

IN THE COURT OF APPEALS OF IOWA

No. 0-443 / 10-0131
Filed July 28, 2010

TONY A SCOGGINS,
Plaintiff-Appellant,

vs.

**ZURICH AMERICAN
INSURANCE COMPANY,**
Defendant-Appellee.

Appeal from the Iowa District Court for Jackson County, Gary D. McKenrick, Judge.

Tony Scoggins appeals from the district court's ruling granting Zurich American Insurance Company's motion for summary judgment. **AFFIRMED.**

James J. Roth of Roth Law Office, Dubuque, for appellant.

Bernard L. Spaeth Jr. and Kimberly S. Bartosh of Whitfield & Eddy, P.L.C.,
Des Moines, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ.

POTTERFIELD, J.**I. Background Facts and Proceedings**

On or about October 16, 2003, Tony Scoggins experienced a work-related injury involving his left elbow and left shoulder. Zurich American Insurance Company (Zurich) was the workers' compensation carrier for Scoggins's employer at the time of his injury. Scoggins was diagnosed with a strain and contusion of the elbow. Recommended treatment for this injury was conservative and included physical therapy and an elbow splint.

This treatment resolved Scoggins's shoulder injury, but he continued to have pain in his left elbow. He was diagnosed with inflammation of the left lateral epicondyle. Cortisone injections were offered, but Scoggins refused them and indicated he preferred to see if therapy would be effective.

In December of 2003, Scoggins reported a reinjury to his left elbow associated with climbing a ladder and lifting and throwing heavy objects while at work. Scoggins was diagnosed with a tear to the extensor attachment of the lateral epicondyle secondary to the October 2003 injury. Scoggins's doctor, Dr. Edwin Castaneda, advised that ninety percent of individuals with this diagnosis obtain relief of symptoms with nonsurgical measures but that recovery was slow and tedious. Scoggins's treatment involved a long cast to rest the joint and decrease the acute inflammation followed by physical therapy.

Scoggins's cast was removed on January 7, 2004, and he began physical therapy to stretch and strengthen his elbow. In February of 2004, Castaneda noted significant improvement in Scoggins's condition but continued lateral tenderness and pain with certain movements. A cortisone injection was

administered into Scoggins's left elbow, and he was instructed to continue physical therapy. By April of 2004, Scoggins began participating in a work hardening program, and his condition continued to gradually improve.

In May of 2004, Scoggins reported a reoccurrence of his pain despite his previous improvement. Castaneda opined that this exacerbation was related to Scoggins's occupation and that if Scoggins did not change his occupation, he would always have symptoms. Castaneda's report indicates that he discussed with Scoggins that surgery is effective only sixty-five percent of the time and that even with surgery, Scoggins would need to find another line of work. Castaneda referred Scoggins to occupational medicine to establish his permanent partial impairment rating.

On May 26, 2004, Dr. Rick Garrels performed an independent medical examination on Scoggins. Garrels recommended that Scoggins consider surgical intervention, reporting that Scoggins's current limitations were severe enough that the chance of improvement was "probably worth the risk" of the surgery not being successful.

On June 22, 2004, Scoggins saw Dr. William Irey for a second opinion. Irey recommended continued symptomatic treatment. On August 20, 2004, Scoggins returned to Irey for a recheck of his elbow. On that date, Irey recommended surgery and planned "to proceed at a convenient time with surgical treatment." Irey requested authorization from Zurich for the surgery. Zurich sought an opinion from Irey regarding what impact Scoggins's secondary employment as a bartender might have had on his injury. Irey responded on September 2, 2004, stating it would likely have minimal impact. On September

8, 2004, Zurich faxed authorization for the surgery to Irey's office. Irey performed the surgery on October 1, 2004.

On February 26, 2009, Scoggins filed a petition alleging bad faith and breach of fiduciary duty based on the theory that Zurich unreasonably delayed surgical treatment of his injury. On October 13, 2009, Zurich filed a motion for summary judgment on both the bad faith and breach of fiduciary duty claims. The district court granted Zurich's motion for summary judgment as to both claims. Scoggins now appeals, arguing the district court erred in granting Zurich's motion for summary judgment because there is a genuine issue of material fact as to whether Zurich's delay in authorizing the surgery was reasonable.

II. Standard of Review

We review rulings on motions for summary judgment for the correction of errors at law. *City of Cedar Rapids v. James Props., Inc.*, 701 N.W.2d 673, 675 (Iowa 2005). "Summary judgment is appropriate only when the entire record demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007). We examine the record in the light most favorable to the nonmoving party and draw all legitimate inferences the evidence bears in order to establish the existence of questions of fact. *Mason v. Vision Iowa Bd.*, 700 N.W.2d 349, 353 (Iowa 2005). "A party resisting a motion for summary judgment cannot rely on the mere assertions in his pleadings but must come forward with evidence to demonstrate that a genuine issue of fact is presented." *Stevens*, 728 N.W.2d at 827.

III. Summary Judgment

Scoggins argues that because Zurich refused, without a reasonable basis, to authorize his surgery in a timely manner after surgery was first suggested on May 26, 2004, the district court erred in granting Zurich's motion for summary judgment on his claim of bad faith.

To establish a first-party bad-faith claim, a plaintiff/insured must show: (1) the absence of a reasonable basis for denying benefits under the policy, and (2) the insurer's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. *Dolan v. Aid Ins. Co.*, 431 N.W.2d 790, 794 (Iowa 1988). "A reasonable basis exists for denying insurance benefits if the claim is 'fairly debatable' as to either matters of fact or law." *Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388, 396 (Iowa 2001). A claim is "fairly debatable" when it is open to dispute on any logical basis. *Bellville v. Farm Bureau Mut. Ins. Co.*, 702 N.W.2d 468, 473 (Iowa 2005).

Zurich did not unreasonably delay Scoggins's surgery. Though Scoggins had discussed the option of surgery with his doctors on several occasions, he did not decide to proceed with the surgery until August 20, 2004. Zurich briefly withheld authorization for surgery while it investigated how Scoggins's work as a bartender would impact his injury. On September 2, 2004, Irey informed Zurich that he believed the impact of Scoggins's bartending job on his injury would be minimal. On September 8, 2004, Zurich authorized the surgery. Scoggins's condition did not require immediate care. Nothing in the record indicates that surgery could have been scheduled for an earlier date. There is no issue of

disputed fact. Zurich's delay in authorizing treatment while it waited for information from Scoggins's doctor was not unreasonable.

AFFIRMED.