

Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *H.W. v. Saskatchewan Government Insurance,*
2006 SKAIA 055

Date: 20061004

File: 014 of 2005

BETWEEN

H.W., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:

Jeffrey Reimer, for the Applicant

Stephen McLellan, for the Respondent

Before: **Peter Bergbusch, Chair**
Beverly Cleveland, Commission Member
Jeffrey Scott, 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
September 7, 2005, July 4, 2006, and September 13, 2006

DECISION

INTRODUCTION

[1] The Appellant, H.W., was injured in a motor vehicle accident on November 28, 1998. He has two appeals before the Commission. The first is an appeal (the “First Appeal”) from a decision made by Saskatchewan Government Insurance (“SGI”) dated June 10, 2004 (the “First Letter”) in which SGI decided that the Appellant is, effective June 2, 2004, not entitled to an Income Replacement Benefit (“IRB”). The second is an appeal (the “Second Appeal”) from a decision made by SGI dated March 15, 2005 (the “Second Letter”) in which SGI, pursuant to section 185 of *The Automobile Accident Insurance Act* (the “Act”), decided to terminate the payment of all benefits to the Appellant.

PRELIMINARY MATTERS

[2] At the beginning of the Hearing, only the First Appeal was before the Commission. Mr. McLellan, lawyer for SGI, requested an adjournment to permit Dr. J. Alport, SGI’s Medical Director, an opportunity to review the file. Also, Mr. McLellan informed the Commission that he understood that the Appellant intended to appeal from the Second Letter. Assuming that to be the case, Mr. McLellan stated that SGI would be relying upon the limitation period in the Act, as the time to appeal from the Second Letter had expired.

[3] Mr. Reimer, lawyer for the Appellant, initially opposed the request for an adjournment. In response, and on a without prejudice basis, Mr. McLellan agreed to reinstate to the Appellant the payment of an IRB from June 2, 2004 up to and including the resumption of the Hearing. Mr. McLellan also agreed, pursuant to the provisions of the Act and *The Personal Injury Benefits Regulations*, to pay solicitor-client costs to the Appellant. Mr. Reimer and Mr. McLellan stated that they believed they could come to an agreement on the amount of the solicitor-client costs.

[4] The Commission granted the adjournment on the condition that SGI would immediately reinstate to the Appellant the payment of an IRB from June 2, 2004 up to the resumption of the Hearing and that SGI would pay solicitor-client costs to the Appellant. The Chair suggested to

Mr. Reimer that if the Appellant wanted to appeal from the Second Letter, he should take steps to bring that appeal before the Commission.

[5] Mr. Reimer subsequently filed with the Commission Office an Application Form appealing from the Second Letter. The Application Form was received by the Commission Office on June 29, 2006.

[6] At the resumption of the Hearing on July 5, 2006, Mr. McLellan stated, given Dr. Alport's review of the file, that SGI would likely abandon the First Letter. With respect to the Second Appeal, Mr. McLellan reiterated that SGI intended to rely upon a limitation defence. Mr. McLellan, also, stated that he had not yet had an opportunity to gather all of the evidence that SGI intended to rely upon in support of the Second Letter. Consequently, Mr. McLellan sought a further adjournment.

[7] The Commission did grant a further adjournment on the condition that SGI would continue to pay, on a without prejudice basis, to the Appellant an IRB up until the resumption of the Hearing on September 13, 2006. Further, the Commission held that if the Appellant was successful with his First Appeal but not successful with his Second Appeal then the IRB referred to above would be applied to the IRB that the Appellant should have received from June 2, 2004 (termination date of the IRB) through to March 15, 2005 (date of the Second Letter).

[8] On September 13, 2006, the Hearing reconvened. Mr. McLellan advised that SGI had decided to withdraw the First Letter. Consequently, the Appellant is successful with respect to the First Appeal.

[9] With respect to the Second Appeal, Mr. McLellan relies upon a time limitation defence. That is to say, the appeal from the Second Letter was not commenced within the time required by the Act. Mr. Reimer, in response, argued that the Second Letter does not constitute a decision within the intendment of Sections 189 and 191 of the Act. He argued that the Second Letter was a nullity and, consequently, no time limitation runs from that Second Letter. The logical extension of Mr. Reimer's argument, as the Commission pointed out, was that we would not

have jurisdiction to determine whether SGI erred in terminating the Appellant' benefits for non-compliance if we accepted that the Second Letter was a nullity. In the alternative, Mr. Reimer argued that SGI should have provided him with a copy of the Second Letter since SGI knew that the Appellant retained him with respect to the First Appeal. Presumably, if Mr. Reimer had been provided with a copy of the Second Letter he would have taken steps to protect the Appellant' interests by commencing an appeal in time.

JURISDICTION

[10] In reviewing a decision of SGI, the Commission has the jurisdiction under section 193(7) of the Act to:

“set aside or vary the insurer’s decision;
or make any decision that the insurer is authorized to make pursuant to this Part”.

[11] In *George Allary v. Saskatchewan Government Insurance*,¹ the Saskatchewan Court of Appeal considered the nature of a hearing before the Commission and the standard of review of an appeal before the Commission. In *Allary*, as in this appeal, the applicant put the facts in issue before the Commission. The Court in *Allary* held, in part, as follows:

“Where the facts are placed in issue, as they are here, the appeal commission has an obligation to receive and consider any new evidence submitted by the appellant and, depending on the nature of the hearing which is conducted, to consider as well the evidence received by SGI in making the finding of fact in dispute on the appeal. The appeal commission must determine whether the decision of SGI was erroneous having regard to all of the evidence” (See paragraph [20]).

[12] During the Hearing for this appeal, the Commission received and considered all of the new evidence submitted by the Appellant and SGI. As held by the Court of Appeal in *Allary*, we will determine whether “... the decision of SGI was erroneous having regard to all of the evidence”.

¹ 2006 SKCA 89.

ANALYSIS OF THE TIME LIMITATION DEFENCE

[13] The Second Letter is dated March 15, 2005. The Appellant acknowledged candidly that he received the Second Letter in March 2005. As set out in the Second Letter, the Appellant had 90 days, or up until June 14, 2005 to appeal from the Second Letter. Section 191 of the Act sets out the limitation periods that apply to appeals from SGI's decisions under Part VIII:

191(1) A claimant may appeal a decision of the insurer pursuant to this Part to either the Court of Queen's Bench or the appeal commission within the later of:

- (a) 90 days after the date of insurer's written decision; and
- (b) if a claimant has requested mediation pursuant to section 190, 60 days after the date the mediator's written statement pursuant to subsection 190(8) declaring that the mediation is completed.

Mediation did not take place in respect of the Second Letter and, accordingly, the applicable limitation period is the 90-day period specified in Subsection 191(1)(a).

[14] The document commencing the appeal from the Second Letter, the Application Form, is dated June 28, 2006, and was filed at the Commission Office on June 29, 2006. The appeal taken from the Second Letter is clearly out of time. The Commission cannot extend the period of time for an appeal.² Consequently, on the face of it the Second Appeal is statute barred and cannot proceed.

[15] Mr. Reimer argued, however, that the Second Letter does not actually constitute a decision since SGI had in the First Letter already terminated the payment of an IRB to the Appellant and, consequently, there was nothing more for SGI to decide. For the reasons outlined below, we disagree.

[16] In the First Letter, SGI decided to terminate the payment of an IRB to the Appellant. The reason given by SGI for its decision was that the Appellant was capable of performing the essential duties of the employment that he had on the date of the accident. In the Second Letter, SGI decided to terminate the payment of "all" benefits to the Appellant. Also, included in the Second Letter is the following:

² *Mintzler v. Saskatchewan Government Insurance* 2001 SKCA 54.

“I contacted your massage therapist and advised him we will not fund any further massage treatments effective immediately.”

[17] In response to a question asked by a member of the Panel, Mr. McLellan informed the Commission by way of a letter dated September 14, 2006 that SGI had on behalf of the Appellant paid for massage therapy treatments between “...February 17 and March 3, 2005 and the payment was made on March 19, 2005”.

[18] In support of its Second Letter, SGI alleged that the Appellant failed to provide SGI with certain requested information. SGI had made numerous requests of the Appellant for specific information, much of it concerning a business corporation for which he worked. From the Appellant’ testimony and the documents filed at the Hearing, it was clear that the Appellant had not been an owner or director of this corporation since 1993 and did not have the right to obtain most of the information sought by SGI. It appeared to the Commission that SGI’s allegation of non-compliance was founded upon a misunderstanding about the Appellant’ role in the corporation. SGI’s confusion about this matter was exacerbated by the unclear questions asked by the personal injury representative and by the Appellant’ failure to clarify his status. However, by the time of the Hearing SGI had obtained most of the missing information, or an explanation for why it was not forthcoming, that it had not received when it terminated the Appellant’ benefits for noncompliance.

[19] Those comments about the merits of the termination for noncompliance aside, it is clear that a decision (i.e. terminate all benefits including massage therapy treatments) is identified in the Second Letter. That decision is distinct from the decision (i.e. terminate the IRB) identified in the First Letter. Further, the basis (i.e. substantially able to perform the essential duties of his employment) for the decision expressed in the First Letter is different from the basis (i.e. non-compliance) for the decision expressed in the Second Letter. Accordingly, we do not accept Mr. Reimer’s argument that the Second Letter does not amount to a “decision” within the meaning of Sections 189 and 191 of the Act.

[20] We will also address Mr. Reimer's argument that SGI should have provided him with a copy of the Second Letter since SGI knew that he was representing the Appellant in the appeal from the First Letter. Section 189 of the Act provides:

189(1) The insurer shall give every claimant a written decision respecting the claimant's entitlement to benefits.

(2) At the time the insurer sends a claimant a written decision, it shall give the claimant:

(a) written reasons for the decision; and

(b) written notice of the claimant's right to ask for mediation or to appeal the insurer's decision pursuant to this Division.

[21] Although we do appreciate Mr. Reimer's argument, we do not agree that SGI had an obligation to provide Mr. Reimer with a copy of the Second Letter. Section 189 requires SGI to provide its written decision to "every claimant." Had the Second Letter come from a lawyer with SGI who was aware that the Appellant had legal counsel then, of course, there would have been a professional obligation on the SGI lawyer to provide Mr. Reimer with the Second Letter. However, that is not the situation here. In this case, the First and Second Letters came from a SGI Personal Injury Representative. It is unfortunate that the Appellant did not inform Mr. Reimer of the Second Letter.

CONCLUSION

[22] The Appellant is successful with respect to the First Appeal. SGI shall immediately pay to the Appellant, with interest, the amount of his Income Replacement Benefit from June 2, 2004 (termination date of the IRB) through to March 15, 2005 (date of the Second Letter) **less** the Income Replacement Benefit that SGI has already paid to the Appellant while his appeal was pending. As noted in paragraph 3, Mr. McLellan agreed that SGI would pay solicitor-client costs. If it has not already done so, SGI will pay solicitor-client costs to the Appellant in accordance with the Act and the Regulations.³ If Mr. Reimer and Mr. McLellan cannot agree on the quantum of the solicitor-client costs then Mr. Reimer and/or Mr. McLellan may contact the

³ The amount payable to the Appellant to reimburse him for his solicitor-client and other costs is subject to a maximum prescribed amount of \$2,500: Section 196 of *The Personal Injury Benefits Regulations*.

Commission Office and arrangements will be made to bring that issue before the Commission for argument and a determination.

[23] The Second Appeal is statute barred and is dismissed.

Dated at Regina, Saskatchewan, on October 4, 2006.

Peter Bergbusch, Chair

Beverly Cleveland, Commission Member

Jeffrey Scott, Commission Member