

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *L.L. v. Saskatchewan Government Insurance,*
2004 SKAIA 038
Date: 20040830
File: 090 of 2003

BETWEEN

L.L., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
Henri Chabanole, for the Applicant
Jocelyn Clement, for the Respondent

Before: **Ann Phillips, Q.C., 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
February 18, 2004

DECISION

[1] The Appellant, L.L., appeals a decision of Saskatchewan Government Insurance (SGI) dated August 7, 2003 that terminated his rehabilitation benefits after discharge from a physical therapy program at Canadian Back Institute (CBI). The decision allowed for a further four treatments of massage therapy to assist the Appellant's transition into the active home program with which he had been set up at CBI when he was discharged June 30.

[2] Despite the termination, the Appellant had not fully recovered from his injury, incurred in a motor vehicle accident on March 8, 2003, and this appears to have been acknowledged by SGI, after the decision appealed from, since they referred him for tertiary assessment on September 15. After assessment October 7, 8 and 9 by an interdisciplinary team of health professionals, he was admitted to Wascana Rehabilitation Centre (WRC) in its Functional Rehabilitation Program which he attended for eight weeks, with a discharge date of December 19, 2003.

FACTS

[3] Before the accident, the Appellant had worked as a parking lot cashier. He also sold long distance phone cards for additional money. He had enrolled at SIAST, taking one English course. He was [in his twenties] and enjoyed soccer. He helped support his parents who live in Bosnia.

[4] He began physiotherapy on March 21, 2003 complaining of cervical thoracic pain and stiffness and TMJ discomfort. The physiotherapist assessed his condition as cervical WAD Grade II with moderate paraspinal, cervical and thoracic pain strain. He reported to the Appellant's family physician on his clinical findings and expressed concern that the Appellant's perception of disability was out of proportion to these objective findings. A subsequent report based on an appointment June 11 from the physiotherapist noted:

“Functional thoracic mobility. Mild T6/7 flexion hypermobility. Mild paraspinal hypertonicity. Marked pain focused behaviour. T7 costo vertebral joint hypermobility.”

[5] He noted minimal improvement and said that the subjective symptoms exceeded the objective signs.

[6] At discharge from physiotherapy June 30, the physiotherapist advised that the cervical and lumbar symptoms had resolved, but he still had some mid-thoracic hypermobility. He was given a home conditioning program to increase strength in this area.¹

[7] His family physician, Dr. Harris, reported on mid-thoracic pain and stiffness but cleared him for return to regular work duties, as long as he did no heavy lifting (over ten pounds) and his worksite was ergonomically correct. He was of the view that no further treatment (chiropractic or physiotherapy) was required, but another physician had referred the Appellant to Dr. Buwembo, a neurosurgeon, for further investigation. A discussion between Dr. Harris and NRCS Inc.'s Kris Benson, a kinesiologist/rehabilitation consultant, noted that the Appellant was functionally capable of returning to full time regular duties of his pre-injury position as a parking lot attendant, provided he avoided heavy lifting and ensured that the work site was ergonomically correct. Dr. Harris did not think he required any physiotherapy or chiropractic treatment but might benefit from occasional massage therapy. It was on this basis, set out in a letter to Dr. Harris from NRCS Inc.'s Kris Benson, a kinesiologist/rehabilitation consultant engaged by SGI to obtain medical updates on the Appellant on its behalf, that SGI issued the decision letter of August 7, 2003.

[8] He had been on a graduated return to work program since June 2. On July 11, his employment as a parking lot attendant terminated.

[9] On August 15, Dr. Harris saw the Appellant again. His report to SGI said that he had normal range of motion of the spine, had slightly tender paraspinal muscles in the thoracic area. He thought the Appellant needed chiropractic, physiotherapy, massage, acupuncture, anti-inflammatory medication, a multidisciplinary assessment, and an exercise program for his back which he was not receiving.

[10] SGI referred the Appellant for tertiary assessment at WRC. SGI told him to disregard the decision letter and to continue with his treatment. In mid-September, the tertiary assessment team diagnosed scapulothoracic dysfunction and whiplash associated disorder I with headaches.

¹ Three documents refer to this but the actual report was not filed.

They observed altered posture, but functional in neck range of motion, thoracic range of motion, upper extremities range of motion and shoulder range of motion, but with pain at the end of the thoracic and scapular range of motion. He was below average for endurance, grip strength, cardiovascular fitness, and had some biomechanical dysfunction. His functional assessment showed him to be capable of working at a light level of work. His graduated return to work had failed because of prolonged maintenance of posture, such as standing and sitting.

[11] He was admitted October 20 for an eight week program (Functional Rehabilitation Program) to provide biomechanical treatment of the thoracic spine disorder, in consultation with a chiropractor, regional, functional and global conditioning, education on stress, pain management and coping techniques.

[12] The discharge summary as of December 19 from the Functional Rehabilitation Program again noted that his subjective pain reports were inconsistent with objective findings and observed functional abilities. He had a high perceived disability and was very pain focused. While he attended the program regularly, punctuality was an ongoing issue and he needed supervision to see that he was performing all program activities appropriately and safely.

[13] His ability to complete functional tasks had improved, and he met physical job demands of light to medium level work. He was “self-limited by pain” on all lifting, reaching and carrying tasks. His positional tolerances included standing for approximately 60 minutes and sitting for 60 minutes, and sustained reaching for 50 minutes (chest level) and 45 minutes (crown level). His depression had mostly resolved, with pain reduction and improvement in sleep. He expressed concern about pain affecting his ability to perform certain jobs, and while interested in creating business opportunities, did not seem very motivated to find basic employment. He was given a self-directed home exercise therapy/physical therapy program, was encouraged to continue upper body stretching and strengthening exercises, global conditioning and general functional activity, with continued use of therabands and a theraball. Chiropractic and massage therapy treatments were not recommended.

[14] About a month after receiving this discharge summary, SGI wrote a second decision letter dated January 16, 2004, which stated:

“We have received the discharge report from Wascana Rehabilitation Centre which indicates that you meet the physical job demands of the job you held at the time of the motor vehicle accident. Your income replacement benefit will therefore be concluded February 15, 2004.

On the discharge report there was no recommendations for any further treatment, except the home exercise program which is your own responsibility. Therefore, SGI will not be funding any further treatment of any kind.

I know you currently do not have a job to return to, SGI is not obligated to find you a job. We are prepared to have the vocational rehabilitation consultant from NRCS work with you up to February 15, 2004 to assist you with some job search skills, resume preparation, and interview skills.

We will fund your income replacement up to February 15, 2004 while you are working with NRCS and actively seeking employment. Effective February 15, 2004 your income replacement benefits will be concluded. We enclose our cheque in the sum of \$943.38 which represents payment of your income replacement benefit up to February 15, 2004.”

[15] On the same day, January 16, 2004, SGI sent a further letter with respect to the amount of income replacement benefits. They paid him income replacement benefits from June 2, 2003 to July 11, 2003 (when his employment terminated), based on the hours worked in the graduated return to work program, and for the period July 12, 2003 to October 19, 2003, when he began the WRC program. (He had previously been paid during the WRC program up until January 11, 2004.)

[16] The Appellant filed additional medical information at the hearing. Dr. Harris wrote notes February 9 and 16, 2004 to the effect that he was suffering from chronic pain in the neck and upper back secondary to an injury. He was still awaiting an appointment with neurosurgeon Dr. Buwembo (scheduled for May 25). “He feels that he is currently unable to work.” His massage therapist reported back pain in the mid-thoracic and lower lumbar regions, with limited range of motion in side lateral bending and flexion with hypertonic paraspinal musculature. He recommended continuing treatment.

[17] SGI called four witnesses to testify by telephone. Alistair Wilson, the physiotherapist who treated him post-injury, elaborated on his reports referred to in paragraphs [4] to [6]. He stated that the Appellant had returned to work during the course of the physiotherapy, and that he had felt discharge appropriate at the time because the nature of the job was sedentary. He was aware of the Appellant’s continuing discomfort, and said he did not dispute the pain symptoms he reported. However, there were no objective signs which led him to believe the Appellant

could not perform his duties, and no further active rehabilitation was required at the time of discharge. Wilson was extensively cross-examined: his replies were responsive and thoughtful. He acknowledged that the severity of pain can affect one's ability to work, and that the Appellant certainly demonstrated the possibility of developing chronic pain at the time of discharge. He agreed that his patient's lack of familiarity with the English language may have impaired communication, and might have affected the Appellant's scores on the pain questionnaires administered.

[18] Kelli Draper was the Appellant's physiotherapist in the WRC's Functional Rehabilitation Program. She testified that he was fully functional on discharge with no structural restrictions: he could do the job he had before. He met the goals set at the beginning of the program, and he met the job demands as tested by the occupational therapist. She had described him as "self-limited by pain": by this she means he stopped before the task was done due to pain. She observed that pain did not limit him in other related activities. She acknowledged that a functional capacity evaluation had not been done, and they had not assessed him "on the job". He did function six hours a day on program, with global conditioning, exercises, and activities related to functioning. His pain complaints had improved but were still present. His complaints of headaches, dizziness and blurry vision had been investigated. His neurological testing had been negative: if it had not been, she is trained to assess and refer to a neurologist. She acknowledged limited work experience, having graduated with a B.Sc. degree in Physical Therapy and Anatomy from University of Saskatchewan in May, 2003.

[19] Nicole Gallais, the senior physiotherapist on the WRC team involved with the Appellant, supervised Draper in connection with Draper's assessment, management and discharge of this patient, to ensure all biomechanical issues were addressed. In her experience, very few leave the tertiary treatment program free of pain, but over half go through graduated return to work programs and do in fact return to work. She was also cross-examined in detail on the different levels (primary, secondary, tertiary) of treatment, the active treatment model, the effect of pain on function, pain thresholds, pain behaviour and chronic pain. She acknowledged that she had not been the Appellant's treating physiotherapist.

[20] Sherry Chestney, also at WRC, described the Functional Capacity Examination to which the Appellant b's counsel referred. It is usually carried out over a two day period, four hours each day, in cases where there is a permanent impairment, or the person is incapable of returning to his previous job. It evaluates different activities to see what the person is capable of doing other than those required in the previous job, or, if the person is returning to her own job, whether there are any restrictions. Some aspects of the FCE were addressed in the tertiary program: for example, the Appellant's abilities to lift, reach, and sustain various positions were assessed.

[21] There is no dispute that the Appellant has experienced and continues to experience pain, to such an extent that in the fall of 2003 he was taking 10 mg. doses of morphine nightly, as well as during the day on an as-needed basis. (He was also taking non-steroidal anti-inflammatory medication and diazepam.) The medical information available, however, does not permit the conclusion that he is unable to work at the level at which he was employed before the accident. On discharge from the tertiary program, he was functioning at the light to medium level of work. Two months later, his doctor said: "He feels that he is currently unable to work". This is quite a different matter from outlining clinical findings that would prevent or restrict him from working.

[22] His counsel suggested in argument that his pain made him unable to cope with job demands, that he had a predisposition to pain, and that he was not back to where he was before the accident. There was only the Appellant's evidence that he could not work due to pain, and while his subjective opinion is certainly to be considered and respected, I do not give it the weight of the objective findings of the WRC discharge summary. I agree that he is "not back to where he was before the accident": to qualify for income replacement benefits, however, this is not the test to be met. Section 113(2) of *The Automobile Accident Insurance Act* in force at the time of the Appellant's accident provides:

113(2) An insured is entitled to an income replacement benefit if, as a result of an accident, the insured:

- (a) is unable to continue an employment held by the insured at the date of the accident;"

[23] While it is possible that his appointment with the neurosurgeon scheduled for May, 2004 may have disclosed a condition that (with hindsight) may have operated to prevent or restrict him from working at a sedentary to light level job, there was no evidence of this either at the hearing or filed thereafter.

[24] SGI's decision on this issue is upheld.

[25] The Appellant also claimed that he should have received income replacement benefits with respect to his self-employment selling phone cards. A letter from [the telephone company] of Calgary said that he had been distributing phone cards in the Regina area from December, 2002 to March, 2003, and had been buying \$10,000 to \$13,000 per month. The telephone company manager estimated a monthly income for the distributor of \$1,300, based on 8% to 10% of sales. The Appellant acknowledged that his expenses were between \$800 to \$1,000 per month, for a net of \$300 to \$400. He said he had a small piece of paper where he kept a record of his expenses, but did not know if he still had it. He had not declared any income in 2002, but he had only just begun this business. He made cash sales only, and neither gave nor got receipts. He did not collect GST or PST. He had only one invoice from the telephone company, and it shows purchases of \$1,059. His customers were mainly corner stores, in Regina, Saskatoon, Moose Jaw, Fort Qu'Appelle, and Winnipeg. He was unable to give a list of their names. Moreover, of the cards he purchased from the telephone company, many were sold for him by other people. He was not able to answer why he could not continue this practice after the accident. SGI had contacted the company in April, 2003 to attempt to obtain information to enable them to calculate lost income, but the telephone company had not contacted them in reply. The Appellant acknowledged he had "a lot of trouble" with the telephone company representative after the accident, e.g. problems with release of documents.

[26] I am not satisfied that the Appellant adequately proved a loss of income from the phone card business, or that the loss of income was attributable to his accident. This does not prevent him from providing information at a later date, although the absence of information at this stage suggests this eventuality will be unlikely.

CONCLUSION

[27] SGI's decisions are confirmed: the application is dismissed.

Dated at Regina, Saskatchewan, on August 30, 2004.

Ann Phillips, Q.C., Chair