

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *R.E. v. Saskatchewan Government Insurance,*
2004 SKAIA 030
Date: 20040716
File: 077 of 2003

BETWEEN

R.E., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
R.E., Applicant
Jocelyn Clement, for the Respondent

Before: **Ann Phillips, Q.C., Chair**
Beverly 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 Regina, Saskatchewan
January 28, 2004

DECISION

FACTS

[1] R.E., the Appellant, appeals two decisions of Saskatchewan Government Insurance (SGI) dated April 24 and April 25, 2003. The former discontinued payment for physiotherapy and exercise therapy; the latter denied funding for TMJ treatment.

[2] SGI denied benefits for two main reasons:

- (1) She had pre-existing medical conditions – migraines, sleep disturbance, gastrointestinal upset, anxiety and depression. She had been scheduled to begin exercise therapy before her MVA of July 21, 2001. By April, 2003, she had returned to the state she was in prior to the accident.
- (2) SGI had obtained the report of an accident reconstructionist, Carl Shiels, who was asked to consider whether the forces of impact that she experienced during the collision would have been great enough to cause injury. He had concluded that, on the basis of the Appellant's report of the accident and his examination of the rear bumper and bumper mounting brackets of her car, the impact velocity change would be no more than 4 kph (2.5 mph), which has a negligible injury potential. He concluded that she may have been less hurt than startled by the very loud noise associated with the collision.

[3] Dr. John F. Alexander was asked to testify by SGI. He graduated in medicine from the University of Saskatchewan in 1965. From 1967 to 1998 he was a family physician with specialties in occupational and sports medicine. He is a contractor/medical consultant to SGI's Medical Rehabilitation Unit and has been since before 1995 (the change to the no-fault regime). In advising SGI, he said he looks at the significant medical circumstances in a person's file in order to determine when they are back to the pre-MVA level of function.

[4] The Appellant had applied for benefits on February 13, 2002, a considerable time after the accident on July 21, 2001. In her application she acknowledged receiving sick benefits at

work¹. A health history she had completed in April, 2002 (again post-accident) for orthodontist Dr. Gherasim, stated:

“Freq. Headaches/Neckaches/Backaches since July 01. freq. & debilitating headaches, neck & shoulders & low back. 1 major incident *at work* July/01 almost knocked me off my feet – back pain, spasm (?) & weak knees had to grab the counter to keep from falling. Back of neck & shoulders.” (emphasis added)

[5] In her health history, she also disclosed fibromyalgia diagnosed in 1992 with flare ups in 1998, 2000 and recently².

[6] Dr. Alexander had reviewed physicians’ notes from March 4, 1999 to February 26, 2002, particularly noting:

“02-09-99 Had a bus ride – very bumpy. Was jolted significantly. Now hurts all over. Neck, back, head, teeth and jaw, upper thighs and wrists, doesn’t feel well at all. ‘crabby’. Severe headaches all a.m.”

[7] Her family physician diagnosed this as a fibromyalgia flare and provided neck, arms and hands massage, as well as mild manipulation of the thighs. She subsequently prescribed massage therapy for the fibromyalgia. Since massage therapy was not covered by Saskatchewan Health, the physician agreed to do this on a monthly or bimonthly basis.

[8] The Appellant was off work September 27 to October 15, 1999 with pneumonia and was given the go ahead to return to work half time on October 26. She then developed low back strain and was determined to be suffering another fibromyalgia flare on November 18. In December, she fell from a stool hurting her left wrist and ankle, with no fracture but swelling and return of fibromyalgia and depression. Work stress and fibromyalgia symptoms continued through April and May, 2000 and she was taken off work for medical reasons from May 24 to July 15, 2000.

¹ However, she testified that she did not start to receive these until after the motor vehicle accident. Exactly when was not clear.

² In fact, she had fibromyalgia flares, according to her family physician’s notes, in September, 1999; November, 1999; January, 2000; May, 2000; June, 2000; migraine flare September, 2000; March, 2001, as well as after the MVA.

[9] Dr. Alexander said he had noticed a *decline* in frequency of her visits to the doctor in 2002, after she filed her application for benefits with SGI. He observed from her doctor's clinical notes that over the years she had attended her family physician for a variety of medical issues (not just motor vehicle accident related): she experienced a "running wave of on-again-off-again trouble". This included gastrointestinal upset in August, 2001, leading to an ultrasound procedure to rule out gall stones; the severe effect on her illness of a bumpy bus ride mentioned in paragraph [6] showing a "tissue sensitivity"; and symptoms produced by work stress. He concluded from this that when she had a medically related problem, she sought medical help. In 2002, the records showed that she had been seen only on January 8 and February 1 and 26. [It is not known at what point the records were sent by her physician to SGI, although it appears that they were sent by SGI for review by its medical consultant on June 18, 2002 and were reviewed by Dr. Alexander on August 2, 2002. It was this recent absence of ongoing problems that lead him to state: "It is apparent that SGI responsibility has been completed."

[10] With respect to the TMJ condition, he acknowledged that he was certainly not a dentist. However, he noted in Dr. Gherasim's report, she could open her mouth about 48 mm, which he said was within normal limits. A hyperextension injury can be jarring but in this case her head didn't hit the head rest, according to Shields' report,³ which he had seen. There was no shearing force. He doubted that the motor vehicle accident had caused the TMJ condition, since there is usually contact and there was none here. There was no dental damage.⁴

[11] The Appellant objected, stating that she had had one tooth crack and also a filling and tooth fell out after her motor vehicle accident. She received a bill for this in September, 2001. She had discontinued her TMJ treatments since SGI paid for treatment for accident related difficulties only. At the time of review in 2002, she had not appreciated that her TMJ condition might be related to the motor vehicle accident.

[12] SGI provided additional documentation on her exercise therapy in 2002. In late March, her exercise therapist wrote:

³ See paragraph 23 below.

⁴ Not noted in Dr. Gherasim's report. He notes seven missing teeth and generalized wear.

“Has been having energy problems; sleeps for 2-3 hrs. after therapy sometimes; feels good while exercising, but will hurt later; low back/neck soreness same; does feel a little stronger.”

[13] Dr. Alexander commented that a lack of energy was not motor vehicle accident related. He pointed out the improvement in the actual clinical findings made by the therapist in the same report.

[14] The physiotherapist who saw her in April, and recommended both a conditioning program and a tertiary assessment, observed that she had been fired from her employment in November, 2001.

[15] In May, SGI had received absentee reporting forms from Arcola Physiotherapy, showing failure to attend on May 13 and 14. A week before she had failed to attend on the grounds that she had fallen in the mall and hurt her knee.

[16] Dr. Alexander thought that if her condition had deteriorated from March to May, 2002, the fall was a potentially relevant consideration. However, what the medical records did show was a slight improvement overall, with the exception of the TMJ condition.

[17] The Appellant testified. She said that SGI had refused requests for a tertiary assessment made by both her doctor and her exercise therapist. She believed she needed TMJ treatment, as it had been recommended by her family physician, Dr. Cowley. In response to an allegation that if she had a TMJ condition, it preceded the accident, she produced a letter from her dentist, who had treated her since 1982 which stated: “[The Appellant] has never complained or raised a concern about having trouble with her TMJ to me.” This was in response to an allegation that she had the problem before her motor vehicle accident.

[18] The Appellant readily acknowledged that she had been taking physiotherapy for a work injury before the MVA and that she had pre-existing fibromyalgia.. She was aware that there was a fibromyalgia program available at Gold Square Physiotherapy and understood that it could be funded by her employer. She needed to have cardiovascular clearance beforehand and was waiting for this at the time of the MVA. She had requested massage after the MVA because it

had been effective some years before: there were five treatments.⁵ She had paid for them herself. She said then in October, 2002 she had been sent to a neurologist as she was “passing out”. She had been given Verapamil to control headaches and migraine, but could not afford these at \$15 per pill. She said that the dosage had increased post-accident. She had not been diagnosed but she thought that it was “multiple migraine and tension (sinus) headaches”. The symptoms includes dizziness, ears ringing constantly, and she cannot hear clearly or handle loud noise.

[19] She could not recall very much about the day of the motor vehicle accident. She said it was a Saturday and also that she had headaches immediately afterwards at work. When she had been talking to her SGI personal injury representative, she could not remember anything but feeling bad. She had pain at the base of her spine and had collapsed. Such an event had not happened since.

[20] She needed new glasses because her vision was becoming blurry. She associated this with the MVA. She offered to make available some information she had received on “trauma headaches” which are sometimes associated with her symptoms of blurred vision and ears ringing.⁶

[21] She acknowledged that when she filed her claim for damage to her car, she had not indicated any injuries because “I didn’t have any bumps, bangs or anything going on”. It was not until she was referred to physiotherapy in January, 2002 that the physiotherapist suggested that the problems she was then experiencing (constant headaches, neck, shoulder, wrist and ankles aches) could be due to the accident. She described herself as having a high tolerance for pain, despite indicating on the pain diagram on her application for benefits that she had pain at the 10 level on a scale of 0 to 10, where 10 means pain is as bad as it can be.

⁵ Described as “only helps temporarily for neck and shoulders”. These may have been reimbursed.

⁶ Burton Gelba, *Alternative Medicine Definitive Guide to Headaches 1997*. The Commission was not prepared to accept this as evidence of the Appellant’s actual condition, in the absence of information from her own practitioners.

Accident Reconstruction

[22] Carl Shiels has spent 32 years in the field of motor vehicle accident reconstruction. He has a Masters degree in mechanical engineering and biomechanics. He has done research for Transport Canada, at the University of Saskatchewan from 1972 to 1976 and the Saskatchewan Highway Transportation Board in connection with vehicle standards. He has frequently appeared as an expert for the Crown in dangerous driving charges. In 1986, he established a private practice of accident reconstruction.

[23] He elaborated on the findings of his report, observing that there is a good correlation between damage to the vehicle and the forces experienced by the occupants of a vehicle. When examined the Appellant's car on April 24, 2002, the damage from the accident was still there. No repairs had been made. The rear bumper of her van has no energy absorption system. There will be greater damage at less severe impacts. Here there is a very minor vertical crease at the centre with forward bending. The metal mounting brackets of light sheet steel were not deformed or stressed. At 8 kph these bumper brackets deform. He has concluded that the vehicle impact velocity change was about 4 kph or 2.5 mph. Based on testing that has been done, the level at which people are injured is at 8 to 10 kph. A study involving military subjects put this level at 20 kph. Up the 8 kph level, the potential for injury is negligible or very transient: headaches, minor dizziness. At 4 kph, the head seldom contacts the head support. For the Appellant's car, the photos show head restraints which are a part of the seat. The top of the head restraint is well above the Appellant's ears which would give very good protection. The forces involved at 4 kph are very like those encountered in normal activities such as bending over.

[24] He explained that the reverberation of noise when two metal cars hit each other can be horrific. Many people experience the feelings reported by the Appellant, who had told him that the impact "scared the hell out of me". The noise can deceive as to the severity of the impact.

[25] He said that the body experiences 0.2 to 0.3 Gs force in normal braking. Panic braking would produce forces of 0.7 Gs. The tires lock but since the person is expecting an impact, their muscles are better equipped to handle the change. Bending over produces 1.0 G force as does a

4 kph deceleration. A 8 kph change, such as might be produced during a collision while polkaing, would be between 1.0 and 3.0 Gs. A hockey check would be between 2.0 and 3.0 Gs.

SUMMARY

[26] In the Commission's view, based on the medical reports, clinical notes, Dr. Alexander's evidence, and the Appellant's own account of what happened to her,⁷ the motor vehicle accident of July 21, 2001 did not injure her to the extent that in April, 2003 she still required physiotherapy, exercise therapy or TMJ treatment as a result of the accident.

[27] In the absence of medical evidence (in the form of reports or otherwise) from the Appellant's own physician, the Commission often experiences difficulty in accepting uncritically the Appellant's views on diagnosis (what is wrong with them), causation (what caused the condition) and treatment plan (what ought to be done). In the Appellant's case, we are not convinced by her present tendency to relate her dental problems (cracking tooth, tooth and jaw pain),⁸ her "collapse", her lack of energy, her inability to complete a course in biblical studies, her need for new glasses, her on the job memory problems and inability to keep up with paperwork as being attributable to the motor vehicle accident. While it may be natural to attempt to give structure to the events that strongly affect us, quite often events such as fibromyalgia flares, tooth cracking, headaches, are not related to any particular trigger. We think that the six month delay in reporting a claim after the accident is significant, although not conclusive against her.

[28] If an Appellant has medical evidence to back up the cause and effect relationship – and many Appellants who appear before the Commission do – then it is an entirely different matter.

⁷ Paragraphs [17] to [21] and documents.

⁸ Such as experienced in September, 1999 after a bumpy ride.

CONCLUSION

[29] The Appellant has not succeeded in demonstrating that SGI's decisions to terminate therapy or to fund TMJ treatment were based on erroneous assumptions or were patently unreasonable, nor was there any error in law.

[30] SGI's decisions of April 24 and 25, 2003 are upheld.

Dated at Regina, Saskatchewan, on July 16, 2004.

Ann Phillips, Q.C., Chair

Beverly Cleveland, Commission Member

Al Knippel, Commission Member