. He had inquired of SGI as early as April 1, 2003 if they would pay him for this and repeated the request for information on May 14 and July 8. SGI provided him the information September 3, almost two months after his surgery. He felt that he had been misled into thinking that SGI would pay for this, and that he could have made arrangements to limit the cost to him if he had known on a timely basis.

FACTS

[5] At the time of his accident, the Appellant’s job entailed buying used cars at auction in different parts of Canada and arranging for them to be shipped to Regina, reconditioned, and

resold in locations all over the prairie provinces. It is a specialized and unusual occupation, which kept him on the road a lot, and he was successful at it. A typical week would see him planning his week on Monday, travelling on Tuesday (to, for example, Montreal, which he visited every two weeks) and appraising the cars to be offered at the auction, and contacting his potential customers in the West. Wednesday would have a final walk through, and then the auction itself, usually about five hours long, arranging for transport for the vehicles purchased, and flying home. Thursday to Saturday would entail paper work, vehicle inspection, and selling cars purchased the previous week.

[6] After his accident, rehabilitation — specifically, physiotherapy appointments two or three times per week — was difficult to fit into this schedule. He did not think he had missed any physio appointments because of his job, but he did think that he had missed business opportunities because of the physiotherapy. It was opportunities to meet customers, as opposed to attending the auctions. He did have some help (unpaid) from his father and cousin, who drove him to meet with customers as well as helping deliver cars. On cross-examination, he acknowledged he had no documents showing commissions that he had lost and time he had to take off. He had not kept a record of his customers. He had not mentioned the trouble he was having with scheduling to his SGI injury representative, and he had not thought of changing physiotherapists to better accommodate his schedule.

[7] He continued this pattern of job activity with his new employer, beginning in August 2001. In January 2002, he and his employer produced a written contract outlining the terms of his salary and commission, but he said this simply formalized the existing relationship. Under that arrangement he earned \$4650 in commissions during 2002 and \$1350 from January to the end of June 2003.

[8] He had to take time off work from at the beginning of July 2003 because of pain, and remained off work until his surgery in mid-July.

[9] It is apparent that the Appellant earned lower commissions in 2003 than in 2002. The evidence (other than his testimony) is slight that the decline is attributable to his pain or to the

physiotherapy appointments. However, because of the wording of the applicable statute, it is not necessary for us to make such a determination.

DECISION —INCOME REPLACEMENT BENEFITS

[10] As we pointed out in *W.I.*¹, *The Automobile Accident Insurance Act* in force at the time of the Appellant's accident in 2000 ("the old Act") does not contemplate income replacement benefits for enhanced earnings after an accident has occurred. In other words, even if you can prove that your income or business was poised to increase at the time of the accident, the old Act does not compensate you for that increase.

[11] This can be seen by referring to section 112 of the old Act, in which the emphasis on income at the time of the accident (*italicized below*) is apparent:

"112(1) A full time earner is entitled to an income replacement benefit if, as a result of an accident, the full time earner:

- (a) is unable to continue the full time *employment he or she held at the time of the accident*;
- (b) is unable to continue any other *employment that he or she held at the time of the accident* in addition to the full time employment mentioned in clause (a); or
- (c) is deprived of a benefit pursuant to the *Unemployment Insurance Act* (Canada) or the *National Training Act* (Canada) or any other prescribed benefit, to which he or she was *entitled at the time of the accident.*"

[12] *The Personal Injury Benefits Regulations*² in force at the time provide a method of determining the "gross yearly employment income" which is used in the old Act (section 135 and following) to calculate the income replacement benefit. They too emphasize that it is the employment and the income earned at the time of the accident that is used. For salaried full-time workers (which the Appellant was at the time of the accident in 2000), section 20 of the *PIBR* provides:

GYEI not derived from self-employment

20 Subject to these regulations, a victim's gross yearly employment income not derived from self-employment at the time of the accident is the sum of the following amounts:

¹ 2004 SKAIA 014.

² Chapter A-35 Reg 3 (effective January 1, 1995).

(a) in the case of a full-time earner, the salary or wages...³...received or receivable with respect to employment that the full-time worker held or would have held if the accident had not occurred and that are the greater of:

- (i) the salary or wages received or receivable for the pay period in which the accident occurred, multiplied by the number of pay periods in the year; and
- (ii) the salary or wages received or receivable in the 12-month period prior to the date of the accident.

[13] There are specific provisions of the old Act dealing with relapse:

“142(1) A victim who suffers a relapse of a bodily injury is entitled to an income replacement benefit as though the victim had been entitled to the income replacement benefit from the day of the accident to the day of the relapse, if the victim suffers the relapse within two years after:

- (a) the end of the last period for which the victim received an income replacement benefit, other than an income replacement benefit pursuant to section 139 or 140⁴; or
- (b) the day of the accident, if the victim was not entitled to an income replacement benefit before the relapse.

[14] Section 143 deals with relapses occurring more than two years after the accident, which is treated as a second accident, and is not relevant in the Appellant’s case.

[15] Section 144 gives a relapsee the greater of the income replacement benefit he is actually receiving, or that he would be entitled to under the relapse provisions.⁵

[16] Section 113 is a somewhat unusual provision, and we have considered what it might mean and whether the Appellant falls within its scope.

“113(1) Subject to subsection (2) and to the regulations, where the insurer is satisfied that a full-time earner who is entitled to an income replacement benefit would have held a more remunerative employment at the time of the accident but for special circumstances, the insurer shall calculate the full-time earner’s income replacement benefit on the basis of the gross yearly employment income for that more remunerative employment.

³ There are separate provisions for bonuses, overtime and commissions that have been omitted for ease of understanding of the basic entitlement. The Appellant in fact received \$5,900 commission income in the calendar year before his accident. It was included by SGI in the calculation of his gross yearly employment income.

⁴ Sections 139 and 140 provides a formula for reduction of income replacement benefits where the victim is able to hold a job paying less than his pre-accident employment, and is not relevant to the Appellant’s case.

⁵ “144. If a victim is receiving an income replacement benefit pursuant to this Division, other than pursuant to subsection 129(2) or section 139 or 140, and becomes entitled to an income replacement benefit respecting a relapse or second accident pursuant to section 142 or 143, the victim is entitled to whichever income replacement is the greater.”

(2) The employment mentioned in subsection (1) must be regular full-time employment that is compatible with the education, training, work experience and physical and intellectual abilities of the full-time earner immediately before the accident.”

[17] What “special circumstances” are contemplated by section 113? Because section 20 of the *PIBR* quoted above calculates income on the basis of the pay period immediately preceding the accident, or the 12 month period preceding the accident, a person on leave — or just terminated — from his or her regular job, and working temporarily at employment paid on a lower scale (whether *pro bono* or by force of necessity) would be penalized by this calculation. We do not wish to limit the scope of “special circumstances”. It does not appear to us, however, that section 113 applies to the Appellant’s pre-accident job. He was working well, and successfully. His income was not depressed for any unusual reason.

[18] Instead, the Appellant argues that his income *before the relapse* was depressed because of the pain of his injuries. Would this constitute “special circumstances” within the meaning of section 113?

[19] We do not think so. Section 113 says “more remunerative employment at the time of the accident”. Section 144 gives the injured person the better of his income at the time of the accident or the relapse. There is no reason to interpret section 113 as if it read “more remunerative employment at the time of the relapse”, and we do not believe that is appropriate. The old Act, unfortunately for the Appellant, does not take into account a person’s diminished ability to earn income prior to a relapse that actually takes him or her off work.

[20] SGI’s decision on this aspect of the appeal is upheld.

Cell Phone

[21] There was no dispute on the facts concerning the Appellant’s cell phone or arrangements. The cell phone was in his name and the bills came to him. He used it primarily for business, with some personal use since his job required him to be frequently away for business. His employer reimbursed him for this expense, among other things, on a monthly basis. He was also provided with a company car, and his personal use of the car is shown as a taxable benefit on his

T4 slip. He had not given any thought as to whether the personal cell phone use was a taxable benefit, and has no idea how this amount is calculated by his employer.

[22] When he learned he was going in for surgery, he contacted SGI on several occasions seeking information as to whether or not this expense would be paid. As set out above in paragraph [4], he did not receive an answer until September 3, 2003 following his surgery. He did not ask his employer to cover this expense while he was off work, as he had already been allowed the continued use of the company car during his absence. He did not think it was appropriate to ask for a further favour.

[23] The old Act and the Regulations quite clearly preclude recovery for reimbursement of expenses associated with employment during the payment of income replacement benefits or otherwise. SGI provides income replacement benefits based on income rather than expense, and it reimburses customers for expenses associated with attending for medical and other treatment, but not for employment related expenses.

[24] The two personal injury representatives who dealt with the Appellant testified. The former, a Personal Injury Representative I, was not qualified to handle claimants with problems requiring income replacement benefits, home care assistance and the like. When it became apparent that the Appellant would require this following his surgery, she discussed the matter with her supervisor, who recommended it be handed over to a Personal Injury Representative II with experience in these matters. It is not clear why the supervisor did not deal with the Appellant's inquiry at the time.

[25] The new personal injury representative, somewhat surprisingly, was not able to answer the question with respect to reimbursement for cell phone expenses either. Eventually, she contacted SGI's Calculation Unit, and an income replacement benefit representative there was able to provide the answer immediately: "No".

[26] We feel that the delay in inquiring and the delay in communicating the answer to the Appellant were unfortunate and unacceptable. We do not find, however, that SGI misled the Appellant. It is apparent from his repeated posing of the question that he knew he did not have

an answer to the question. The Appellant testified, and we agree, that if he had known that he would be turned down, there were steps he might have taken to cut his costs, e.g. having the service provider put his account into suspense during the two or three months he was off work.

[27] His out-of-pocket losses in this regard may be considered balanced by the reimbursement SGI provided to him for time attending physiotherapy appointments, which they paid on the basis that his employer was withholding wages for that time, which was not the case. We do not find that the Appellant misrepresented the situation in any way to SGI, but he did receive compensation to which he was not, strictly speaking, entitled.

[28] The application is dismissed.

Dated at Regina, Saskatchewan, on May 18, 2005.

Ann Phillips, Q.C., Chair

Beverly Cleveland, Commission Member

Darleen Topp, Commission Member