

Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *E.R. v. Saskatchewan Government Insurance*,
2008 SKAIA 016
Date: 20080312
File: 043 of 2006

BETWEEN

E.R., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
E.R., for the Applicant
Joan Eremko, for the Respondent

Before: **Ann Phillips, Q.C., Chair**
Conrad Hnatiuk, Commission Member
Beverly Cleveland, 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
February 12, 2008

DECISION

[1] E.R., the Appellant, appeals a decision of Saskatchewan Government Insurance (SGI) dated February 24, 2005 denying him a permanent impairment benefit under section 175 of Part VIII of *The Automobile Accident Insurance Act*¹ based on forensic toxicology analysis and that he was more than 50% responsible for the accident.

[2] The Appellant's appeal was filed on April 11, 2006 and more than 180 days after the date he received² the decision letter and SGI says his right to appeal the decision is time-barred and that the Commission has no entertain an appeal of SGI's decision dated February 24, 2005.

[3] The purpose of this hearing was to determine whether the Appellant's appeal of SGI's decision was filed with the Automobile Injury Appeal Commission on a timely basis.

FACTS

[4] The Appellant was injured in a single vehicle roll-over accident on May 14, 2004 that resulted in criminal charges. He made auto damage and injury claims to SGI and was denied coverage in separate letters dated October 12, 2004 (auto damage) and February 24, 2005 (permanent impairment). The Canada Post AR card indicates the Appellant received the letter respecting permanent impairment on February 24 or 25, 2005. The Appellant retained and

¹ Section 175 Notwithstanding any other provision of this Part [VIII], an insured is not entitled to any lump sum benefit for a permanent impairment pursuant to Division 7 to which the insured would otherwise be entitled if:

- (a) the insured is more than 50% responsible for the accident; and
- (b) the insured:
 - i. at the date of the accident;
 - A. was the operator or had the care and control of a motor vehicle involved in the accident; and
 - B. was under the influence of alcohol or drugs to such an extent that the insured was incapable for the time being of having proper control of the motor vehicle;
 - ii. was convicted, with respect to the accident, of:
 - A. an offence pursuant to paragraph 253(a) or (b), subsection 254(5) or subsection 255(2) or (3) of the *Criminal Code*; or
 - iii. [not relevant in this case]

² February 24 or 25, 2006, Canada Post A/R card

instructed legal counsel respecting both the criminal matter and the SGI matters and testified he was confident his instructions included handling the injury claim.³

[5] Section 177 of *The Automobile Accident Insurance Act* provides the Appellant may file an appeal within 180 days of receipt of the determination under section 175 (denying him permanent impairment benefits). Calculated from February 25, 2005, the 180 day period ended August 24, 2005. The Appellant's appeal was received April 11, 2006.⁴

[6] The Appellant believes that he was told by someone at SGI (either the personal injury representative, Kathy Bryant or the auto claims adjuster, Maureen Forsberg) that he could file his appeal after the criminal charges had been dealt with. He suggests this was misrepresentation and relies on s. 17(b) of *The Limitations Act* that the 180 day limitation period does not apply as a result. It reads:

Concealment

17 The limitation periods established by this Act or any other Act or regulation are suspended during any time in which the person against whom the claim is made:

- (b) wilfully misleads the claimant as to the appropriateness of a proceeding as a means of remedying the injury, loss or damage.

[7] Alternatively, he suggests that SGI by its conduct or actions waived the 180 day limitation period and relies on the doctrine of estoppel.

Misrepresentation

[8] The Appellant testified that after he received the February 24, 2005 letter he believed he called SGI and asked if he should file an appeal. Despite a firm belief of what he'd been told, the Appellant was unable to confirm who he had talked to at SGI – other than to say either Kathy Bryant, personal injury representative, or Maureen Forsberg, auto claims adjuster. He recalls that he was told he didn't have to file an appeal because there might not be anything to appeal and to wait until after the criminal matter was over.

³ See para 10

[9] A review of the injury notes between March 23 and September 1, 2005, being the time period after the decision denying permanent impairment benefits and the expiry of the time period to appeal, showed no record of any phone calls between the Appellant or the Appellant's wife and Kathy Bryant. The Appellant wondered if it was possible that a conversation took place but that it hadn't been recorded or got lost.

[10] Ms. Bryant testified an injury note can only be changed or deleted on the same day it is made. After the February 24, 2005 decision letter denying permanent impairment benefits, Ms. Bryant told us she was contacted by the Appellant's lawyer in March 2005 and asked how SGI determined he was impaired and at fault. This conversation was documented in the injury notes. Ms. Bryant had no other communication with the Appellant respecting permanent impairment benefits until September 26, 2005 when he inquired about payment for scarring and she advised him benefits had been denied in February.

[11] The Appellant's wife testified that she did a lot of the correspondence for her husband and that she talked to Kathy Bryant and Maureen Forsberg. The Appellant's wife told us her understanding was similar to her husband's and that "we didn't have to worry about it until after the charges were dealt with". She doesn't recall anything about "permanent impairment" but they (SGI) weren't going to do anything until this went to court. In reviewing the note made by Ms. Forsberg on July 18, 2005, the Appellant's wife acknowledges it only refers to the car but her memory was they talked about the 180 day time period and the impression she had was everything was OK until after the matter went to court.

[12] Ms. Forsberg has been an auto claims adjuster for more than 20 years and testified that she has no access to the injury claims notes and that if anyone asked her about an injury claim she would tell them to call the PIR because she doesn't know about or have anything to do with injury claims. Ms. Forsberg told us she recalls the conversation referred to by the Appellant's

⁴ Section 177 A claimant who disagrees with a determination of the insurer pursuant to section 174 or 175 may appeal the determination to the Court of Queen's Bench or the appeal commission, in the prescribed manner, within 180 days after receiving written notice of the insurer's determination.

wife about giving the Appellant's lawyer information on the auto claim but that she wouldn't know anything about a 180 day time period (which is consistent with the claim note).

[13] Both the Appellant and his wife candidly acknowledged their efforts were focused on the criminal charge that was eventually stayed on September 13, 2005.

[14] SGI's injury notes do cover two conversations of Ms. Bryant with the Appellant and his wife before the decision letter was sent. On September 27, 2004, she recorded: "He put in the claim because he would like permanent impairment benefits for his scars. I advised that if he is charged and convicted of impaired driving, he won't be entitled to permanent impairment benefits. I told him that even if he is not convicted, he may still not be entitled depending on his blood alcohol readings. I told him we won't pay these benefits until after the court has made a decision."

[15] On January 11, 2005, she recorded: "[The Appellant's wife] said [the Appellant] was wondering if he should be getting photos or anything done for his scarring. I told her first we will need to wait until the outcome of the court to see what happens with that."

[16] We believe that it is those conversations the Appellant and his wife recall. We do not consider that SGI made misrepresentations, and in particular, misrepresentations with respect to the time for appealing. The February 24, 2005 decision letter was not sent until after an opinion on his blood alcohol level had been ordered (February 1) and obtained (February 9). The letter is clear on the time limit of 180 days.

[17] We are satisfied that there were no discussions with SGI after the February 24 letter that are remotely relevant other than the one with the Appellant's lawyer in March 2005, referred to in paragraph [10], and the one with the Appellant's wife in July 2005, referred to in paragraph [12], and are satisfied that neither of them was a misrepresentation.

[18] Having regard to all the evidence, both oral and documentary, we are satisfied and find there was no misrepresentation, willful or otherwise, by Kathy Bryant or Maureen Forsberg

respecting any matter but in particular the 180 time limit to appeal the decision of February 24, 2005 denying permanent impairment benefits.

Estoppel

[19] The Appellant refers us to two cases respecting this legal argument: *Ryan v. Moore* 2005 SCC 18 at para 5; *Montreal Trust co. v. Williston Corp*, 2002 SKCA 91 at para. 28. Although estoppel has been raised as an argument before us previously, counsel for SGI raises for the first time that *The Automobile Accident Insurance Act* is a statutory scheme and the doctrine of estoppel does not bind the Crown, and that SGI is a Crown agent.

[20] The four elements of estoppel by representation as set out in the *Montreal Trust* case noted above are:

1. a representation of an existing fact or promise about the future;
2. an intention, or reasonable presumption of an intention that the representation be acted upon;
3. reliance upon the representation; and
4. alteration of position to the party's detriment.

[21] As indicated above, we find there was no representation made that the 180 day time period would not apply and the argument of estoppel must fail not having met test # 1. We do not have to decide and leave for another day to consider whether SGI is bound by equitable remedies such as estoppel by representation.

[22] Lastly respecting waiver, we find there was no waiver by word or action and also note that Section. 77 of *The Automobile Accident Insurance Act* provides:

Waiver to be in writing

77 No term or condition of this Act shall be deemed to be waived by the insurer in whole or in part unless the waiver is stated in writing and signed by an officer of the insurer.

[23] By agreement of the parties, SGI assessed the Appellant's permanent impairment at 8.96% whole body impairment for a benefit of \$13,571.27.

CONCLUSION

[24] We find there was no willful or any misleading representation by any employee of SGI and in particular by either Maureen Forsberg or Kathy Bryant that the Appellant did not have to file an appeal of SGI's denial of permanent impairment benefits until after the criminal matters had been dealt with or after 180 days from receipt of the decision letter. The Appellant and his wife put their case as strongly as it could have been, but they did not cross the line of "improving the facts". They acknowledge they could not remember the details of the conversations they had, and even that they might be mistaken, and we appreciate their frankness and candour. They may well have believed that the time period for filing their appeal was suspended pending the (criminal) court case but there is no evidence to that effect.

[25] We find the appeal from the SGI decision dated February 24, 2005 was not brought within the mandatory time period and that is fatal to the Appellant's claim. The appeal is dismissed.

Dated at Regina, Saskatchewan, on March 12, 2008.

Ann Phillips, Q.C., Chair

Conrad Hnatiuk, Commission Member

Beverly Cleveland, Commission Member