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What Happens if I Make a Mistake? (Accident Benefits)

The fact is that people make mistakes at work. Mistakes will happen to the most diligent of workers and in obvious circumstances. The issue of addressing mistakes in the accident benefits world is somewhat complicated in that an insurer has a duty of good faith to treat its insured fairly and properly. If an insurer does not act in good faith, it is potentially subject to a special damages award which is designed to essentially "teach the insurer a lesson" for not acting in a proper manner. Sometimes insurers make innocent or even negligent mistakes when adjusting their files due to the strict timelines imposed by the *Schedule*, the sheer volume of files they are handling, and simple oversight. When an insurer makes a mistake in adjusting a file to the detriment of the insured, the adjuster will certainly hear about it from the claimant/lawyer. Not surprisingly, when a mistake is made to the benefit of the claimant, rarely is a phone call received. When a mistake is made however, insurers should realize that they are not bound by this mistake for the life of the file. Mistakes can be corrected.

There are two legal principles that are relevant to whether an accident benefits insurer can correct a mistake it has made: (a) Waiver and, (b) Estoppel.

Waiver and Estoppel: The Basics

In *Budd and the Personal Insurance Company* (2001), the following principles were set-out for waiver to be applicable:

1. A party must knowingly forego reliance upon some known right or defect: one should not be able to waive rights of which one was not fully aware or apprised. [*Marchischuk v. Dominion Industrial Supplies Ltd.* (1991)]
2. The conduct purporting to be a waiver must be express and unequivocal. [*Northern Life Assurance Co. of Canada v.Reison*, [1977].
3. What must be ascertained is a conscious intention to abandon a known right. [*Saskatchewan River Bungalows Ltd. et al. v. Maritime Life Assurance Co.* (1994)]

In *Bissoon and Pilot Insurance Company* (1997), The Director's Delegate summarized the principle of estoppel as follows:

> "If [the insurer], by words or conduct, made representation to [the applicant] with the intention and the result of inducing him to alter his position in a way that ended up being to his detriment, then it is estopped from arguing a position substantially at odds with its previous representation."

Essentially what this means is that an insurer must knowingly, willingly, and expressly advise an claimant that it knows that the claimant was in violation of a certain matter and will not take any action regarding it. If an insurer accidentally or even negligently does something to the benefit of a claimant, then it has not waived its right to correct that mistake into the future within the bounds of the *Schedule*. For instance, if an adjuster expressly tells a claimant that: (a) he knows that the claimant does not qualify for income replacement benefits because he has never worked a day in his life and (b) that the insurer has purposely chosen to ignore the *Schedule* and pay income replacement benefits in any event; then an insurer has waived its right to deny this benefit on these grounds. On the

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other hand, if an overworked adjuster accidentally mixes-up a file and erroneously pays an income replacement benefit to the same claimant above for a year until this is realized, the insurer is not estopped from ceasing to make ongoing payments.

Indeed, certain provisions of the *Schedule* show a legislative intention that insurers make payments promptly on the understanding that they may recover payments made in error. Section 35 of the *Schedule* requires an insurer to promptly determine whether a benefit is payable, and if it determines that it is payable, pay it within 14 days after receiving the application. Section 46 imposes an interest rate of 2 per cent per month compounded monthly on overdue payments. These sections encourage an insurer to pay first and investigate later. Section 47 provides for the recovery of payments where an insurer has now discovered through its investigation that it has paid a benefit in error.

Examples

In *McDonald v. Guarantee Company of North America* (2002) the claimant was charged and convicted of assault under s.266 of the Criminal Code for an assault which would disentitle him to accident benefits. The claimant did not fully disclose this specific conviction to the insurer (but did disclose some details of a conviction) and received accident benefits until the insurer discovered that they were paying to the claimant accident benefits in error. The claimant argued that Guarantee waived its rights to the repayment of accident benefits, since it knew or should have known that he had been convicted. Alternatively, it should be estopped from repayment because he detrimentally relied on the payments.

The Arbitrator found that the insurer made a mistake in not noticing the reference to the charge in the application or in the other materials and in not following up with Mr. McDonald. However, a mistake is not a waiver, and insurers are entitled to repayment even if they make mistakes, as s. 47(1)(a) provides that a person shall repay to the insurer any benefit "paid to the person as a result of an error on the part of the insurer."

In *Quarashi v. Belair* (2002), a taxi driver was assaulted by a passenger and put forth a claim for accident benefits. Initially, Belair thought that Mr. Quraishi was covered and paid income replacement benefits. Belair terminated income replacement benefits after it received an opinion from its counsel that the incident was not an "accident." Mr. Quraishi argued that Belair had waived its right to terminate benefits. The Arbitrator heard no evidence that Belair knew that Mr. Quraishi was not entitled to benefits but paid them regardless. Accordingly, it was found that Belair did not waive its right to deny benefits on the grounds that Mr. Quraishi was not involved in an "accident."

In *Manzanares v. Allstate* (2003) the claimant had a valid G1 permit to operate a motor vehicle at the time of accident. Under Ontario's graduated licencing system, he was required to have a fully licenced driver in the front seat with him all the time he drove. Mr. Manzanares violated the terms of his novice licence as he did not have another qualified driver with him at the time of the accident. Mr. Manzanares' breach of his novice licence restriction constitutes operating a vehicle without a valid driver's licence within the meaning of subsection 30(1)(b) of the *Schedule*. Nonetheless the insurer initially paid to the claimant benefits and the claimant alleged that the insurer was estopped from denying ongoing payment of same.

The evidence supported that Pembridge knew at the commencement of Mr. Manzanares' claim that he was violating his licence restriction at the time of the accident. The adjuster testified that she was very busy with many files and she overlooked the exclusion. Pembridge knew about this exclusion, and neglectfully paid benefits. Despite this, there was nothing in the evidence to imply an intention to abandon or give up the exclusion. The Arbitrator found that Pembridge did not waive the subsection 30(1)(b) exclusion in the *Schedule*, and was allowed to assert that the claimant was driving without a valid licence at the time of the accident. This decision was upheld on Appeal.

Of course, the *Schedule* cannot be misconstrued as being overly forgiving to an insurer. For one thing, the *Schedule* creates firm deadlines for an insurer to respond to treatment plans and OCF-22s which give little room for error. Furthermore, the repayment provisions of Section 47 limit to what extent an insurer can recover from an insured for payments made and contains certain procedural hurdles.

Conclusion

Courts seem to realize that insurance companies are composed of people who are doing a job, and that sometimes mistakes are made. If the mistake is one that results in the claimant receiving an unjust reward, the Courts are willing to rectify these past errors. No one wants to see a claimant profit unfairly. Although an insurer may not be able to recoup all benefits it paid in the past on account of its mistake, it is certainly not obligated to keep paying for it. As long as an insurer takes reasonable and appropriate action to rectify the problem once it is realized, mistakes can be rectified.

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