

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *T.O. v. Saskatchewan Government Insurance,*
2004 SKAIA 015
Date: 20040421
File: 072 of 2003

BETWEEN

T.O., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
Zoe Litman, for the 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
January 7, 2004

DECISION

[1] The Appellant, T.O., appeals a decision of Saskatchewan Government Insurance (SGI) dated May 8, 2003 that terminated his income replacement benefits, physiotherapy (and travel expenses to physiotherapy), as well as the use of morphine medication for back and hip/leg pain effective that day, May 8.

[2] The Appellant submitted additional information after the decision but before the hearing, and this was considered by SGI and its medical consultants.

[3] The appeal proceeded before the Commission on the basis of the additional information, including medical information submitted at the Commission's request after the hearing by both the Appellant and SGI.¹

FACTS

[4] On December 20, 2001, the Appellant was in a motor vehicle accident in which he sustained a compression fracture of the second lumbar vertebra (L2). He was treated with a Boston brace for a period of eight weeks.

[5] On April 12, 2002, he fell and fractured his right femur. He described what happened as follows: He was on a roof, walking on a heating duct about three feet wide. He lost his balance and fell off the heating duct about two or three feet. While he managed to land on his feet, his body twisted and he landed so that his leg broke. He acknowledged that he had climbed the ladder to get to the roof and that he had some flexibility. He said that he did not have much muscle tone and that he had not yet begun physiotherapy following the motor vehicle accident.

[6] An intramedullary screw placed to secure the femur had to be surgically removed in April, 2003, further delaying his recovery.

¹ A letter from Dr. Russell dated January 30, 2004 and a letter from Dr. Howlett dated February 17, 2004.

[7] Finally in late May, 2003, he fell again fracturing his left clavicle. He had fallen in the bathroom wedging himself between the toilet and the bathtub when he had lost his cane.

[8] The issue is whether SGI bears any responsibility for the additional recovery time necessitated by either or both of the falls.

[9] SGI relied on the response from Dr. R. Griebel, neurosurgeon, of September 20, 2002 which stated:

“1. During his follow up appointment, were there any x-rays completed of his 2nd lumbar vertebra compression fracture. If so, what were the findings from the X-rays? (If available, please send a copy of the x-ray report)

Yes; Plain x-ray of the lumbar spine showed a stable L2 compression # w 50% vertebral collapse and loss of lumbar lordosis. Essentially no change since June '02.

2. In relation to the injuries he incurred as a result of his motor vehicle accident (2nd lumbar vertebra compression fracture), when do you anticipate that he will be able to return to his pre-disability occupation, Journeyman Electrician.

From a lumbar perspective I believe [the Appellant] should be able to return to work within 2-3 mos.

3. What is your present treatment plan for this patient? (i.e. frequency of follow up appointments, surgery, time frame for recovery, etc.)

I have arranged no further treatments or follow-up appointments for this man's back problem.

4. In your opinion, has the patient reached maximum medical improvement in relation to his motor vehicle accident injuries?

Yes; there may be some further improvement in back pain as the hip heals but I do not anticipate any dramatic change.”

[10] SGI also relied on a response from Brad Boehm at Daniels Kimber Physiotherapy Clinic, March 11, 2003 which states:

“1. In December 2002, Dr. R. Griebel, Neurosurgeon, indicated that in relation to the patient's vertebral compression fracture of the 2nd lumbar vertebra as a result of his involvement in the motor vehicle accident on December 20, 2001, he would likely need to be away from his pre-disability work position of Journeyman Electrician until March 2003. From your perspective, please indicate when it is anticipated that the patient will be able to return to her former occupation?

[The Appellant] has attended regularly in the last 2 months. He has had difficulty weight bearing on the R leg and has ambulated with 1 crutch or a cane in that time. He has had moderate back

pain and decreased back mobility in that time also. [The Appellant]'s job requires lots of walking, stairs and lifting, all of which we have not been able to do because of back symptoms and decreased weight bearing. In my estimation [the Appellant] may be able to return to his former occupation after another 2 months of functional conditioning.

2. What barriers continue to prevent the patient from returning to his pre-disability occupation?

- Decreased weight bearing on the R leg including use of an aid (crutch/cane).
- Low back pain and stiffness.
- Overall mobility to tolerate functional conditioning.

3. What are your ongoing treatment recommendations for this patient? (i.e., Physical Therapy, Chiropractic, Massage, Exercise Therapy, etc. Please also indicate frequency)

- Daily – Regional exercise – daily abdominal, low back, leg strength specific.
- Daily – Functional conditioning – lifting, carrying, stairs, walking and positional tolerance (such as assembling wires at waist level).
- 3x wk – Physical therapy – to restore biomechanics to the lumbar spine.

4. Additional comments?

Decreased weight bearing ability has impaired functional progress and advancement of functional programs. [The Appellant] currently functions at a light level of functioning but needs medium to heavy function to perform his job. I believe [the Appellant] may need further review as his status continues to progress slowly.”

[11] The Appellant’s family physician, Dr. Bob Russell, was asked whether the treatment provided applied to his back or his hip. He responded:

“At this point in time, it would be difficult to differentiate whether [the Appellant] is needing this for his back or his hip. However, my personal medical opinion is that [the Appellant] would have not suffered this fracture had it not been for his fractured spine, which left him fairly rigid and unable to prevent his fall from occurring, or at least change the mechanism of the fall so that he would not have fractured his hip. So, regardless of whether the pain medication is needed for his back or hip, they are both the result of the same injury.”

[12] The information was forwarded to SGI’s medical consultant with a request for an opinion as to whether SGI should continue funding the Appellant’s secondary treatment and the continued use of morphine. The SGI injury representative advised “he has a history of using this prior to the accident and he had an old fracture of L4”.

[13] Dr. E. Howlett, SGI medical consultant, replied on April 24, 2003:

“I have reviewed the medical information provided. In December, 2002, Dr. Griebel indicated that the customer had reached maximum medical improvement with regard to the L2 compression

fracture. He also indicated that he would be able to return to work within two to three months as it pertained to his lumbar spine injury. Mr. Brad Boehm of Daniels Kimber Physiotherapy indicated in February 2002 (sic) that another two months of functional conditioning would be required before [the Appellant] could return to work. Thus, we have two practitioners that have indicated an ability to return to work at the latest by April 20, 2003.

It would seem that as of April 20, 2003, the customer would be able to return to his employment as it pertains to his lumbar compression fracture. It would seem fair that at that date the insurer has met its responsibilities with regard to rehabilitation of a specific injury.

In addition, after this date of April 20, 2003, the continued use of morphine for back and leg pain would be assumed to be at the level that was being used prior to the accident. Any continued use of this medication presumably would be at the customer's own expense."

[14] On April 30, 2003, Brad Boehm, the physiotherapist, provided an update on the Appellant's condition as follows:

"This letter is an update regarding [the Appellant] who is in a Secondary program in our clinic. He has recently had surgery by Dr. Dzus on 17 April 2003 to take out an intramedullary screw. Since that time, he has had significant decrease in pain and has been able to weight bear. We are progressing him in a weight bearing fashion as tolerated and he is currently walking with the use of either crutches or a walker and is not yet able to ambulate on the right leg without the use of some external support. His low back remains stiff in several planes including flexion, extension and side flexion particularly from L3 to S1. Functional levels have not been able to be achieved as his functional demands include walking up and down stairs and ladders and walking on uneven ground and it has not been feasible to perform this due to the stiffness in his back and the decreased weight bearing ability in his leg.

Given the increased weight bearing ability and decreased pain in his hip, we will have a better idea of determining whether [the Appellant] is safe to resume his previous line of employment as an industrial engineer (sic) within 8 weeks of a progressive functional Secondary program."

[15] Boehm's report was faxed to SGI May 5, and SGI paid for it May 7. Notwithstanding his report, SGI's decision letter, dated May 8, 2003, stated:

"...Thus, we have two practitioners that have indicated an ability to return to work at the latest by April 20, 2003.

It would seem that as of April 20, 2003, you would be able to return to your employment as it pertains to your lumber (sic) compression fracture and at this date, SGI has met its responsibility with regards to rehabilitation of the specific lumbar injury."

[16] When the Appellant was advised of the termination, he was very concerned and solicited additional information from medical caregivers. Brad Boehm wrote on June 24, 2003:

“[The Appellant] was involved in an MVA 20 December 2001 in which he was the driver of a vehicle that hit the center divider, suffering a complete fracture of L2. He was placed in a Boston brace for 8 weeks. In April 2002, he twisted his right leg and fractured his right femur. He had ORIF by Dr. Dzus with follow up in July 2002. In July, he started partial weight bearing and in late July he started full weight bearing. He attended our clinic for Secondary level treatment on 15 August 2002.

At this time, he had moderate reduction in lumbar range of motion, normal neurological findings for the lower quadrant, decreased knee and hip movements, particularly on the right and he was ambulating with two crutches. There was weakness around the quadriceps, hip and low back regions with increased tone in the lumbar paraspinals.

He was placed in a program to resume some strength in the lower extremities along with allowing some strengthening to the trunk and the majority of this was done in the pool and several times for conditioning and physiotherapy treatments each week. This was continued until April 2003 at which time he was still walking with a walker and doing slightly better in terms of lumbar movement, but was still having pain. He had surgery on 17 April 2002 (sic – April 2003) where they removed the intramedullary screw and this has decreased his hip pain, which had been hindering his rehabilitation with regards to how much he could lift, push/pull, carry and, even walk (he had been walking with one crutch mainly).

In May 2003, SGI stated that they would no longer cover [the Appellant] for the injuries that he sustained. He has continued treatment throughout May in a similar manner that we have been doing, including the pool, regional and global conditioning in the gym and manual therapy treatment. In late May 2003, he had an unfortunate fall and fractured his left clavicle and he has not been coming regularly, but he is going to start on 24 June 2003 with his exercise as his shoulder is starting to feel somewhat better. [The Appellant] has attended regularly and worked hard throughout his rehabilitation. He remains functionally limited below the level required to perform his work as an industrial electrician.”

[17] His family physician added on June 25, 2003:

“[The Appellant] was involved in a motor vehicle accident on December 20, 2001 in which he fractured, I believe, several vertebrae.² Following the accident several months later, he fell landing on his right hip, resulting in a subtrochanteric fracture. It is my professional opinion that his fractured hip would never have occurred if it had not been for the fractured spine. At the time, the patient was extremely stiff and sore due to the fracture, and did not have good balance and was unable to recover from a fall that he would normally not have injured himself in. It is, therefore, my belief that he should be continued to be covered by SGI until his hip has fully recovered and he is able to return to gainful employment.”

[18] He wrote again on July 11, 2003 as follows:

“[The Appellant] was seen today, stating that you were requesting more information in regard to his fractured leg, and that my previous report was lacking in information. I don’t think I can make it any clearer than I previously did. This patient had significant difficulty moving around because of his fractured spine. He was stiff and having a fair bit of discomfort due to the back. Because of this, when he lost his balance he was unable to prevent himself from falling, and was also unable to properly protect himself in the fall. This resulted in him fracturing his femur, which I’m sure he

² Only one vertebra was broken.

would not have if he had not had a broken back at the time. As I already stated, it is therefore my belief that this fracture is a result of his fractured spine and that it should be covered by SGI.”

[19] SGI asked Dr. Howlett to review the new information and he provided the following opinion in September, 2003:

“After reviewing the medical information provided, including the most recent documentation, I would offer the following opinions:

1. The L2 compression fracture occurred in December 2001. There was almost a four-month interval before the right femur fracture. General medical opinion would hold that significant healing of the compression fracture would occur in this time interval. There is no medical information available that there was any re-injury of the compression fracture with the April 2002 fall.
2. The treatment of the right femur fracture was appropriate and the rehabilitation from this fracture seems to have followed medically expected time frames. Approximately three months passed between the time of the right femur fracture and the customer being able to full weight bear and start rehabilitation.
3. Approximately one year elapsed between the time of the original lumbar compression fracture and the customer’s review by Dr. Griebel. General medical opinion would hold that a compression fracture would be well past the healing stage after twelve months. Dr. Griebel indicates this in his written opinion that maximum improvement has been reached as of December 2002 and that with regard to the lumbar compression fracture returning to work was a viable option in two to three months time. (i.e. March 2003). There is additional opinion from Mr. Boehm in March 2003 that the customer should be able to return to work in approximately two months. It is my opinion that at that point in time two medical practitioners indicated an ability to return to work with regard to the lumbar compression fracture.
4. The April 17, 2003 surgery for removal of hardware of the right hip would be a setback with regard to rehabilitation of the right hip, but at this point in time it is assumed that the lumbar compression fracture had long since healed.
5. I am unable to accept the reasoning that the customers (sic) right femur fracture was caused by the lumbar spine compression fracture. As such, I do not view the right femur fracture as a result of the motor vehicle accident of December 20, 2001. I feel that general medical opinion would be un-accepting (sic) of this reasoning as well.

Conclusion

This customer has suffered a series of unfortunate events. It is hoped that he shall soon recover and return to a productive life. The fracture of the femur and now the fracture of the clavicle are unfortunate injuries, but in my opinion, neither are directly related to the motor vehicle accident of December 20, 2001. Healing and rehabilitation of the lumbar compression fracture would appear to have been completed by late April 2003. This assertion was supported at the time by two medical practitioners. Unfortunately I am not able to accept retrospective opinion with regard to causation, in this case.”

[20] Two further medical reports were provided for Dr. Howlett’s review.

[21] Dr. Griebel was asked by Dr. Russell to comment on the relationship between the lumbar fracture and the fall and femoral fracture. He stated:

“An issue is whether the lumbar fracture contributed in a substantive way to his fall and femoral fracture. Certainly the lumbar injury has limited the patient’s range of movement as well as his general agility and ability to protect himself in a fall. Whether this played a substantive or critical role in his sustaining the fracture, I have no absolute way of knowing. It would seem reasonable however that the insurance company assumes some responsibility, if not complete responsibility for the one injury arising from the other.”

[22] Dr. Dzus, the orthopaedic surgeon, saw him September 29 for follow up of the fractured femur and the fractured clavicle. Dr. Dzus stated:

“[The Appellant] was here for follow up of his fractured right femur. This occurred on April 8th when he fell approximately 3 feet. Of note in his history is that two months before his fall, he had been in a motor vehicle accident where he sustained a fracture of L2. I have reviewed his x-rays and this was quite a significant fracture. He was treated by Dr. Griebel with a brace and it is likely the muscle weakness and poor balance as a result of the L2 fracture that resulted in his fall. At two months post injury he would still have some discomfort in his back from the fracture and his muscle strength would not be back to normal as a result of immobilization. These would be contributing factors in his fall.”

[23] The report also dealt with continued pain in the right hip and knee, restricted motion in the left shoulder with pain localized kyphosis at about L2 with tenderness and a restricted hip and knee range of motion. The x-rays of the hip showed that it was continuing to heal though not totally.

[24] Dr. Howlett stated: “I have considered this information and it in no way alters my previous opinion of my letter of September 3, 2002.”³

DISCUSSION

[25] In our view, Dr. Griebel correctly identified the issue as being whether the lumbar fracture contributed in a substantive way to the Appellant’s fall and fracture of his femur. If it did, on the basis of the principles outlined in *Athey v. Leonati*,⁴ then SGI is fully liable for the injury resulting from the fall and fractured femur. These principles, restated for the present purposes, are:

³ Actually September 3, 2003: The letter is dated “September 3, 2002” but this is clearly another date error.

⁴ [1996] 3 S.C.R. 458.

- (1) Causation is established where the claimant proves to the civil standard on a balance of probabilities that the motor vehicle accident caused or contributed to the injury.
- (2) The general, but not conclusive, test for causation is the “but for” test, which requires the claimant to show that the injury would not have occurred but for the motor vehicle accident.
- (3) The “but for” test is unworkable in some circumstances, so the courts have recognized that causation is established where the motor vehicle accident “materially contributed” to the occurrence of the injury. A contributing factor is material if it falls outside the *de minimis* range.
- (4) The claimant must prove that the motor vehicle accident caused or contributed to the claimant’s injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision. It is essentially a practical question of fact which can best be answered by ordinary common sense. Although the burden of proof remains with the claimant, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.
- (5) It is not now necessary, nor has it ever been, for the claimant to establish that the motor vehicle accident was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. As long as the motor vehicle accident is part of the cause of an injury, SGI is liable, even though the motor vehicle accident alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: SGI remains liable for all injuries caused or contributed to by the motor vehicle accident.

[26] We are mindful of the standard for review of decisions by the insurer: we are to exercise our discretion in favour of the claimant only if it is demonstrated that SGI's decision was erroneous, based on erroneous assumptions, or at the very least unreasonable.⁵

[27] To review the evidence on this point.

Dr. Russell

"Following the accident several months later, he fell landing on his right hip resulting in a subtrochanteric fracture. It is my professional opinion that his fractured hip would never have occurred if it had not been for the fractured spine. At the time, the patient was extremely stiff and sore due to the fracture, and did not have good balance and was unable to recover from a fall that he would normally not have injured himself in..."⁶

"I don't think I can make it any clearer than I previously did. This patient had significant difficulty moving around because of his fractured spine. He was stiff and having a fair bit of discomfort due to the back. Because of this, when he lost his balance he was unable to prevent himself from falling, and was also unable to properly protect himself in the fall. This resulted in him fracturing his femur, which I'm sure he would not have if he had not had a broken back at the time."⁷

Dr. Griebel

"Certainly the lumbar injury has limited the patient's range of movement as well as his general agility and ability to protect himself in a fall. Whether this played a substantive or critical role in his sustaining the fracture, I have no absolute way of knowing..."⁸

Dr. Dzus

"He was treated by Dr. Griebel with a brace and it is likely the muscle weakness and poor balance as a result of the L2 fracture that resulted in his fall. At two months post injury he would still have some discomfort in his back from the fracture and his muscle strength would not be back to normal as a result of immobilization. These would be contributing factors in his fall."⁹

Dr. Howlett

[28] Against this is Dr. Howlett's view:

"I am unable to accept the reasoning that the customers (sic) right femur fracture was caused by the lumbar spine compression fracture. As such, I do not view the right femur fracture as a result

⁵ R.C. v. SGI, 2003 SKAIA 001.

⁶ June 25, 2003.

⁷ July 11, 2003.

⁸ October 14, 2003.

⁹ September 29, 2003.

of the motor vehicle accident of December 20, 2001. I feel that general medical opinion would be un-accepting (sic) of this reasoning as well.”¹⁰

[29] Dr. Howlett does not address the stiffness, limited range of movement, restriction of agility, muscle weakness and poor balance raised by the Appellant’s physicians. The only reason that he gives for the rejection of the causation link is the healing time of the lumbar fracture.¹¹ SGI’s consultant also states: “Unfortunately I am not able to accept retrospective opinion with regard to causation in this case.” We think, on the contrary, that retrospective opinion on causation *is* acceptable, as a matter of law. If the consultant had followed the causation tests which are outlined in this decision, which is not apparent from his reasons, or if he had outlined in a convincing way why the stiffness, limited range of movement, restriction of agility, muscle weakness and poor balance were not relevant on why the Appellant was so badly injured in a three-foot fall, then we might have reached a different conclusion.

[30] We are satisfied that SGI’s decision that the April fall was not caused by the motor vehicle accident was based on an erroneous interpretation of the law with respect to causation, as outlined above in paragraphs [24] to [28]. The Appellant’s account of the fall was, in our view, a credible one. The back injury incurred in the motor vehicle accident was a necessary contributing cause of the extent of the Appellant’s injury from the fall that fractured his femur. We conclude that the April fall was not “an independent intervening event” but was itself caused or contributed to by the motor vehicle accident (and its effect on the Appellant’s continuing physical condition) and that the motor vehicle accident was a necessary and non-trivial contributing cause to that fall.

[31] We further observe that SGI had available to it Brad Boehm’s April 30, 2003 letter outlining the continuing problems with the Appellant’s back¹² before the decision letter was sent on May 8. In our opinion, that letter went so far to negate the earlier predictions of Dr. Griebel

¹⁰ September 3, 2002 (actually 2003).

¹¹ We appreciate that his statement of the time between the two accidents (“almost four months”) is more accurate than Dr. Dzus’ (“two months”). It is in fact 113 days; 16 weeks and two days. Its relevance to anything but the vertebral healing time is not evident.

¹² See paragraph [14].

and Boehm himself that the Appellant's back would be healed sufficiently to enable him to return to work that it was unreasonable for SGI to issue the letter terminating benefits.

[32] On the basis of both the law and the facts, SGI's decision terminating the Appellant's benefits is set aside. From the decision letter itself, it cannot be determined whether the benefits were terminated as of April 20 or May 8, 2003.

[33] We take a different view with respect to the second fall in the bathroom which fractured his clavicle. SGI made no decision with respect to this issue. In our opinion, there is no satisfactory medical or other evidence of any kind now available upon which we can rely to make a determination as to whether this second fall is causally attributable to the lumbar fracture. While it *might* have been attributable to the femoral fracture, which we have found was attributable to the lumbar fracture, we make no finding on this point. We note that it did delay his rehabilitation by about a month, and was causing him pain as late as September 29, 2003, at a time when he was still having difficulty with his femur, which had not fully healed. SGI should consider the issue of causation in the second fall (after obtaining better evidence from the Appellant as to the circumstances) at the time that a determination of the date of recovery from the first fall is made.

Use of Morphine Medication

[34] SGI's consultant stated on April 24, 2003:

"In addition, after this date of April 20, 2003, the continued use of morphine for back and leg pain would be assumed to be at the level that was being used prior to the accident. Any continued use of this medication presumably would be at the customer's own expense."

[35] At the hearing, it was agreed that further information would be provided on the Appellant's use of morphine medication before the motor vehicle accident, and after the accident, and that SGI would review this information. As a result, Dr. Russell indicated in a letter to the Commission dated January 30, 2004, that the Appellant had been using MS Contin for chronic back pain before the accident at a dosage of 60 mg. b.i.d. from November, 2000.

After the accident, the dosage was increased to four to seven 60 mg. pills a day. In 2004, he was taking approximately five pills per day, with an attempt to decrease the dosage.

[36] Dr. Howlett's letter of February 17, 2004 accepted this, and concluded that the additional three tablets per day of current use "could be viewed to be a result of the motor vehicle accident". He suggested a review of the dosage in six months' time.

[37] We believe that this decision is reasonable, and we order that it be made retroactive to the date of termination of these benefits, if this has not already been done.

SUMMARY

[38] SGI's decision terminating the income replacement benefits, physiotherapy and travel expenses is set aside. The Appellant's income replacement benefits are restored to at least the date of the hearing of January 7, 2004, with interest. Similarly, the expenses and travel expenses he has incurred for physiotherapy and the supervised exercise program are to be reimbursed or paid for.

[39] The Appellant is entitled to his costs of this application, including the application fee, and travel expenses to attend the hearing.

Dated at Regina, Saskatchewan, on April 21, 2004.

Ann Phillips, Q.C., Chair

Beverley Cleveland, Commission Member

Al Knippel, Commission Member

