

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *D.I. v. Saskatchewan Government Insurance,*
2004 SKAIA 037
Date: 20040827
File: 055 of 2003

BETWEEN

D.I., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
D.I. and D.L., for the Applicant
Jocelyn Clement and John Schmidt, for the Respondent

Before: **Beverly Cleveland, Chair**

**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
October 6, 2003

DECISION

[1] The Appellant, D.I., appeals a decision of Saskatchewan Government Insurance (“SGI”) dated March 5, 2003 denying her claim for benefits because she failed to initiate her injury claim with SGI within two years of the motor vehicle accident on January 7, 1997.

FACTS

[2] The Appellant was a belted front seat passenger in a motor vehicle driven by her husband that was involved in a single vehicle accident on January 7, 1997 in Montana. The car in which she was riding slid out of control and struck a cement barrier on an overpass after hitting an icy patch of road. She describes the vehicle moving violently from side to side of the road but other than being shaken up she does not recall being injured. She did not seek medical attention after the accident. The left front wheel was replaced and the car was driven back to Canada. A property loss report was filed with SGI in February 2002.

[3] The Appellant did not report any injuries to SGI until August 2002 when, at the suggestion of her physiotherapist, she called an adjuster. The adjuster advised her of the limitation period but that an injury representative would call her nonetheless. The Appellant completed an Application for Benefits on September 24, 2002.

[4] Section 167(1)(a) and (b) of *The Automobile Accident Insurance Act* in force at the time of the accident (“the old *Act*”) provides:

“Time limitation for claims

167(1) Subject to subsections (2) to (5), a claimant shall make an application for a benefit:

(a) within two years from the date of the accident on which the claim is based; or

(b) within two years from the date on which an observation of symptoms of a bodily injury is first made by a practitioner if those symptoms are not apparent immediately after the accident but are observed by the practitioner within two years from the date of the accident.”

[5] Sections 167(2), (3) and (4) do not apply in this case. Section 167(5) provides:

“(5) The insurer may waive a time limitation set out in this section if it is satisfied that the claimant had a reasonable excuse for failing to make an application within the time limit.”

[6] On March 5, 2003, SGI rejected the Appellant’s injury claim based solely on the expiry of the limitation period set out in s. 167(1)(a) and (b) of the *Act*. Although the decision to deny her claim was approximately five months after the Appellant submitted her Application for Benefits, the letter did not indicate whether any medical reports were requested and reviewed or if reasonable excuse was considered.

[7] The Appellant saw her family physician, Dr. Poon, in November 1997 for minor facial numbness, and complaints of not feeling well and fatigue. She was diagnosed with allergies and a sinus infection and prescribed an extensive course of antibiotics, none of which abated the numbness in her face.

[8] Unhappy with Dr. Poon’s care, the Appellant saw Dr. Linde for the numbness in her face in 1999. She underwent several (unspecified) tests and was eventually prescribed hormone therapy. Nothing however relieved the periodic numbness to her left face that at it’s worst times also affected her vision. In a letter dated March 15, 2003, Dr. Linde stated “...(S)ince the beginning she has complained about numbness in her face with no other neurological symptoms. No cause could be found at that point in time.

[9] Dr. Linde left family practice in 2001 and referred the Appellant to Dr. Van Heerden with continued complaints of facial numbness. He continued the hormone therapy and also prescribed anti-depressant medication. In April 2002, the Appellant experienced severe neck and upper back pain for which she received physiotherapy, acupuncture and chiropractic treatment. The Appellant reported that Dr. Van Heerden showed her the scar tissue on the x-ray of her neck and stated the cause has been from an accident.¹ I can find no where however that Dr. Van Heerden states her current symptoms are caused from the 1997 accident.

[10] In a letter dated March 10, 2003, Dr. Van Heerden wrote:

¹ note – no medical record dated May 28, 2002 was provided

“The above patient has been known to me since May 2001. Since the beginning, she has been complaining of a numbness in her face, which varies in intensity. A few months later, she also started complaining of quite a severe pain in the neck, numbness in the face, and pain and numbness in the left arm. Up to this stage, there was no association between the neck and the face. Examination revealed tenderness in the neck and central lower C4-5-6 area. She also had pain with lateral flexion of the neck but neurologically she was normal. The numbness in the arm and the face seemed to vary with certain positions of the neck. She was tried on physiotherapy and anti-inflammatories which helped, but did not clear up the situation. She had an x-ray in May 2002, which revealed degeneration at the C6-7 and C5-6 levels and the C5-6 disc space was significantly narrowed. There were also a couple of millimetres of retrolisthesis of C5 on C6. She was referred to a neurosurgeon and had an MRI scan. The MRI scan was done on October 9, 2002 and confirmed a slight retrolisthesis of C5 on C6 and showed mild disc bulging on levels C3 through to C6. The patient has since improved slightly through regular physiotherapy, chiropractic, massage, and acupuncture treatments.

“She has no history of any injury to the neck apart from a motor vehicle accident that she had a few years ago. This was prior to me knowing her and I have no notes or information on the motor vehicle accident. She, however, states that her problems started soon after that, although she never made the relation between the facial numbness and a possible neck injury. She now finds that certain positions and manipulation of the neck does relieve the numbness in the neck and numbness in the arms as well.”

[11] The radiological findings are stated as:

CERVICAL SPINE

Changes of disc degeneration are noted at C6-7 and particularly at C5-6 where the disc space is quite significantly narrowed. There is a couple of millimetres of retrolisthesis of C5 upon C6 as well. No facet abnormalities are evident.

THORACIC SPINE

The vertebrae appear somewhat osteopenic, possibly osteoporotic. There are several mild mid vertebral compressions most pronounced at what appears to be T8.²

FLEXION & EXTENSION VIEWS OF THE CERVICAL SPINE

Again, the bony structures are noted to be markedly osteoporotic and there is degenerative disc disease at C5-6 with limitation of movement at this level. No evidence of instability is demonstrated.³

[12] An MRI examination was done on October 10, 2002 of the Appellant’s head and cervical and lumbar spine. The radiologist’s findings, in part, are:

² exam date May 29, 2002

³ exam date July 8, 2002

CERVICAL SPINE

C5-6 Level: Mild disc bulge and accompanying posterolateral marginal osteophytes that mildly encroach on the neural foramina. The central canal is maintained. There is slight C5 on C6 retrolisthesis, probably degenerative in etiology.

IMPRESSION:

Multilevel degenerative disc disease with minimal to mild bulge. There is no significant central canal stenosis.

LUMBAR SPINE IMPRESSION: L3-4 through L5-S1 minimal to mild disc bulge.

[13] Dr. Van Heerden's letter doesn't refer to the radiologist's comments about the cervical and thoracic spine being "somewhat osteopenic, possibly osteoporotic" and "markedly osteoporotic". The Appellant was however referred for bone density testing. The clinical results are reported as:

"The left forearm is normal. The left femoral neck and total hips are osteopenic+. The right femoral neck is normal, and the total hip has osteopenia+. The L-spine has osteopenia+.

Rule out secondary causes for accelerated bone loss. Comprehensive non-drug management (adequate daily intake of calcium, Vitamin D, and Vitamin C) is required. Follow-up bone mineral density at Regina Qu'Appelle Health Region in three to four years."

[14] It is noted that the Appellant's bone mineral density is mildly osteopenic but the percentage loss is normal for her age.

[15] Until the severe pain she experienced in April 2002, the Appellant had worked at three part-time jobs as well as assisted her husband in his ministerial duties. She has remained unemployed since May 2002 due to the pain and discomfort in her neck, back and arms. The Appellant reported that her family now helps or does the meal preparation and housework because he can no longer do it.

[16] The Appellant's husband testified in addition to the significant pain his wife suffers, this is a significant stressor because she took great pride in caring for her family and doing all of the extra activities as a minister's wife. He described her as a completely different person now than before the accident and that some days she cannot do anything.

[17] The Appellant submitted a letter from her chiropractor, Dr. Shannon MacNeill, dated April 10, 2003. It reads in part:

“[The Appellant] attended this clinic on January 28, 2003 for treatment of her neck condition and numbness in her left face. She related a serious MVA in 1998, after which she experienced the facial numbness and had attended several practitioners as well had several tests done to determine its cause. It was not until several years later that it was determined that the facial numbness appeared to be related to her cervical spine. She states that she did not have the facial numbness prior to the MVA, and that she did not seek medical treatment for any cervical spine complaints as it did not seem to be a major complaint. In April 2002, [the Appellant] found that her neck had seized up and she attended physiotherapy when at that time the connection between her cervical spine complaints and her numbness into her face were made.

“...Diagnosis was mild cervical discs with intermittent neurological signs as well as cervical spine dysfunction. Secondarily, she also has osteoporosis and osteoarthritis.

“After a short trial of 5 treatments involving soft tissue work into the cervical spine as well as gentle spinalmanipulation, [the Appellant] states that her numbness improved dramatically and that she hasn't felt this good in years. It would therefore be logical to assume that the numbness in her face is indeed connected to the cervical spine.”

[18] In July 2003, Dr. MacNeill wrote to SGI and said, “...[The Appellant] has had great improvement in her symptomatology, but still experiences intermittent facial numbness and numbness into her upper extremities. This tends to increase in frequency when her cervical spine symptoms flare up...As [the Appellant] did not have any of these symptoms prior to her MVA in 1998, it is likely that her current symptoms are the result of the injuries she sustained in the MVA. The type of symptoms [the Appellant] is experiencing is also very common with an MVA; eg. Whiplash associates disorder with neurological involvement...”

[19] Lastly, the Appellant provided a hand-written note from neurosurgeon, Dr. C. Ekong. He writes “(P)lease note that there is nothing in my examination findings nor CT findings to prove or disprove your symptoms and their relationship to a particular accident. Your best bet would be if you can prove to SGI that you developed certain symptoms after the accident.”

[20] The Appellant states the 1997 accident was the only motor vehicle accident she had been in prior to discovering her injuries. She did not know the numbness in her face had anything to do with it until x-rays revealed the cause was from an accident. She also submitted her

symptoms are consistent with whiplash associated disorder with neurological involvement and is very common with motor vehicle accidents.

[21] She argued this accident was the sole cause of her injuries and that she had reasonable excuse for not making a claim for benefits because neither she or her doctors discovered the numbness in her left face had anything to do with her neck injury or the 1997 motor vehicle accident until May 2002.

[22] SGI states the Appellant complained of the numbness in her face as early as November 1997 when she knew or at least should have remembered that she was in a motor vehicle accident. SGI submitted a note from Dr. Poon dated October 18, 2002 that stated “[The Appellant] was seen in the clinic for R ear and upper jaw pain on November 16, 1997.” SGI’s position is the Appellant’s injury claim was brought outside the limitation periods set out in s. 167(a) and (b) of the *Act* and that she has no reasonable excuse as provided in s. 167(5).

CONCLUSION

[23] The Appellant’s claim for benefits was brought more than five years after the motor vehicle accident she believes caused her injuries. She is prohibited from bringing her injury claim by 167(1)(a) and (b) of the *Act*. The Appellant relies on “reasonable excuse” as provided for in s. 167(1)(5).

[24] In rejecting her claim in March 2003, SGI did not consider whether the Appellant had a reasonable excuse for failing to bring her claim within the legislated time periods. However it was argued at the hearing that because she complained of pain and numbness in her face shortly after the accident in November 1997 she should have remembered the car accident long before April 2002.

[25] The Appellant experienced chronic numbness and pain in her face that increased in intensity and sometimes affected her vision for which she attended numerous care providers. Notwithstanding five years of continued complaints of numbness to her face she did not undergo any radiological examination until 2002. Her evidence is she was symptom free before the

accident and that at least by November 1997 she had pain that continues to today. I think it is unreasonable she would not recall the motor vehicle accident in these circumstances.

[26] The Appellant provided several letters from her care providers that she submitted support her injuries were caused from the 1997 accident. At best, what may be said is there is a possibility (not a probability) the symptoms she complains of are the result of the accident. The issue in this appeal however is *reasonable excuse* and not causation. Even if reasonable excuse had been found, there was no *objective* medical evidence to support the symptoms she experiences today were caused by the 1997 accident. For example, Dr. MacNeill's opinion is not supported by any objective medical findings.

[27] The role of the Commission was described at the hearing and set out in our decision in *R.C.*⁴ The Appellant did not bring her injury claim within the required time periods and she has the onus of proof to establish reasonable excuse for failing to do so. I am satisfied on a balance of probabilities that the Appellant did not have a reasonable excuse for failing to bring her application within the required time periods.

[28] SGI's decision is upheld and the application is dismissed.

Dated at Regina, Saskatchewan, on August 27, 2004.

Beverly Cleveland, Chair

⁴ *R.C. v. Saskatchewan Government Insurance* 2003 SKAIA 1