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1999 CarswellOnt 5520
Ontario Insurance Commission

Ironside v. Royal Insurance Co. of Canada

1999 CarswellOnt 5520

James Ironside, Applicant and Royal Insurance Company of Canada, Insurer

Renahan Member

Heard: December 14-15, 1998

Judgment: January 19, 1999

Docket: A97-001143

Counsel: John R. McCarthy, for Mr. Ironside

Nestor E. Kostyniuk, for Royal Insurance Company of Canada

Subject: Insurance

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Insurance

[XII](#) Automobile insurance

[XII.5](#) No-fault benefits

[XII.5.e](#) Disability benefits (loss of income payments)

[XII.5.e.ii](#) Entitlement

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Insurance

[XII](#) Automobile insurance

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Insurance

[XII](#) Automobile insurance

[XII.5](#) No-fault benefits

[XII.5.i](#) Practice and procedure on claim for benefits

[XII.5.i.ix](#) Miscellaneous

Headnote

Insurance --- Automobile insurance — No-fault benefits — Disability benefits (loss of income payments) — Entitlement — "Employed"

Insurance --- Automobile insurance — No-fault benefits — Disability benefits (loss of income payments) — Calculation

Insurance --- Automobile insurance — No-fault benefits — Practice and procedure on claim for benefits

Table of Authorities

Statutes considered:

Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28

Generally — referred to

Insurance Act, R.S.O. 1990, c. I.8

Generally — referred to

s. 268.3 [en. 1993, c. 10, s. 27] — considered

s. 282 — referred to

s. 282(10) — referred to

s. 282(11) — referred to

Regulations considered:

Insurance Act, R.S.O. 1990, c. I.8

Statutory Accident Benefits Schedule — Accidents after December 31, 1993 and before November 1, 1996, O. Reg. 776/93

Generally

Pt. VI

s. 1 "personal and vocational characteristics"

s. 5

s. 29(2)

s. 29(3)

s. 83(a)

Renahan Member:

Issues:

1 The Applicant, James Ironside, was injured in a motor vehicle accident on October 25, 1994. He applied for and received statutory accident benefits from Royal Insurance Company of Canada ("Royal"), payable under the *Schedule*. The *Statutory Accident Benefits Schedule - Accidents after December 31, 1993 and before November 1, 1996*, Ontario Regulation 776/93, as amended by Ontario Regulations 635/94, 781/94 and 463/96. O.R. 776/93 was extensively modified by O.R. 781/94; accordingly, where necessary, "1994 Schedule" refers to the original O.R. 776/93, and "1995 Schedule"

refers to O.R. 776/93 as amended. The parties could not agree on the amount of Mr. Ironside's pre-accident earning capacity and were unable to resolve their dispute through 1 mediation. Mr. Ironside applied for arbitration at the Financial Services Commission of Ontario Effective July 1, 1998, the Ontario Insurance Commission was changed to the Financial Services Commission of Ontario, pursuant to the *Financial Services Commission of Ontario Act*, S.O. 1997, c.28. under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

2 The issues in this hearing are:

1. Was Mr. Ironside self-employed at the time of the accident?
2. If Mr. Ironside was self-employed, what is his gross annual income from self-employment within the meaning of subsection 29(2) of the *Schedule*?
3. Is Mr. Ironside entitled to a special award pursuant to subsection 282(10) of the *Insurance Act*?
4. Is either party entitled to expenses of the arbitration proceeding pursuant to subsection 282(11) of the *Insurance Act*?

Result:

3

1. Mr. Ironside was self-employed at the time of the accident.
2. Mr. Ironside's gross annual income from self-employment within the meaning of subsection 29(2) is \$22,000.
3. Mr. Ironside is not entitled to a special award.
4. The issue of entitlement to expenses of the arbitration proceeding is deferred.

Evidence and Analysis:

Background:

4 James Ironside suffered soft tissue injuries to his back and shoulder in a motor vehicle accident which occurred on October 25, 1994. At the time he was employed as a shift captain in the Midland Fire Department. As well, he and his wife were equal shareholders in a numbered company which carried on business as Georgian Bay Performance Boats. The business never showed a profit.

5 Royal paid Mr. Ironside income replacement benefits for 104 weeks based on his income from employment with the fire department. Part VI of the *Schedule* sets out the rules for payment of a weekly loss of earning capacity benefit where the insured qualifies for income replacement benefits for 104 weeks. In general, the weekly loss of earning capacity benefit is based on the amount by which the insured's pre-accident earning capacity exceeds his residual earning capacity. The parties agreed on Mr. Ironside's residual earning capacity and his pre-accident earning capacity from his employment as a firefighter. They could not agree on whether his pre-accident earning capacity included an additional amount based on income from Georgian Bay Performance Boats.

6 Subsection 29(2) provides that the pre-accident earning capacity of a person who was self-employed at the time of the accident is based on the gross annual income from employment that the person could reasonably have earned at the time of the accident, having regard to the person's personal and vocational characteristics at that time. Mr. Ironside argued that he was self-employed at the time of the accident and that he had a pre-accident earning capacity as a result of his skills as an outboard motor mechanic. Royal argued that Mr. Ironside was not self-employed at the time of the accident, but that if he was self-employed, the gross annual income he could reasonably have earned was zero.

Georgian Bay Performance Boats:

7 Mr. Ironside became interested in modifying outboard marine motors through working alongside a friend. In time, he developed an expertise in increasing the horsepower of outboard motors, particularly two-stroke, V-6 motors. The work involved taking the motors apart and using precision dye grinders to balance the motor's piston rods and connecting rods. He also changed the configuration of pistons and modified engine ports and mufflers to increase the volume of air admitted to the engine. These modifications could increase horsepower from 225 to 280 horsepower. He started Georgian Bay Performance Boats in 1986 as a sole proprietorship.

8 Mr. Ironside worked full-time at the fire department either four ten-hour day or night shifts followed by four days off. He could usually sleep when he worked the night shift and then work on motors during the day. With holidays and other time off he worked only 60 day shifts per year for the fire department.

9 He testified that his shop was on the property where he and his wife lived and that he worked on motors during the night and devoted 40 to 50 hours per week to his business. Mr. and Mrs. Ironside testified that the business was their social life. They spent a considerable amount of time on their boats and recreational vehicles with friends and customers. A customer testified that he became friends with Mr. Ironside and travelled to boat shows with him and worked on motors with him and that he and his family spent weekends with the Ironsides. Since the business was on the property and since a large part of Mr. Ironside's social life was spent socializing and working with friends interested in boats and motors, I find that although Mr. Ironside devoted a significant amount of time to his business, part of the 40 to 50 hours a week was spent on non-business related activity around the home and with friends. I do not accept that he worked 40 hours a week every week of the year at his business.

10 Mr. Ironside developed a niche market modifying motors. He then started customizing and selling boats to go with the motors. He developed customers and a good reputation and expanded into a year round business by selling and repairing all terrain vehicles and snowmobiles. At the time of the accident he rebuilt 12 to 15 motors a year at a cost of about \$4,500 each.

11 In February 1994, about eight months before the accident, Mr. Ironside and his wife incorporated the business. At the time of the accident annual sales had increased to over \$600,000. Despite this, the financial statements of the sole proprietorship and the incorporated business always disclosed a loss. The loss for the year ending February 28, 1995 was \$14,105. Neither Mr. or Mrs. Ironside received any salary or dividends from the company.

Employment or hobby:

12 Under section 5 of the *Schedule*, employment includes self-employment. The first question is whether Mr. Ironside was engaged in employment or a hobby.

13 Mr. Ironside started working on motors as a hobby. He started Georgian Bay Performance Boats in 1986. He testified that his financial statements showed that the business operated at a loss for each of the next eight years. Royal submitted that if Mr. Ironside was operating Georgian Bay Performance Boats as a business, the only business solution at the time of the accident was to shut down the business. By continuing to operate the business at a loss, Mr. Ironside operated Georgian Bay Performance Boats as a hobby.

14 Commissioner's Guideline No. 4/96 for identifying self-employed individuals contains a definition of "business" which I adopt. A "business" is:

An activity that is carried on for profit or with a reasonable expectation of profit, including a profession, a calling, a trade, a manufacture or undertaking of any kind, an adventure or concern in the nature of trade, or a service.

15 Although Mr. Ironside was primarily motivated by the enjoyment he received from working on boats and motors and sharing that interest with like-minded individuals, I find his activity involved manufacture, service and trade. As

well, a loss of \$14,000 on sales of \$656,000 shows that his activity was nearly profitable at the time of the accident and I find that an expectation of profit in the near future was reasonable.

Employee of company or self-employed:

16 The Commissioner's Guideline for identifying self-employed individuals states that "an individual is self-employed if the business he or she derives his or her remuneration from is not incorporated under any law" and "if the individual derives his or her remuneration from an incorporated business, then he or she is considered to be an employee of the corporation." Under the Guideline, Mr. Ironside is an employee because any remuneration would have to come from the company. However, section 268.3 of the *Insurance Act* provides that the arbitrator need only consider the Guideline. Arbitrators have consistently considered the substance as well as the form of an applicant's business arrangements to determine whether he or she is an employee or self-employed.

17 The most significant factors which tend to show that Mr. Ironside was an employee of Georgian Bay Performance Boats was that he and his wife incorporated and held shares in the company and they, through their accountant, treated the company as a separate entity for income tax purposes.

18 In all other respects, Mr. Ironside conducted business after incorporation the same as he had before incorporation. He continued to think of himself as self-employed. In his application for accident benefits dated November 16, 1994 he distinguished between being an "employee" with the fire department and being "self-employed" in his own business. The only evidence of remuneration he received from the corporate entity was cash receipts which he considered his own and which he did not feel he needed to account for. He and his wife continued to think of the assets of the company including the boats, the recreational vehicles and the shop in which Mr. Ironside worked, as their own property. After incorporation, Mr. Ironside continued to work hours which suited him. Finally, two customers, the operators of two other marinas and an employee testified. They spoke of Mr. Ironside as if he was the business and that Georgian Bay Performance Boats had no identity separate from Mr. Ironside.

19 Although the legal form of his business was a company, in fact, after incorporation, Mr. Ironside continued to carry on business as a self-employed individual and I find that for the purposes of the *Schedule* he was self-employed as the operator of Georgian Bay Performance Boats.

Pre-accident earning capacity:

20 The pre-accident earning capacity of a person who was self-employed at the time of the accident is defined in subsection 29(2) of the *Schedule*. It is the

net weekly income ... using the gross annual income from employment that the person could reasonably have earned at the time of the accident, having regard to the person's personal and vocational characteristics at that time.

Personal and vocational characteristics

21 Royal did not seriously contest that rebuilding outboard motors to enhance their performance suited Mr. Ironside's "personal and vocational characteristics." I therefore do not examine the definition of "personal and vocational characteristics" in section 1 of the *Schedule* in detail.

22 Mr. and Mrs. Ironside, two customers, two marina owners and an employee testified as to Mr. Ironside's "personal and vocational characteristics." They testified that Mr. Ironside enjoyed working on motors and was skilled in rebuilding outboard motors in order to enhance their performance. They also testified that there was a demand for that skill in the southern Georgian Bay area where Mr. Ironside lived and that Mr. Ironside was the only person in that area who could satisfy that demand. One customer testified that he took his motors to Toronto when Mr. Ironside could no longer work. Having regard to the definition of "personal and vocational characteristics" in section 1 of the *Schedule*, I find that employment repairing and rebuilding outboard motors suits Mr. Ironside's "personal and vocational characteristics."

The question is how much he could have reasonably earned at the time of the accident from this employment in view of the facts that he worked full-time as a firefighter and that his business operated at a loss in the eight years prior to the accident.

Income that Mr. Ironside could reasonably have earned

23 In *Gan Canada Insurance Company and David Lehman*, (FSCO P97-00064, August 10, 1998) Director's Delegate Draper discussed the meaning of pre-accident earning capacity as it is used in subsection 29(3). He wrote that the determination "requires a realistic assessment of the insured person's capacity at the time of the accident."

24 Royal's accountant interpreted subsection 29(2) such that Mr. Ironside's actual income from self-employment was what he could reasonably have earned from self-employment at the time of the accident and concluded that since his business operated at a loss, his pre-accident earning capacity was negative. I reject this opinion.

25 Whereas the determination of the income replacement benefit and pre-accident earning capacity of an employee is a mathematical calculation based on an earnings history defined in the *Schedule*, the determination of the pre-accident earning capacity of a self-employed person is an assessment based on what that person could reasonably have earned at the time of the accident having regard to the person's personal and vocational characteristics. The definition of "personal and vocational characteristics" set out in the *Schedule* is not restricted to the enumerated factors. An assessment is based on all the relevant circumstances and does not yield to mathematical certainty. Although a history of losses in self-employment is a relevant consideration in determining pre-accident earning capacity, it is not the only consideration.

26 Mr. Ironside submitted that I should determine his pre-accident earning capacity on the basis that his financial statements did not disclose all his income or, in the alternative, on the basis of what a full-time outboard motor mechanic would earn.

27 Mr. Ironside submitted that the financial statements did not accurately reflect his income and that in the year before the accident he earned \$40,000 in undeclared income from the business. Mrs. Ironside testified that she was not aware of this income until shortly before the hearing. She also testified that although the business operated at a loss, she and Mr. Ironside enjoyed benefits which had a financial value in that they wrote off personal expenses as business expenses and they had the use of brand new motor boats, snowmobiles and all terrain vehicles.

28 Throughout cross-examination both Mr. and Mrs. Ironside wavered back and forth as to whether their financial statements accurately disclosed the income and expenses of the business. No audit or other financial evidence was produced to show that the financial statements were not accurate. I do not accept Mr. Ironside's testimony that he withdrew \$40,000 in cash from the business because Mrs. Ironside could not corroborate that evidence. I find that Mrs. Ironside was more familiar with the financial aspects of the business than Mr. Ironside and that if Mr. Ironside withdrew \$40,000 in cash in 1994 she would have known about it before she prepared for this hearing in 1998. I find that the financial statements are the best evidence of the income of Mr. Ironside's business both before and after the accident and that they show that the business has always lost money.

29 Although Mr. and Mrs. Ironside wrote off home and transportation expenses as business expenses, I heard no persuasive evidence that those expenses were not legitimate business expenses. I therefore do not attribute any income to Mr. Ironside on account of home and transportation expenses declared by the company. Similarly, the use of the boats and recreational vehicles had a promotional value. I heard no reliable evidence that these business expenses were in fact personal expenses.

30 Mr. Ironside argued in the alternative that I should assess what he could have reasonably earned at the time of the accident on the basis of what a full-time experienced outboard motor mechanic would earn. Although he testified that he paid a mechanic \$27 per hour, I prefer the independent testimony of Mr. Munro who pays his experienced mechanics \$24 per hour and Mr. Sagan who pays his experienced mechanics \$22 per hour. Mr. Ironside testified that even with time off from the fire department he still had to work 60-day shifts per year when he was running his business. Both marina

operators testified that they did not have any firefighters "moonlighting" with them, although no one asked whether they would hire Mr. Ironside full or part-time.

31 Work as an employee requires that the employee work hours scheduled by his employer. Mr. Ironside did much of his work at his shop at home, at hours that suited his work schedule with the fire department. I find that Mr. Ironside could not work full-time as a firefighter and full-time as an employee at a marina.

32 I heard no evidence from an economist, self-employed mechanic, accountant or other expert as to how much Mr. Ironside could reasonably have earned at the time of the accident from his skill. However, I find that he was skilled and there was a market for that skill in the area where he lived. I find that his work had value to his business and that he could have earned income from that skill.

33 Mr. Ironside hired Rob Sangster and another employee after the accident to replace his labour until he returned to work. The cost of replacement labour is one factor to consider in assessing what Mr. Ironside could reasonably have earned at the time of the accident. Mr. Ironside's business loss increased as a result of his inability to work. The increase in this loss is another factor to consider in assessing what Mr. Ironside could reasonably have earned at the time of the accident. Assessing these amounts was difficult because the periods covered by Mr. Ironside's financial statements overlapped the date of the accident.

34 Mr. Ironside's financial statement for the year ending February 28, 1995 includes eight months in which Mr. Ironside worked and contributed to the business and four months in which he did not work and incurred additional expenses because he could not work. In evidence and argument, Mr. Ironside treated the 1995 financial statement as his sales and expenses in the 12 months before the accident, partly because that statement covered his busy season. Royal's accountant initially calculated Mr. Ironside's loss from self-employment for the 12 months immediately before the accident as \$16,770. Initially, Royal's accountant interpreted section 83(a) of the *Schedule* such that capital cost allowance was not an expense in the calculation of income from self-employment. Subsequently Director Delegate Rotter decided in *Royal Insurance Company of Canada and Aramakis*, (OIC P96-00081, January 7, 1998) that capital cost allowance was deductible. I therefore added CCA back into the calculation of the loss. In subsequent reports, Royal's accountant calculated the loss for that period as \$26,221. I heard no explanation for the difference. Mr. Ironside's financial statement for the year ending February 28, 1996 showed a loss of \$14,105. This loss is more in line with Royal's first calculation. I therefore find \$16,770 is the most reliable evidence of Mr. Ironside's loss from self-employment for the 12-month period before the accident. I heard no evidence of Mr. Ironside's losses for the 12-month period immediately following the accident. Although his 1996 financial statement covers the 12-month period starting four months after the accident, I find it shows approximately how much his losses increased after the accident and how much his wage expenses increased after the accident. I therefore find that his annual loss after the accident increased to \$45,543 and his expenses for labour increased to \$68,695.

35 I do not have the wage expenses as calculated by Royal's accountant. Although Mr. Ironside's 1995 financial statement includes four months after the accident in which Mr. Ironside was not contributing to the business, it is the best evidence of Mr. Ironside's wage expense prior to the accident. Royal is not prejudiced by this finding because Mr. Ironside's 1995 financial statement includes the four months Mr. Ironside did not contribute to the business and was incurring additional expenses for replacement labour. I therefore find that Mr. Ironside's wage expenses for the 12-month period before the accident was \$53,419.

36 The annual wage expense increased from \$53,419 to \$68,695 after the accident. I round off annual cost of replacement labour incurred as a result of the accident to \$15,000. The annual loss of profit increased from \$16,770 to \$45,543. I round off the annual loss of profits attributable to the accident to \$29,000.

37 The two marina operators testified that they pay an experienced mechanic an average of \$23 per hour. At that rate, an income of \$15,000 is earned at about 13 hours per week over 50 weeks. An income of \$29,000 is earned at about 25 hours per week over 50 weeks. I find that both amounts are factors to consider in assessing what Mr. Ironside

could reasonably have earned at the time of the accident. The average of the two is \$22,000 income earned per year at approximately 19 hours per week.

38 Mr. Ironside was on good terms with at least two marina operators who hired mechanics. Because his skill was in demand, I find that he could have done work for these people on a part-time basis as an employee or contractor. I find that Mr. Ironside's schedule with the fire department allowed him to work 19 hours per week as an employee or contractor. I heard no evidence to justify increasing or decreasing that amount or to lead me to conclude that the cost of replacement labour approach or the loss of profits approach is a more reasonable assessment of what Mr. Ironside could reasonably have earned at the time of the accident. I therefore average the two amounts to assess what Mr. Ironside could reasonably have earned at the time of the accident.

39 Accordingly, I find that Mr. Ironside could reasonably have worked as an employee or contractor 19 hours per week at the time of the accident. I find that he could have obtained work from marinas in the area and that at the time of the accident, \$22,000 is the gross annual income that he could reasonably have earned as an outboard motor mechanic.

Special award:

40 Royal's accountant treated Mr. Ironside as self-employed for the purpose of determining his loss of earning capacity benefit. Royal's lawyer denied that Mr. Ironside was self-employed in its Response to the Application for Arbitration. Mr. Ironside argued that it was unreasonable for Royal to change its position just prior to the arbitration. In my view, Royal's argument that Mr. Ironside was not self-employed, although ultimately unsuccessful, had merit and it was not unreasonable or unfair to raise this issue in its Response.

41 I find that Royal did not act unreasonably in withholding benefits.

Expenses:

42 If the parties cannot agree on entitlement to expenses of the arbitration proceeding, either party can apply to the Registrar for an appointment for me to determine the issue.

Renahan Member:

43 Under section 282 of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended, it is ordered that:

1. Mr. Ironside was self-employed at the time of the accident.
2. In calculating Mr. Ironside's loss of earning capacity benefit Royal shall include in pre-accident earning capacity gross annual income from self-employment in the amount of \$22,000.
3. Mr. Ironside is not entitled to a special award pursuant to subsection 282(10) of the *Insurance Act*.
4. The issue of entitlement to expenses of the arbitration proceeding is deferred.