

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *R.C. v. Saskatchewan Government Insurance,*
2003 SKAIA 001
Date: 20030716
Docket: 020 of 2003

BETWEEN

R.C, Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:

R.C. and R.A., For the Applicant

John Schmidt and Lynn Henderson, For the Respondent

Before: **Ann Phillips, Q.C., Chair**
Beverley Cleveland, Commission Member
Mukesh Mirchandani, M.D., 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
June 10, 2003

DECISION

[1] The Appellant, R.C., applies for review of the decision of Saskatchewan Government Insurance (“SGI”) dated January 2, 2003 concerning his permanent impairment benefit claim.

[2] Also under review is an SGI letter to the Appellant dated February 28, 2003 responding to the Appellant’s inquiries with respect to future medical expenses that might be recovered.

[3] The Appellant also raised the question of whether SGI had improperly terminated his income replacement benefits in November, 2002. He had been determined capable of holding full time employment as a cashier, but had been unable to find an employer willing to hire him in this capacity. However, SGI’s decision on the “determined employment” was made September 9, 2002; his right to appeal this decision to the Court of Queen’s Bench expired 90 days after that. The Commission has no jurisdiction to hear an appeal from this decision, nor can it extend the period of time for appeal.¹

FACTS:

[4] The Appellant was injured in four automobile accidents, none of which were his fault. The first was July 16, 1998; the second January 13, 2000; the third September 14, 2000; and the last December 30, 2000.

[5] Before any of the accidents, he had Grade 10 education. He had worked as a gas station attendant after school and in the summer of 1993-1994, as a labourer on oil and service rigs in 1995-1996, and again in 1997, earning \$X.XX per hour. In November-December, 1997, he was employed for a few days as a bricklayer apprentice by [employer one] in [location], on 10 to 12 hour shifts at \$XX.XX per hour. He was a casual, on-call worker,² and did other occasional odd jobs (non-paying) for employer one prior to the accident. He had an opportunity to work for employer one again in May, 1998 but declined. He was not working at the time of the accident.

¹ *Mintzler v. Saskatchewan Government Insurance*, 2001 SKCA 54.

² Appendix “A”

PERMANENT IMPAIRMENT BENEFITS:

[6] *The Personal Injury Benefits Regulations*, Appendix B, sets out definitions and a conceptual framework for determining permanent impairment benefits:

Definitions

“disability” is defined as an alteration of an individual’s capacity to meet personal, social, or occupational demands. While not all cases of impairment lead to disability, only in the case of impairment can disability develop. Disability usually refers to a specific activity or task the individual cannot accomplish. A disability arises out of the interaction between impairment and external requirements.

“impairment” is defined as a loss, loss of use, or derangement of any body part, organ system, or organ function. A medical impairment can develop from an illness or injury.

“permanent impairment” is an impairment that has become static or has stabilized during a period of time sufficient to allow optimal tissue repair and one that is unlikely to change significantly with further therapy. This time period is referred to as Maximum Medical Improvement (MMI). MMI does not preclude follow-up, maintenance or palliative care or an alteration of the medical condition with the passage of time.

Conceptual Framework

To rate impairment, it is necessary to weigh the relative functional importance of various structures of the human body in relation to the function of the whole person. Through ad hoc proceedings, such values, expressed as a percentage of the whole person’s function, have been assigned to the various physical and psychological impairments with international acceptance. All impairment ratings listed in this manual are “whole person” impairments.

To calculate an injured person’s total whole person impairment rating, the different impairment percentages must be combined by use of Appendix C. If three or more regional impairments must be combined, the two largest impairment percentages should be selected first to determine their adjusted combined value. After their combined value has been calculated, this adjusted value is combined with the third, fourth and so on, in descending numerical order, until all regional impairments have been included in the calculation.

[7] In the accidents, the Appellant incurred serious injuries the effects of which continue. He is entitled to receive and has received permanent impairment benefits from SGI, which were assessed at several different times.

Shoulder Range of Motion

[8] The most recent assessment was done December 23, 2002, in which the permanent whole body impairment was calculated at 21%. It was done by Dr. Murray Flotre, SGI’s Medical Director, Rehabilitation Services Unit, based upon a file review:

“Based on the Progress Report Supplement sheet filled out on [the Appellant’s] right shoulder (with the left shoulder used as a comparison), he has the following percent deficits of range: abduction 44%, adduction 86%, flexion 40%, extension 20%, external rotation 33%, and internal rotation 56%. Based on Part 1, Division 1, Subdivision 1, Section 4(c) of our Regulations these percent deficits translate to the following permanent whole body impairment values: abduction 2.6%, adduction 0.5%, flexion 1.2%, extension 0.5%, external rotation 0.7%, and internal rotation 1%. This gives a total of 6.5% permanent whole body impairment for decreased range of motion of [the Appellant’s] right shoulder. This is rounded to 7% for the purpose of combining with other values.

We now have the following permanent impairment values: 2% for scarring from the right shoulder arthroscopy, 6% for the shoulder instability, 7% for decreased range of motion of the right shoulder, and 8% for the disc protrusions. To arrive at a new final total we must use the Table of Successive Remainders from our Regulations to combine the values greater than 5%. In this case we use the Table to combine the 8% and 7% values to get 14%, which is combined with the 6% value to get 19%, to which is added the remaining 2% to get 21% permanent whole body impairment.”

[9] This represents an increase over the 16% permanent whole body impairment calculation performed August 9, 2001. The difference is based on a reassessment of his shoulder range of motion (“SGI Progress Report Supplement”) done December 9, 2002, in which the injured right shoulder was compared with the left.

[10] The Appellant and his mother, who assisted in his presentation, thought that it was inappropriate for his right shoulder to be assessed against his left shoulder, since, they suggested, his left shoulder had also been through four accidents, and therefore could not have been normal. In fact, the Progress Report Supplement does show a range of motion for the left arm which differs from the definition of “normal” provided in the document.³

[11] It is unfortunate that Dr. Flotre was not available to testify on the methods he used to calculate the deficits, and it is also unfortunate that there was no medical evidence offered on behalf of the Appellant to support his theory. **As a result, we are unable to conclude that there was an error made in this assessment.**

[12] Confusion arose because the Appellant and his mother thought that SGI was using Manitoba’s regulations to determine a rating for the posterior instability in his right shoulder, in

³ Normal abduction 180/adduction 50. (the Appellant’s) Measured abduction 160/adduction 35.
 Normal inferior rotation 90 to 90 superior rotation. (the Appellant’s) Measured inferior rotation 60 to 85 superior rotation.
 Normal flexion 180 to extension 50. (the Appellant’s) Measured flexion 150 to extension 165.

August, 2001. Strictly speaking, this issue was not before the Commission. However, since the matter was clarified at the hearing (we believe to the Appellant and his mother's satisfaction), we outline the basis of that clarification.

[13] The *Personal Injury Benefits Regulations* in effect in 2001⁴ dealt with four forms of shoulder impairments only: rotator cuff rupture, ankylosis, restriction of shoulder joint movement, and loss of the head of the humerus.⁵

[14] The *Act* then in force provided:

Section 156

(1) The insurer shall evaluate a victim's permanent impairment as a percentage that is determined on the basis of the prescribed schedule of permanent impairments.

(2) If a victim's permanent impairment is not listed on the prescribed schedule of permanent impairments, the insurer shall determine a percentage for the permanent impairment using the prescribed schedule as a guide.

[15] The Appellant's right shoulder, which recurrently dislocated, did not fit in any of the existing categories. SGI did assess this as a permanent impairment, and referred to MPI's new schedule, which recommended a 6% rating for recurrent subluxation with a labral tear. In 2002, the guidelines in MPI's schedule were adopted word for word in Saskatchewan.⁶ It appears obvious that SGI did not use its own existing prescribed schedule as a guide: it simply used Manitoba's. If this issue had come before the Commission in 2001,⁷ SGI's decision would have been set aside on that ground.

Disc Protrusion

[16] The Appellant also questioned the assessment of 4% for each disc protrusion. This assessment had been made on August 9, 2001 based on an MRI scan of November 24, 2000. Dr. Flotre assessed the disc protrusions at L4, L5 and L5-S1 at 4% each, based on recommendations

Normal external rotation 90 to 90 internal rotation. (the Appellant's) Measured external rotation 75 to internal rotation 85.

⁴ Chapter A-35 Reg 3 (effective January 1, 1995) and not amended.

⁵ Appendix B, Part 1, Anatomical and Physiological Deficits, Division 1, Musculo-Skeletal System, Subdivision 1, Upper limb and scapula, section 4, Shoulder.

⁶ By Saskatchewan Regulation 70/2002.

⁷ If there had been a Commission, which was not the case.

from *The Personal Injury Benefits Regulations* in effect at the time, Part 1, Division I, Subdivision 3, section 21(a)(iii).

[17] The Appellant referred to Dr. Ekong's report dated December 19, 2000, which also referred to the MRI scan showing that the disc protrusion at L4-L5 "seems to be causing significant nerve root compression" whereas the other caused "questionable nerve root compression". The Appellant suggested that the nerve root compression should have resulted in a higher assessment for L4-L5. In addition, the Appellant noted that the fourth automobile accident in late December, 2000 occurred *after* his appointment with Dr. Ekong. The Appellant relied on the February 4, 2003 report from Dr. Ekong at which time he had complained that his symptoms were much worse. He found it difficult to get out of bed on occasion. Dr. Ekong's examination showed slight restriction of lumbar flexion. The lateral rotation caused moderate pain. Straight leg raising was 70° on the left and 60° on the right. Muscle power and sensation were normal. Both knee reflexes were normal but the ankle reflexes were absent. Dr. Ekong concluded:

"This patient appears to continue to have significant back pain and clodication. It appears that he is significantly disabled by the symptoms. It would have been nice to obtain follow-up MRI on him to evaluate the status of his disc problem more. He however does not seem to be interested in further management as such. It appears that his main area of interest is to have further documentation prepared for SGI. As a result, I have not made any arrangements for further investigations. We will send a copy of this report to SGI if they request."

[18] This may be compared with Dr. Ekong's report of December 19, 2000:

"...the range of back movement was slightly impaired. The straight leg raising was 70° on each side. Muscle power, reflexes and sensation were normal. The MRI scan that he brought along does show disc protrusions at L4-5 and L5-S1 levels. They are central and the one at L4-5 seems to be causing significant nerve root compression. The L5-S1 disc protrusion causes questionable nerve root compression."

[19] As part of the Residual Capacity Evaluation, the Appellant was examined by Dr. V. Thackeray in May, 2001, who also referred to the MRI. Thackeray presented the following information on range of motion in the spine:

"Cervical spine had full range of motion. Dorsal back had limited movement. Lumbar spine was limited in most directions. On flexion he can flex getting his fingertips near the floor and develops a left-sided curve. He had 3/4 of normal extension, reports more pain on extension than flexion. Lateral bending is 50% of expected in both directions and on left rotation he has virtually no movement from the lower dorsal area to the sacrum but has better movement to the right. He

reports with both of these movements pain on the right flank area which he says is sharp like something catching or grabbing... Active straight leg raise was 70° on the right and 60° on the left. Hamstring tightness was a factor. Laying in the right figure 4 position and right Gaenslen's test caused some discomfort in the low back which he did report was in the sacroiliac areas. Internal rotation at the hips when done in sitting position caused pain in the low back centrally and in the sacroiliac areas. He reported this pain was similar to the pain from the figure four test."

[20] As stated above, it is SGI's decision dated January 2, 2003 reviewing the permanent impairment benefit claim is the subject of this application.

[21] While Dr. Ekong's December, 2000 assessment was done before the fourth accident, it had occurred five months before the Appellant saw Dr. Thackeray in May, 2001. Dr. Ekong's February, 2003 letter does say "it would be nice to have another MRI". We do not disagree with SGI's letter of February 28, 2003 that:

"The consultation letter of Dr. Ekong's obtains (sic) no new objective medical information. He states that you were not interested in further management. As stated earlier, if you present new objective medical findings SGI would be prepared to look at them but this is your and your physician's responsibilities.

Funding will not be considered until such time."

FUTURE MEDICAL EXPENSES:

[22] The Appellant raised the practical question of whether as a claimant he has to fund an out-of-province MRI. As this is an example of a question likely to arise in many applications to this Commission, we emphasize that each case will be decided on its particular facts. However, the legal framework under which we operate includes the following:

Section 193(5):

Unless the claimant puts them in issue, the insurer's finding of facts must be adopted on appeal.

Section 193(6):

If the claimant puts the insurer's finding of facts in issue, the appeal commission may hold a hearing to determine the facts.

[23] To put findings of fact "in issue", a claimant must present *evidence* from which a different finding of fact can be made. This could be done by introducing a medical report, or providing oral testimony, whether in person or by telephone, showing a different state of facts from those relied on by SGI. It could be done by showing that SGI's evidence does not address a

material fact at all, so there is a gap in the proof. But if the application is based on a different state of facts, mere denial of the facts is not enough. Once a different state of facts has been introduced in evidence, the Commission determines on a balance of probabilities (51%-49%) which is more convincing.

[24] In addition, the Commission can review the legal correctness of SGI's decision, whether or not the finding of facts is in issue. In reviewing a *decision* of SGI, the Commission has the same jurisdiction under section 193(7) of the *Act* that the Court of Queen's Bench previously had under section 198(3), to:

- “(a) set aside, confirm or vary the insurer's decision; or
- (b) make any decision that the insurer is authorized to make pursuant to this Part.”

[25] It has been frequently held by the Court of Queen's Bench that discretion to make decisions must be exercised in a judicial manner. The discretion can only be exercised in favour of the applicant if it is demonstrated that the decision of SGI (not to advance further funds) was erroneous; or based on erroneous assumptions; or at the very least, the decision was unreasonable.⁸ The Commission will exercise its discretion in the same way.

[26] In this case, we are all of the view that **SGI's decision of February 28, 2003 declining to provide funding for an out-of-province MRI was appropriate**, based on the medical examination done in May, 2001 by Dr. Thackeray, after all four motor vehicle accidents, and our interpretation of Dr. Ekong's report of February 4, 2003. We were also concerned that the Appellant had not arranged to put himself on a waiting list for an in-province MRI, and was unable to provide any reason for not doing so.

[27] With respect to future medical expenses, SGI's obligations are set out in section 112 of the *Act*:

⁸ *Belchamber v. Saskatchewan Government Insurance* [1997] TWL QB97557; *Donen v. Saskatchewan Government Insurance*, [1998] TWL QB98224; *Collis v. Saskatchewan Government Insurance*, [1998] TWL QB98113.

(1) In this section, “rehabilitation” includes any or all of the following measures, programs and treatments that the insurer considers necessary or advisable to contribute to the rehabilitation of an insured, to lessen the insured’s disability caused by the accident and to facilitate the insured’s recovery from the accident:

(f) any additional prescribed measure, program or treatment.

(2) Subject to the regulations, the insurer may take any measure it considers necessary or advisable to contribute to the rehabilitation of an insured, to lessen a disability resulting from bodily injury and to facilitate the insured’s recovery from the accident.

[28] The Personal Injury Benefit Regulations provide in section 13:

(1) A (sic) insured shall not incur an expense mentioned in section 12 without obtaining the prior consent of the insurer.

(2) Before making a payment pursuant to section 12, the insurer may require a insured to provide the insurer with any information the insurer reasonably requires for the purposes of this section, and the insured shall provide that information.

CALCULATION OF SUCCESSIVE REMAINDERS:

[29] The Appellant and his family had difficulty in understanding how his permanent impairment was calculated. The *Personal Injury Benefits Regulations* set out above provide the framework for the calculation, which is then done according to a table set out in Appendix C. To reduce a complex issue to the simplest possible terms, rather than add all the impairments (say, as in the Appellant’s case, for the shoulder, the back and the scarring) together, the method used takes the greatest loss of function (in percentage terms) for the back (in his case 8%). This means that with the back problem alone, he is functioning at 100% - 8%, or 92%. With the shoulder range of motion impairment rounded up from 6.5% to 7% (the tables deal only with integers, not fractions), the second impairment diminishes his function from 92% on the formula $A\% + B\%$ ($100\% - A\%$), or $8\% + [7\% \text{ of } (92\%)]$. As this would give a fractional result, the table in Appendix C rounds the result to the nearest integer. In the Appellant’s case, the formula would give a rating of 14.44% impairment; Appendix C rounds this down to 14%. (Note that the range of motion had been increased from 6.5% to 7% before the calculation.) This leaves him with 86% of total function. Then the 6% impairment attributable to shoulder instability further diminishes his function from 86% (on the formula $14\% + [6\% \text{ of } (86\%)] = 19.16\%$). Appendix

C determines this value at 19%. Impairments less than 5%, such as the scarring following arthroscopy rated at 2%, are simply added at the end.

[30] Why is this method used? As Appendix B describes it, the purpose is to prevent the final total from being greater than 100%. As can be seen from a review of Appendix B, very serious permanent impairments such as above elbow amputation is rated at 57% of whole body impairment, so that the loss of both hands – if added – would be 114%. On the successive remainders formula, that loss would be 81.5% (formula) or 79% (table), still a devastating loss of function, but more realistic.

SUMMARY:

[31] The January 2, 2003 decision that the Appellant’s permanent impairment is 21%, based on Dr. Flotre’s assessment of December 23, 2002, is upheld.

[32] The February 28, 2003 letter declining to provide funding for an out-of province MRI is upheld. With respect to future medical expenses, SGI has indicated it is willing to look at “new objective medical findings”, and in our view, is bound to do so under the rehabilitation provisions of section 112 of the *Act*.

Dated at Regina, Saskatchewan, on July 16, 2003.

Ann Phillips, Q.C., Chair

Beverley Cleveland, Commission Member

Mukesh Mirchandani, M.D., Commission Member