

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *D.N. v. Saskatchewan Government
Insurance, 2006 SKAIA 095*
Date: 20061219
File: #041 of 2006

BETWEEN

D.N., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
Jonathan Abrametz, Applicant
Dale Brown, for the Respondent

Before: **Jane Lancaster, Q.C., Chair**
Carolyn Jones, 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 Saskatoon, Saskatchewan
November 15, 2006

DECISION

[1] The Appellant, D.N., appeals the March 20, 2005 decision letter of Saskatchewan Government Insurance (SGI) which terminated her income replacement benefits as of February 23, 2005.

[2] The Appellant filed two applications for appeal on this decision letter. Appeal Application #1 dated April 4, 2006 was signed by counsel and does not comply with section 87 of *The Personal Injury Benefits Regulations* Chapter A-35 Reg 3(effective January 1, 1995) as amended by Saskatchewan Regulations 70/2002, 121/2002 and 48/2004. Counsel for the Appellant urged the commission panel to use section 196.4(3) of *The Automobile Accident Insurance Act*, c. A-35 (the *Act*) to amend this application.

[3] Appeal Application #2 dated September 15, 2006 is identical to Appeal Application #1 except that the Appellant has signed this appeal. This appeal application was signed past the 90 days provided for an appeal. Counsel for the Appellant urged the commission panel to use the corrective measures of section 196.4(3) and make this appeal valid.

[4] Section 191 of *The Automobile Accident Insurance Act* reads:

Right to appeal

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 latter of:

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

[5] Application #2 was filed past the 90 days from the decision. There was no mediation. The Court of Appeal and the Court of Queen's Bench in *Mintzler v SGI*¹ determined that non-compliance with the time limits for appeal is not subject to relief under the "imperfect compliance" provisions of the *Act*, since this applies only to proofs of claim or loss, or an application for benefits rather than an appeal. Moreover, the failure to launch the appeal amounted to non-compliance (from which relief could not be given) rather than "imperfect compliance."

[6] The *Mintzler* case as well as a decision by the Automobile Injury Appeal Commission , *K.F. v. Saskatchewan Government Insurance*, 2004 SKAIA 006, govern the Commission's interpretation of section 191 of the *Act*, and that the late filing of the application is fatal to the appeal of this decision.

[7] With regard to Appeal Application #1, Counsel for the applicant has been provided with the views of the Appeal Commission on the *S.N.* appeal² heard on October 5, 2006. Without deciding this issue, the panel is prepared to proceed on the Appellant's Appeal Application #1. We are concerned that the Appellant has her matters considered on the substantive issues before us.

[8] The panel felt it is important to draw counsel's attention to the requirements of the *Act*, and *Regulations*, which indicate that it is the applicant and not counsel who must sign the appeal, and if counsel signs on behalf of a client, the authority to act must be attached to the appeal. In this appeal, the authority for counsel to act is not attached and neither is there evidence as required showing the client was incapable of signing the appeal application.

FACTS AND FINDINGS

[9] The Appellant was injured in a motor vehicle accident on January 6, 2005. She sustained broken ribs, punctured lung, and an injured knee. She also reported left sided neck pain and problems with her left ear.

¹ 2000 SKQB 104 and 2001 SKCA 54

² 021 of 2006, AIAC decision

[10] The Appellant had been self- employed looking after her 85 year old mother in the family home since December, 2004. Her mother paid the Appellant \$1500 per month for her care.

[11] While the Appellant was hospitalized and recovering from her injuries, her mother went to stay with the Appellant's brother under the same financial agreement that her mother had with the Appellant.

[12] The Appellant advised that she asked her mother to return to live in her home, but that her mother decided to continue to live with the Appellant's brother.

[13] The Appellant accepts the facts and findings of the Occupational Therapy Report which took place on February 23, 2005 and indicates that the only fact that she disputes is when the author of the report quoted her as saying that the reason that her mother was seeking a personal care home was that she wanted to be with people her own age. The Appellant testified that this was her own speculation and had never been voiced by her mother.

[14] The Appellant does not take issue with the conclusion of the occupational therapist that she was physically capable on February 23, 2005 of having her mother return to live with her and to provide the care that she had done in the past. The Appellant testified that she sat down with her mother a month following the accident and told her that she was welcome to return to her home anytime. Her mother called her 2 days later and advised the Appellant that she had decided to stay at her brother's home. This conversation and decision preceded the occupational therapist's report dated February 23, 2005. The Appellant also testified that she was capable of looking after her mother on the date of February 23, 2005 and there were no duties that she could not do, although she did have some pain.

[15] In addition, the Appellant agreed with the classification of the employment as a National Occupational Classification #6471 which includes homemakers, housekeepers and companions. The gross annual salary for this classification was \$18,484 and the net biweekly income replacement was \$525.

[16] The Appellant agrees that SGI has calculated her income replacement correctly pursuant to section 113(3) (b) (i) of *The Automobile Accident Insurance Act*.

[17] The Appellant advised that she was unemployed from January to December, 2005. She did not seek employment as a Home care provider of looking after elderly persons. In December 2005, she became employed as a part time [craftsperson].

[18] The only issue that is before the Appeal Panel is one of statutory interpretation of section 113 of the Act.

LAW AND ANALYSIS

Automobile Accident Insurance Act section 113 reads as follows:

DIVISION 4

Income Replacement Benefits

Income replacement benefit

113 (1) This section does not apply to a student.

(2) An insured is entitled to an income replacement benefit if, as a result of an accident, the insured:

(a) is unable to continue an employment held by the insured at the date of the accident;

(b) is unable to hold an employment he or she would have held in the first 180-day period following the accident if the accident had not occurred; or

(3) The insurer shall calculate the income replacement benefit for the employment that the insured is unable to continue on the following basis:

b) subject to the regulations, if the insured holds an employment as a self-employed earner, the greater of:

(i) the yearly employment income determined in accordance with the regulations for an employment of the same class as the primary employment the insured held or would have held but for the accident in the first 180-day period after the accident; and

(ii) the yearly employment income the insured earned or would have earned from all his or her employments held at the date of the accident;

TERMINATION OF DIVISION 4 BENEFITS

Termination of benefits

131 (1) Notwithstanding any other provision of this Part, an insured ceases to be entitled to a benefit pursuant to this Division when any of the following occurs:

(a) the insured is able to hold the last employment that he or she held before receiving a benefit;

[19] Counsel for the Appellant argues that although the Appellant was capable of working as of February 23, 2005, she was entitled pursuant to section 113(2)(b) of the Act to receive benefits for the full 180 days. He argues that but for the motor vehicle accident, the Appellant's mother would not have moved to her son's home, and made the decision to remain with her son, thereby, causing the Appellant to lose her employment and income. He characterizes this as a lost opportunity for employment for the Appellant. He submits that therefore, the Appellant should be compensated for the full 180 days in the job category, and not just from the accident date to the date that she was well enough to continue her employment which is agreed to be February 23, 2005.

[20] Counsel for SGI argued that section 113(2)(b) does not apply to the Appellant's situation, and it is section 113(2)(a) which is applicable. SGI argues that section 113(2)(b) does not apply, because at the date of the accident, the Appellant was employed in looking after her mother. Section 113(2)(b) applies if the person is unemployed at the time of the accident but had been promised employment to commence at some time during the 180 days after the accident.

[21] Counsel for SGI also argued that section 131(1)(a) is clear that an insured ceases to be entitled to a benefit, if the insured is able to hold the last employment that he or she held before receiving the benefit. In this case, Counsel argues that the Appellant, as of February 23, 2005 could hold the employment as Home Support worker.

[22] We agree that the proper interpretation of section 113 is that subsection (a) relates to persons who are employed at the date of the accident and as a result of the accident are unable to **continue** this employment, and subsection (b) relates to persons who are **unemployed** at the date of the accident, but who have been promised employment within 180 days of the accident and because of the accident, they are unable to take this employment.

[23] The Appellant's income replacement benefit is properly found in section 113(2) (b) as she was employed looking after her mother at the date of the accident. As a result of the accident, she could no longer do so and her mother left her care.

[24] The calculation of the Appellant's income is made pursuant to section 113 (3)(b)(i) as the Appellant was self employed and the classification of employment as a Home Support worker at \$18,484 was greater than the \$1500 gross per month that the Appellant received from her mother.

[25] When the Appellant was found to be well enough to return to her employment, the fact that she did not continue on as a Home Support worker was not as a result of the accident, but because her mother chose to stay with her son for reasons of her own.. The reason why the Appellant was no longer employed was not because of the accident, but because her mother chose to stay with her brother. Pursuant to section 131(1)(a), as of February 23, 2005, the Appellant was able to hold the last employment that she had before receiving the benefit. The employment is as a Home Support worker, not a Home Support worker who could only work exclusively for her mother.

[26] Therefore, SGI's decision letter of May 20, 2005 is upheld. The Appellant has received proper income replacement for her January 6, 2006 motor vehicle accident.

COSTS

[27] There is no order as to costs.

Dated at Saskatoon, Saskatchewan, on December 19, 2006.

Jane Lancaster, Q.C., Chair

Carolyn Jones, Commission Member

Darleen Topp, Commission Member