

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *K.H. v. Saskatchewan Government Insurance,*
2008 SKAIA 012
Date: 20080229
File: 083 of 2007

BETWEEN

K.H., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
K.H., the Applicant
Elizabeth Flynn, for the Respondent

Before: **Ann Phillips, Q.C., Chair**
Beverly Cleveland, Commission Member
Barbara Tomkins, 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
January 29, 2007

DECISION

[1] The Appellant, K.H., appeals a decision of Saskatchewan Government Insurance (“SGI”) dated July 17, 2007. It awarded him an income replacement benefit (“IRB”) reduced by 75%, because he was able to complete some job duties as a self-employed realtor, although not “driving duties”. The letter stated: “Based on information on file SGI is of the opinion that your driving duties would be 25% of your overall duties.” In addition, for the period of time he was attending a secondary treatment program “16 hours a week”, it reduced his IRB by 60% because he was “available to attend to his work duties” for 24 out of 40 hours a week.

ISSUES

[2] The issues at this hearing were:

- (1) Was the income replacement benefit correctly assessed? Specifically, was 25% the correct proportion to attribute to his inability to drive? Was it correct to pay him an IRB for the 16 hours a week he attended secondary treatment?
- (2) Did the Automobile Injury Appeal Commission exhibit bias against the Appellant at the pre-hearing appeal management conference?

FACTS

[3] The Appellant testified and filed evidence that he had been a commercial real estate agent for 15 years, specializing in motel properties on a Saskatchewan-wide basis, selling mainly to Western Canadian and foreign purchasers. His corporate and personal tax returns were filed for purposes of IRB calculations. He acknowledged that real estate agents’ commission income can be highly variable and also seasonal, but pointed to the current “booming” real estate market as a positive sign.

[4] The Appellant said he maintains a web site, and fields inquiries on his cell phone at all hours, and seven days a week. He lists properties for sale, but also spoke of people who did not wish property actively listed, but who might be available to the right offer. He testified that he travelled extensively, but resisted attempts by SGI and by the Commission panel to provide an estimate of the time he spent travelling, on the grounds that it was impossible or irrelevant (or

both) to do so. Eventually, when asked how much time he spends away from home, he estimated that, on average over a year, he spent about 3 days a week away from home on business.

[5] The Appellant's motor vehicle accident, in March, 2007, was on just such a road trip. He and a group of potential investors were near [location] when his vehicle skidded on ice and went off the road. He hurt his neck and shoulder, and his passenger sustained more injuries.

[6] His initial treatment, with muscle relaxants, painkillers, physiotherapy, and massage, was not particularly effective. SGI referred him for secondary assessment by a multidisciplinary team in Saskatoon on June 25, 2007, three months after the accident.

[7] In the meantime, he had continued to attend to business. He was having trouble with prolonged sitting. For computer work at home, he was able to work for up to an hour, and then could take breaks. For driving in town, he could manage, although shoulder checking was a problem. His wife, who is retired, had driven him on some longer trips.

[8] He told the secondary assessment team that his neck pain became intolerable after about 30 minutes of driving, and they accepted this as consistent with their observations and testing.

[9] The team's chiropractor found that his active range of motion was limited by at least 50% in all directions, with widespread muscular tenderness especially on the right side. This extended into the trapezius area, although the right shoulder range of motion was normal but uncomfortable. The orthopedic surgeon noted that the neck range of motion was only 25% of normal in flexion extension and bilateral rotation, and 10% of normal lateral bending bilaterally. X-rays showed extensive degenerative changes in the mid-cervical spine.

[10] The team proposed a secondary treatment program for 6-8 weeks, 4 or 5 days a week. [In fact, he attended 4 days a week for 8 weeks, from July 11 to September 6.] This involved conditioning for his neck and shoulder, general and functional conditioning, biomechanical treatment, education, and pain management counselling. Continuation with massage during the program was considered helpful.

[11] A limited functional ability evaluation was carried out, based on job demands reported by the Appellant. He told them that before the accident, he drove across the province – [location] to

[location] – on business, and could tolerate sitting up to 10 hours driving. However, when he and his wife drove from [location] to Saskatoon (about 3 hours) for the secondary assessment, he drove for half an hour, was a passenger for the rest of the trip, and was not able to sit more than 60 minutes. On testing, he was able to sit for 42 minutes sustained, or 1 hour 10 minutes total. He further estimated he was “currently only performing 30-40% of his work”.

[12] The Appellant began his secondary treatment program as outlined in paragraph [10], and shortly afterwards received the decision letter of July 17 which he promptly appealed. During two psychological consultations during the program, he expressed frustration that “SGI does not understand the real estate industry, his job demands, and the particulars associated with self-employment” and the time commitment to rehabilitation. He did participate fully in the program, according to the incomplete series of reports filed.¹ By his self-report, he was able to progress from sitting while driving 15-30 minutes (July 18) to 35-40 minutes (August 1).

Applicable Law

[13] The entitlement of a person insured by SGI to income replacement benefits is in section 113 of *The Automobile Accident Insurance Act* (“the Act”):

113(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;...

[14] *The Personal Injury Benefits Regulations* (“PIBR”) further state:

14. For the purposes of the Act, an insured is unable to hold employment if a bodily injury that was caused by the accident renders the insured entirely or substantially unable to perform the essential duties of the employment that the insured:

(a) performed at the date of the accident; or

(b) would have performed but for the accident.

[15] From the outset, SGI was of the opinion that the Appellant could talk on the phone, and attend to his computer from time to time, and so the only part of his job he could not actually do

¹ No final discharge report from the secondary program was filed by either party.

was the driving. It therefore considered that his IRB could be reduced to reflect his partial capacity to work. The relevant section is section 126:

126 (1) Subject to subsections (2) to (4), the insurer shall reduce an insured's income replacement benefit if:

(b) the insured is able to perform some of the insured's duties of employment; ...

(2) For the purposes of subsection (1), the amount of the insured's reduced income replacement benefit is the amount RIRB calculated in accordance with the following formula:

$$\text{RIRB} = \text{IRB} - (90\% \times \text{NI})$$

where:

IRB is the income replacement benefit the insured is receiving pursuant to section 113 ...; and

NI is the greater of:

(a) the net income the insured earns from his or her employment; and

(b) the income replacement benefit the insured is receiving pursuant to section 113... multiplied by the percentage that the insured is either able:

(i) to return to work; or

(ii) if applicable, to return to the activities of daily living.

(3) Notwithstanding subsection (2), if an insured held employment at the date of the accident, the insurer shall not reduce the insured's income replacement benefit pursuant to this section unless the insured is able to return to an employment.

DISCUSSION

[16] In short, this provision says: Can you perform some of the duties of your employment? If you can, and you return to work for part of the time and earn money, we will reduce your IRB by 90% of what you actually make. However, if you were working at the time of the accident, we won't reduce your income unless you are "able to return to work".

[17] The wording, however, also covers the situation of an individual who "is able to perform some of the insured's duties of employment", but does not return to work or earn any money.

There is a point to this: it is justifiable policy to encourage an injured individual to return to work if possible, and to penalize one who, though able to return to work, does not do so.

[18] Many problems can arise in applying this provision too mechanically, and we believe that is what happened here. An emphasis on the words “some of the duties” and the “percentage that the insured is...able to return to work” suggests that every job is something that can be divided up into separate tasks, and that all the assessor has to do is figure out what the percentage is. This might work if a detailed analysis of the job tasks is carried out, with proper weight being given to the importance of the separate tasks to the job as a whole. How critical are the duties the insured can perform, compared to those he can't? Sometimes it is easier to see how critical the tasks are to the job as a whole. If a farmer can't ride a tractor during seeding or harvesting because of a vertebral fracture, it is not particularly relevant that he can answer the phone, read market reports, discuss tax issues with his accountant, etc. Or, where the injured person is an employee, the employer provides a reality check: assigning a person to light duties may be feasible sometimes, but if this cannot be done, employers see no point in paying someone to simply sit around, and the person does not return to work, so that subsection (3) becomes applicable.

[19] In the Appellant's case, the temptation for SGI to figure out the percentage may have seemed irresistible. He was self-employed, so he could take a break whenever he wanted (in theory). His work did not have to be done between set hours, so he could be “flexible”. His work seemed to be sedentary. It was “just the driving” he could not do. So, its approach was to determine what amount of time he spent driving.

[20] Ms Flynn conceded, quite correctly in our opinion, that the 25% figure that SGI had selected was “an estimate”, “a best guess”, and no effort was made to justify this specific figure. While not disputing that for him, “driving is essential”, she did question whether the Appellant could not have “worked around” much of the driving by having owners show their properties, making greater use of phone and other contacts, using proper scheduling – for example, taking longer to get to a destination by making frequent stops.

[21] In our view, to properly apply the legislation and regulations to the Appellant's situation, one must assess the importance of driving long distances to his ability to earn income.

[22] We accept the Appellant's evidence about the nature of his business, and that he worked on a province-wide basis: although he had some local clients, his focus was further afield. In order to service his clients and potential clients, he did have to be available to drop everything and drive to see them and the properties they wished to buy or sell. While he could and did talk to clients and potential clients on the telephone, or contact them by fax or email, making personal contact in a location dictated by the client was essential for him to actually promote and conclude deals and secure commissions (income).

[23] He acknowledged that occasionally time conflicts or similar problems meant that he would ask a motel owner who had listed his property for sale through him to show a potential purchaser around, rather than insisting their realtor do this. However, it is apparent to us that anything more than a rare dose of this is likely to result in a dissatisfied client who will conclude that his realtor is not really interested in him. Assiduous attention to the client's affairs is a minimum requirement.

[24] We think his evidence that he spent about three days a week away from home is significant: while it is not a strict measure of the hours spent driving, it shows the importance to him and his business of frequent and lengthy travel. His was not a desk job (computer, phone, fax), but a travelling job with some clerical duties.

[25] We cannot say that the Appellant was totally incapacitated from all his work duties: he did have some local clientele, and at the secondary assessment in late June, he said he was doing 30-40% of his job. He made this estimate before he became enraged by SGI's decision letter and its approach to his income loss. We think it was likely to be a fair and honest estimate of his capabilities at that time. He may have underestimated at the time the impact his condition might make on his income; equally he might have been concerned enough by the prospect of little income for the next few months that he might have overestimated his incapacity. On balance, we are prepared to accept his estimate.

[26] By his own admission, therefore, the Appellant could do some income-generating work, including driving, if he paced himself in his activities. There was no aspect of his work that he could not do at all – He could make and receive calls, check listings, show properties and drive

to their locations. He simply could not do so as quickly and as frequently as he would have been able to do prior to his injury.

[27] The question for us is what proportion of his pre-injury income he was able to earn. We are satisfied to use the Appellant's estimate of 30 to 40 percent for this purpose. We have concluded that, while he was able to carry out all of his work duties, the Appellant was able to do so in such a restricted manner that he was able to earn no more than 35% of his pre-injury income. We therefore conclude that he is entitled to IRB in an amount equivalent to 65% from the accident² until he entered the secondary treatment program on July 11.

[28] The Appellant objected that SGI did not pay him IRB for the week immediately following his accident. He pointed out that, unlike a salaried individual, his income receipts are variable, and it makes no sense to arbitrarily withhold a notional 1/52 of his annual income. While his objection is logical, and applies not just to his case, but to the self-employed in general, the Commission can only work within the existing legislation and regulations. These provide clearly that IRB begins one week after the accident. The policy reason is almost certainly to screen out minor injuries, and to act as a sort of "deductible":

Payment of benefits

172(1) Subject to subsection (2), and notwithstanding any other provision in this Division, no insured is entitled to receive for the first seven days after the accident any of the following benefits:

- (a) an income replacement benefit;
- (b) a substitute worker benefit;
- (c) a family enterprise benefit.³

[29] A further issue involved the payment of IRB while the Appellant attended the secondary assessment in Saskatoon, and while he attended secondary treatment four days a week for eight weeks. SGI had decided to pay him for the day he was in Saskatoon, but not the day before and the day after, when he had to travel what is normally a 3 hour drive – slowly – to get there and

² Strictly speaking, 7 days after the accident: see the next paragraph.

³ Subsection (2) makes an exception for "catastrophic injuries", for which IRB entitlement begins the day after the accident.

the same to get back. It had also decided to pay him only for the four hours a day he spent at secondary treatment.

[30] At the hearing, Ms Flynn advised that SGI was now prepared to pay him full IRB for the 3 days for the secondary assessment in Saskatoon, and full IRB for the period from July 11 to September 6, while he was undergoing secondary treatment. We consider this fair and appropriate, in that it recognizes the reality that injured people living outside of Regina or Saskatoon must often travel lengthy distances for assessment. While some are able to drive and can do so without loss of income, others cannot. Full payment of IRB during the secondary treatment program recognizes that the rehabilitation activities carried out are demanding, and often are not intended to be coupled with full time or part time work if they are to be successful.

[31] The evidence at the hearing established that SGI had entirely discontinued the payment of IRB to the Appellant after September 6, 2007 but that no decision to terminate those benefits was ever given. SGI acknowledged that this was an oversight.

[32] That being the case, it follows that his entitlement to IRB is not, by this decision, terminated or discontinued after September 6, 2007. If the parties cannot agree on an appropriate reduction of IRB or appropriate period of entitlement (if any), then SGI must provide a decision letter stating its reasons for its reduction, adjustment or termination of IRB, and for its choice of date(s), and advising the calculation of interest on payment of unpaid amounts. The Appellant, if dissatisfied, will have the right to appeal any such decision in accordance with the provisions of the legislation.

Bias Issue

[33] The Appellant raised the issue of bias in a letter sent to the Commission on January 22, 2008, following an appeal management conference the previous day. He sought to have Barbara Tomkins, who had conducted the appeal management conference, not sit as one of the panel members hearing his claim on the merits based on his reasonable apprehension of bias, because, in his words:

- (1) “she refused to deal with the scheduled purpose of the Hearing – that being the issue of delay by the parties
- (2) she failed to conduct the Hearing in a fair, objective and impartial manner,
- (3) she failed to provide the writer with a reasonable opportunity to be heard,
- (4) she pre-judged the outcome and decision without any consideration of the uncontroverted and material facts in evidence before her,
- (5) she made unfair, unfounded and inflammatory reference to the writer as employing “bullying” tactics;
- (6) she failed to display a reasonable level of overall competence in the manner in which she conducted herself and the Hearing.”

[34] The Commission takes allegations of bias very seriously. A transcript of the appeal management hearing was obtained and reviewed. In it, Ms Tomkins stated that the purpose was to discuss how to move the matter forward, and expressed surprise that since the appeal had been set down for hearing the following week, such a management hearing was necessary. She referred to a delay of about five months from the date the Appellant filed his appeal until SGI filed its documents (from August 7, 2007 to January 10 or 11, 2008.) She obtained each party’s consent to abridge the regulatory requirement of 30 days notice of the time, date and place of the hearing⁴.

[35] The Appellant expressed disappointment that SGI’s counsel had not attended in person, but by telephone, when he had driven in over 100 miles. He acknowledged he had been advised to appear by phone, but said that it was important to him. He wished to make an opening statement, which he had submitted in writing outlining his position that SGI had not acted diligently in its conduct of his appeal: he characterized it as showing “fabrication, misleading and deceptive representations”.

⁴ PIBR, section 88.

[36] The transcript shows that Ms Tomkins acknowledged that she had read his submission, acknowledged his concern with the delay he had experienced in waiting for SGI to file its documents, and explained that the appeal management hearings were an attempt to deal with delay by either party and take the appeal forward notwithstanding the lack of a statutory or regulatory time period for filing of documents.

[37] The Appellant stated that the only reason SGI had filed its documents was because he had kept putting pressure on the Commission and SGI to get matters going. Ms Tomkins advised him that she was not convinced that the pressure he gave had actually expedited the filing of the documents. She said that she didn't think the pressure had been helpful. The Appellant responded that "every time I put pressure on and asked about the file then something was done, otherwise it just sat there".

[38] Ms Tomkins said: "...I will say this, [the Appellant], there's a difference between being aggressive and being a bully, and you've come very close to the latter line." She cautioned him that it would not serve him well to take that approach at the hearing: "...you can be assertive, but there's a line and I would advise you not to cross it".

[39] There was a discussion of a letter January 3 from SGI counsel, asking several questions with a possible view to settling the matter. Both SGI and the Appellant appeared to agree to proceed with the hearing the following week. Timing of the hearing was considered.

[40] The Appellant then asked what the purpose of the meeting had been, and Ms Tomkins repeated that she did not know, as the hearing date had already been set. The Appellant said "you wouldn't allow me to even say this, about my one-page recommendations here I had." [We understand this to be that referred to in paragraph [25]] Ms Tomkins said "... that's not a matter that's before us this morning or a matter that's before the Commission at all."

[41] In saying this, Ms Tomkins was not aware that a member of the Commission's staff had written the Appellant that the appeal management conference would provide him with an opportunity to address the issues of delays, timelines for filing documents.⁵

⁵ Letters January 3, 7 and 8.

[42] The Commission invited the Appellant to identify where in the transcript he said bias had been shown. He stated that there was nothing he wanted to add to the written submissions made.

[43] The procedure followed by the Commission to determine the issue was that recommended by Macaulay & Sprague, Practice and Procedure before Administrative Tribunals, and this was explained to the Appellant at the hearing. The decision as to whether or not Commissioner Tomkins would recuse herself on the ground of alleged bias would be made by her alone, based on her review of the transcript and the Appellant's allegations, written and verbal.

[44] She then made her decision, explaining that she had not been aware that the Appellant had been assured that he could speak to the issue of SGI's delays, and apologized to him for that misunderstanding. However, she concluded that she was not actually biased and that a reasonable person would not have a reasonable apprehension of bias. She did not recuse herself. Given this, the hearing would (and did) proceed with three panel members.

[45] The Appellant was advised of his right to waive any objection to the constitution of the panel, and that if he did not waive his objection, he would preserve his right to object on grounds of bias to the Commission's findings if he chose to take the matter to the Saskatchewan Court of Appeal. Accordingly, he chose to maintain his objection and preserve his right.

Summary and Conclusion

[46] SGI's decision is set aside, and the following substituted:

- (a) SGI will pay the Appellant income replacement benefits for the period March 26 to July 10, 2007 [one week after the accident until the beginning of the secondary treatment program]⁶--- at the rate of 65% of the IRB calculated.
- (b) SGI will pay the Appellant full IRB for the three days he travelled to and attended in Saskatoon for secondary assessment, as agreed.

⁶ See paragraph [10]

- (c) SGI will pay the Appellant full IRB for the period July 11 to September 6, 2007 when he attended secondary treatment, as agreed.
- (d) SGI may, of course, deduct amounts already paid for those periods, and is not required to doubly compensate for the secondary assessment in (b).
- (e) Interest is payable on the amounts unpaid from the date they should have been paid until the date of our decision, as prescribed by section 193(9) of the *Act*, and after that until payment, pursuant to *The Interest Act (Canada)*, section 3.⁷
- (f) No finding is made with respect to the Appellant's entitlement to IRB after September 6, 2007.
- (g) The Appellant is entitled to claim from SGI his reasonable costs of travel and accommodation in attending the pre-hearing conference and the hearing, and to the return of his application fee. We had no evidence to support his claim for "consultant fees" or whether the advice he received was helpful in presenting his case, and therefore a "reasonable expense" under section 96(1) of the *PIBR*. Any evidence he has in this regard shall be reviewed by SGI in the usual way, under sections 193(11) and (12) of the *Act* and he shall be compensated accordingly, to the extent appropriate. However, we specifically do not allow any amount for "consultant fees" for any work done after the pre-hearing meeting, as any advice he may have received on the issue of bias was not helpful to him or to the Commission.

Dated at Regina, Saskatchewan, on February 29, 2008.

Ann Phillips, Q.C., Chair

Beverly Cleveland, Commission Member

Barbara Tomkins, Commission Member

⁷ 3. Whenever any interest is payable by the agreement of parties or by law, and no rate is fixed by the agreement or by law, the rate of interest shall be five per cent per annum. R.S., c. I-18, s. 3.

