Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *O.T. v. Saskatchewan Government Insurance*, 2004 SKAIA 013

Date: 20040315

File: 041 of 2003

BETWEEN

O.T., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances*:*
O.T., Applicant
Darrell Mack, for the Respondent

Before: **Ann Phillips, Q.C., Chair**
Beverley Cleveland, Commission Member
Al Knippel, 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 Saskatoon, Saskatchewan
November 6, 2003

DECISION

FACTS

[1] The Appellant, O.T., appeals a decision of Saskatchewan Government Insurance (SGI) dated March 12, 2003. The decision denied funding for right shoulder arthroscopy at a private clinic in Saskatoon, on the ground that the pain she was then experiencing was not related to her motor vehicle accident on November 1, 2001.

[2] This was based on a file review by SGI's medical director, Dr. Murray Flotre, which stated in a letter March 11, 2003:

> "I have reviewed this woman's file, including the recently acquired clinical notes from her family physician. Following this review, I would agree with Dr. Paul Taillon's opinions (March 15, 2002 and September 276, (sic) 2002) that [the Appellant's] present shoulder pain doesn't appear to be related to the November 1, 2001 MVA.
>
> Indications from early consultation with both the family physician (Dr. Z. Tymchak) and the physiotherapist (Jessica Gruszka) are that the problem was located posteriorly in the upper back and neck. This is quite similar to a problem that [the Appellant] had in 1998. Dr. Tymchak's initial consultation (November 5, 2001) states, 'shoulders normal'. The physiotherapy assessment of January 3, 2002 states, 'Screening of the shoulder joints did not reproduce typical symptoms'.
>
> The MRI of [the Appellant's] right shoulder shows degenerative changes in the AC joint. This was not caused by the MVA in question.
>
> I am not disputing that [the Appellant] has pain in her right shoulder, or that excision of the AC is required. There is just not a clear paper trail from the MVA to her current problems. Given this, it is my opinion that SGI should not be responsible for funding the expedited surgery to [the Appellant's] right shoulder.
>
> This opinion is based on the information available on the file at this time. Should further information be available in the future, we would be prepared to review the file again. If you have further questions regarding this file, please don't hesitate to contact me."

[3] Following the denial of SGI-funded surgery, the Appellant did in fact have Medicare-funded surgery on May 8, 2003 at St. Paul's Hospital, Saskatoon: a right shoulder arthroscopy and arthroscopic acromioplasty with arthroscopic excision of the distal clavicle and a subacromial bursectomy.

[4] This does not make the appeal unnecessary. SGI's decision that the shoulder problem is not related to the MVA affects the Appellant's rights to rehabilitation expenses and income replacement benefits associated with the surgery, and the Commission proceeded on this basis.

The Reports Relied On

[5] As can be seen in paragraph [2], Dr. Flotre referred to and endorsed two opinions from Dr. P. Taillon. At SGI's request, Dr. Taillon, a family physician, carried out a file review on March 15, 2002. He was asked to comment whether her injuries would have prevented her from working. He noted the following as "pertinent":

> "Whether MVA related injuries would have precluded work?
>
> MVA rear-ended at low speed – scratched bumper – drawing indicates head, neck and back[1]
>
> Nov 5, 2001 Dr. Tymchak – whiplash associated disorder 2 and myofascial upper back pain
>
> Dec 18, 2001 Jessica Gruszka, CBI – mechanical headache, myofascial tightness, and whiplash associated disorder 2 – recommends exercise, education, massage therapy
>
> Jan 29, 2002 Jessica Gruszka, CBI – notes rehabilitation done with education and notes many missed appointments and recommends home program. Also states 'this patient is very busy in her life continuing on with full time full duties work and so many failed appointments due to cancels or no-show.'
>
> Feb 25, 2002 – Dr. Tymchak notes that pain may be issue in her work and that now her main problems is that of her right shoulder and referral to Dr. Ernst is made"

[6] The first date to which he refers was her initial attendance at Dr. Tymchak's office on November 5, 2001 when she reported a rear end motor vehicle accident on November 1, 2001. His clinical records (which were *not* available to him: see paragraph [26] below) state:

> "Rear ended while stopping. ø head injury. HA later that night – severe. C/O pain/ neck or traps
> R > L . ø neuro (illegible)
> ROM = 80% N with pain @ end of ROM. N light touch/pain/DTR. Shoulder N.
> P Physio xx
> Pain (illegible)
> ø relation to movement / (illegible)
> NAD"

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1 This appears to be a reference to the diagram showing the location of pain in SGI's Application for Injury Benefits.

[7] There is a small diagram with xx's on the neck and around the shoulder blade, with the notation: "x = tender".

[8] Dr. Tymchak provided testimony by telephone. He stated that in his reference to "shoulder N (or normal)", he was carrying out a test to ascertain if there was damage to the rotator cuff. This involves bringing the shoulder up and gently pushing it forward while pulling back on the elbow. He was looking for pain in the front of the shoulder to indicate a rotator cuff injury. He confirmed that the right shoulder pain continued, as appeared from file notations on February 18 and April 18. He was aware that the physiotherapy and massage therapy had not improved the situation, and eventually referred her to Dr. Mark Ernst, an orthopaedic surgeon.

[9] While his evidence was somewhat vague, he did confirm that in his initial Practitioner's Report to SGI, under "Primary Diagnosis" he wrote: "Post MVA, pain neck, right shoulder girdle muscles". These would include the trapezius, supraspinatus, infraspinatus, subscapularis, pectoralis major and minor. When asked why he wrote that when the shoulder was "normal", he said "That specific test was normal". He said it was not easy to pinpoint what the problem was, when there are multiple problems occurring at the same time. This one (the shoulder injury) became the most prominent, and this is common in many different injuries. On the causation issue, he said it was fairly clear that there were no problems before and there were problems afterwards. It was related time-wise and there was no other mechanism of which he was aware that could have caused the problem. He agreed that it is difficult to pinpoint at a later time (e.g. at the time of the MRI) *when* something occurred. He did not agree that the degenerative changes in the AC joint shown on the MRI were not caused by the accident: degenerative changes can occur from major injury, minor injury, or repeated injuries. Trauma causes degenerative changes. He did not think the spur found in the AC joint on surgery was related to the small rotator cuff tear found on surgery.

[10] The second document referred to by SGI's consultant is the Practitioner's Report of physiotherapist Jessica Gruszka, dated December 20, 2001. Her diagnosis, based on an examination that day, was: "Mechanical headaches, myofacial (sic) tightness in trapezius and

rhomboids." She noted pain and limitation of movement in all directions of the cervical spine, with palpatory tenderness: a Grade II whiplash associated disorder.[2]

[11] The third document was the CBI assessment of January 3, 2002, also by physiotherapist Jessica Gruszka. This report refers to symptoms of headache, neck and mid-back pain, with the headaches as the worst problem, limiting her ability to concentrate at work and throughout the day. She found reduced cervical range of motion in all planes, worsening of symptoms with flexion and extension, and with sitting for longer periods of time. There was difficulty with side bending the head to the right. She had full strength through her extremities, normal deep tendon reflexes and cranial nerve examination. "Screening of the shoulder joints did not reproduce typical symptoms."

> "Analysis of Findings:
> - Cervicogenic mechanical headaches
> - Myofascial tightness in trapezius and rhomboids"

[12] The final report referred to by the consultant is a February 25, 2002 letter from Dr. Tymchak, responding to an SGI inquiry about the Appellant's days missed from work: she is the principal of an [inner city school].

[13] The SGI letter refers to the days of work missed as November 1, 2, 6, 19, December 3, 12, 14 and February 8[3], says her attendance at physiotherapy has been less than recommended, states "her injuries would not appear to correlate to the accident circumstances" (unexplained in the letter, but see below at paragraph [23]), suggests that if the claimant's job is stressful, her symptoms may be due to her occupation or other life stresses, and requests both "objective medical information that would support her absences from work due to her accident injuries for the above dates" and that he consider referring her for secondary assessment.

[14] Dr. Tymchak replied that he had no further information than already provided, although he had seen her on two occasions for unrelated problems. She had told him that the pain she was experiencing caused her to miss work, and he had mentioned this in his first reply. She had not

[2] Implying musculoskeletal signs (decreased ROM, point tenderness), but no neurologic signs.
[3] Half days only on 5 occasions.

found the physiotherapy very beneficial. Her main problem was her right shoulder, and he planned to refer her to Dr. Ernst regarding this. Until he had seen her, the secondary assessment should be deferred.

Discussion

[15] We believe there is a serious problem with the March 25, 2002 opinion, not subsequently corrected by the opinions of September 27, 2002 or March 11, 2003 That problem is the understanding of the Appellant's initial condition.

[16] With respect to the reference to "Nov. 5, 2001 Dr. Tymchak", whatever document Dr. Taillon was looking at, he was not quoting directly since the words "myofascial upper back pain" do not appear anywhere in Dr. Tymchak's clinical notes[4] nor in his Practitioner's Report which diagnoses post-MVA pain neck and right shoulder girdle muscles.[5]

[17] More importantly, he was not provided with or failed to note Dr. Tymchak's Practitioner's Report to SGI of November 30, 2001, reporting on her November 5, 2001 attendance on him, in which the primary diagnosis is:

> **"Post MVA pain neck + ® (right) shoulder girdle muscle" The report also states: "Pain may be a distraction at work, may make concentration difficult. Use of ® arm/shoulder may increase pain."**

[18] In our view, if he had seen this, he would have (should have) commented on it in his report.

[19] His opinion to SGI did not directly answer the question as to whether the MVA injuries would have precluded work. Although the request refers to the days of work missed as November 1, 2, 6, 19, December 3, 12, 14 and February 8[6] (for an accident November 1), the report says: "…she was in fact working and meeting her job demands. *Now* (emphasis added) she is missing work due to her injuries. Because she is now 15 weeks post-MVA and is claiming

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4 which in any event were not available to SGI until 2003: see paragraph [26].
5 It may be Dr. Taillon's own diagnosis based on the information available to him.
6 Half days only on 5 occasions.

income replacement because of the injuries…" He recommends a secondary assessment to establish her functional abilities to see if she is meeting her job demands.[7]

[20] In September, 2002, SGI again consulted Dr. Taillon, asking how the shoulder pain referred to in Dr. Ernst's report — probably the May 15, 2002 report[8] — could relate to the November 1, 2001 MVA. For the second time, the adjuster stressed that the accident was minor, which resulted in no damage to her vehicle.[9]

[21] Dr. Ernst's report describes pain and discomfort over the anterior superior and anterior posterior aspects of the right shoulder with some radiation down the arm, intermittent numbness and pain especially at night. She reported difficulties lying on her right side, and with reaching and overhead activities. He described the results of his examination, including limitation of movement, positive impingement signs for forward elevation and abduction and internal rotation. Joint stability and rotator cuff power were normal. X-rays showed a type II acromion with some sclerosis over the new surface of the acromion. The acromioclavicular joint had some early degenerative changes. He gave her a cortisone shot, with mild improvement, and suggested a review after 8 weeks for evaluation of her rotator cuff status.

[22] Dr. Taillon questions Dr. Ernst's reference to the shoulder pain being immediate after the accident[10] as follows: "..upon review of Dr. Tymchak and the physiotherapy report, there was no mention of actual right shoulder pain. Indeed on one of the physiotherapy reports, the examination revealed that 'screening of the shoulder joints did not reproduce typical symptoms'."

[23] Again, it is apparent that in Dr. Tymchak's initial Practitioner's Report[11], he specifically mentions pain in the right shoulder girdle muscles, and use of the arm/shoulder at work may cause pain. The Appellant's Application for Injury Benefits, prepared November 18, 2001, also identifies shoulder pain at a level of 9/10.

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7 SGI decided to pay income replacement benefits for the 5 days missed, which seems reasonable, although future missed work would result in a referral to secondary assessment.

8 "..Dr. Ernst's letter which notes that the shoulder pain was immediate after the accident."

9 The Appellant does give an explanation for the minimal damage.

[24] Dr. Taillon adds:

> "Finally the mechanism of the accident would not support the development of shoulder pain considering there was very minimal force in the accident.
> As such, based on the medical file review at this time, I do not think that her shoulder pain is related to the November 1, 2001 motor vehicle accident."

[25] We note at this point that we are concerned by the practice of an SGI medical consultant commenting on "the mechanism of the accident", if, as appears to be the case here, it is based only on the adjuster's unsupported assertion that the accident was very minor, which resulted in no damage to the vehicle.[12] There can be circumstances where an opinion on causation is appropriate, and background information can be provided to the medical consultants, but we think neither the form of the request nor the form of the response in this case gave us any confidence in the opinion expressed.

[26] The next SGI medical review was done in March, 2003, after receiving the results of an MRI assessment, which occurred on September 9, 2002. The second page of this report was filed after the hearing. SGI had also obtained, for the first time, Dr. Tymchak's clinical notes going back to an earlier motor vehicle accident in June, 1998 and which include the November 5, 2001 entries described in paragraph [5].

[27] The MRI report identified:

> "1. Degenerative changes in the AC joint with mild synovial hypertrophy, bone marrow edema, and a small inferiorly projecting spur.
> 2. No rotator cuff tear demonstrated.
> 3. Probable mild fraying of the superior labrum at the biceps anchor which does appear intact."

[28] Nevertheless, Dr. Ernst considered that there was "some evidence of a small rotator cuff tear", justifying surgery in view of her ongoing pain and debilitation and the failure of conservative management including cortisone injections.

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[10] Dr. Ernst's words were: "It was her right shoulder, neck and arm that were injured initially…"

[11] See paragraph. [17].

[12] Another document notes: another adjuster in an letter to the consultant: "…she was rear-ended by a truck, which resulted in no damage to the vehicle she was driving" and to Dr. Tymchak: "…a minor motor vehicle accident, which resulted in no damage to the vehicle she was driving."

[29] His operative findings of May 8, 2003 were:

> "EUA[13] revealed full range of motion. Intra-articular evaluation revealed normal glenoid and humeral head articular surface. There was an articular sided tear of the supraspinatus tendon and this was debrided. This was not in full communication. The remainder of labrum was normal and biceps tender anchor was stable. There was some inflammation in the synovium, there were no loose bodies.
>
> Subacromial space was entered and a type 3 acromion was encountered with an inflamed bursa. There was no rotator cuff tear on the bursal side. AC joint demonstrated a spur and OA.[14] Arthroscopic acromioplasty and arthroscopic excision distal clavicle was carried out."

[30] He estimated the rehabilitation time from this procedure to be 8 to 12 weeks, with mobilization and strengthening as tolerated.

[31] Dr. Flotre's assessment of the medical evidence is set out at paragraph [2] above. Because he too does not refer to Dr. Tymchak's initial Practitioner's Report and the express diagnosis of post-MVA neck and right shoulder girdle muscle pain, as set out in paragraph [17], we can only conclude that he did not see it either.

[32] In our view, there *is* a "clear paper trail" from the MVA to her condition before surgery.

[33] The Commission has determined in *R.C. v. SGI*[15] that its discretion to set aside or vary decisions under section 193(7) of *The Automobile Accident Insurance Act* must be exercised in a judicial manner. The discretion will be exercised in favour of the applicant only if it is demonstrated that the decision of SGI was erroneous; or based on erroneous assumptions; or at the very least, the decision was unreasonable.[16]

[34] This is a case where SGI's decisions were based on incomplete information on a critical point — an erroneous assumption — that led to an erroneous decision. **The decision is set aside**.

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13 Examination under anaesthesia.

14 Osteoarthritis.

15 *R.C. v. Saskatchewan Government Insurance* 2003 SKAIA 001

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

[35] At the hearing before the Commission, there was a discussion as to whether or not the time that the Appellant was unable to work in fact resulted in a loss of pay for her, and the effect of her employer's sick leave policy. There was not enough evidence before the Commission to decide on this issue.

[36] The Appellant is entitled to her costs of the application, including the application fee, any necessary expenses and any actual loss of pay involved to attend the hearing

[37] **Dated** at Regina, Saskatchewan, on March 15, 2004.

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Ann Phillips, Q.C., Chair

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Beverley Cleveland, Commission Member

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Al Knippel, Commission Member