

Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *I.R. v. Saskatchewan Government Insurance,*
2004 SKAIA 055
Date: 20041207
File: 127 of 2003

BETWEEN

I.R., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
I.R., Applicant
Dale Brown, for the Respondent

Before: **Ann Phillips, Q.C., Chair**
Beverly Cleveland, Commission Member
Joy Dobko, 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
September 7, 2004

DECISION

[1] This is an appeal by I.R., the Appellant, regarding a decision by Saskatchewan Government Insurance (“SGI”) dated October 7, 2003 regarding the termination of income replacement benefits. SGI’s decision to terminate benefits was based upon a pre-existing medical condition of congenital spinal stenosis which the Appellant suffered from which they allege was the reason for her spinal surgery on September 22, 2003 and in turn led to her inability to maintain employment following surgery.

FACTS:

[2] The Appellant was involved in a motor vehicle accident on September 2, 2003. The Appellant suffered soft tissue injuries to her neck and back when the vehicle she was operating was rear-ended by another vehicle while she was stopped at a red light. She complained of severe pain in her neck and right shoulder. She was unable to work following the accident. She testified that prior to the motor vehicle accident she experienced pain in her neck but that she was able to work because the pain was tolerable. After the accident, her arms would lock up and the pain was so severe she was unable to keep working. The Appellant completed an Application for Benefits (“Application”) on September 10, 2003. She described her injuries from the accident to include extreme headaches, fatigue in arms and soreness in shoulder and pain in the neck. On her Application she shaded areas of pain to be in the right side of the neck, right shoulder and right arm. A review of clinical notes for Dr. Shukla on June 13, 2003, August 8, 2003 and August 29, 2003 confirm that the Appellant complained of pain in her neck prior to the motor vehicle accident and she had a prescription for Demerol for the pain.

[3] Prior to the motor vehicle accident, the Appellant suffered from congenital spinal stenosis. On June 4, 2001, the Appellant attended to the Neurosurgical Outpatient Clinic at the Royal University Hospital in Saskatoon, Saskatchewan. The report of Dr. Pirouzmand dated June 5, 2001 noted that the Appellant presented with a long history of progressively worsening pain in her neck radiating down both her arms up to her mid-forearm. Dr. Pirouzmand reported that the MRI done in December of 2000 showed congenital spinal stenosis especially from C4 to the superior aspect of C7. She did not have any significant disc bulge at the time. The Appellant

was advised of two options at the time: to not do anything and follow up serially in the clinics or she could have surgery which would involve a multi-level anterior cervical corpectomy with a strut graft to achieve fusion. She was advised to avoid trauma to her cervical spine.

[4] On January 15, 2002, Dr. Griebel examined the Appellant and advised that given her symptomatology and radiographic findings, it would seem reasonable to proceed with surgical decompression. Dr. Griebel reported that he was concerned with the risk of waiting given her increased potential for neurologic injury if she were to have an accident or fall. Dr. Griebel recommended a follow-up with Dr. Pirouzmand for surgical decompression. The Appellant consulted Dr. Pirouzmand on January 16, 2002. Dr. Pirouzmand found that the Appellant presented with some neurological deterioration and mild myelopathy compared to her last visit in June 2001. Dr. Pirouzmand recommended anterior multi-level discectomy and fusion of at least 3 levels of C4-5, C5-6 and C6-7. Dr. Pirouzmand reported that the other option of a multilevel laminectomy could lead to a swan-neck deformity. Dr. Pirouzmand reported that he would try to arrange the operation in the near future. On January 31, 2002, the Appellant consulted with Dr. Pirouzmand regarding the proposed options for surgery and elected to have posterior over anterior decompression.

[5] The Appellant underwent posterior multilevel laminoplasty from C4 to C6 and C7 laminectomy on April 29, 2002. It is important to note that this surgery took place three and one-half months following the Appellant's appointment with Dr. Pirouzmand in January 2002 when Dr. Pirouzmand stated that he would try to arrange the operation in the near future.

[6] Subsequent CT scans on May 2, 2002 and June 25, 2002 and an MRI scan on June 28, 2002 showed that the laminoplasty fragments extending from C3 to C6 were found to be causing some impingement of the spinal cord predominantly on the left and most severe at C5-6 and C6-7. Dr. Pirouzmand examined the Appellant on July 10, 2002 and reported that the MRI showed mild to moderate residual spinal stenosis at the decompressed level. Dr. Pirouzmand reported that the Appellant was doing quite well with no further progression of her cervical myelopathy. However, on January 9, 2003, the Appellant attended upon Dr. Pirouzmand for reappearance of neck pain. Dr. Pirouzmand reported that she remained neurologically stable and felt that

symptoms in her upper extremities could be related to Cubital Tunnel Syndrome. Nerve conduction studies done on March 5, 2003 showed left ulnar motor neuropathy. A repeat MRI scan done on June 16, 2003 showed severe spinal canal stenosis at the C4, C5 and C6 levels. The MRI report also noted “patchy signal changes within the spinal cord at C4-5 and C5-6 disc spaces, which are more pronounced in comparison to the previous study from June 2002”. The Appellant saw Dr. Pirouzmand on August 27, 2003 to discuss the MRI results. This consultation was prior to the motor vehicle accident and identifies the medical condition of the Appellant prior to her motor vehicle accident. Dr. Pirouzmand reported the MRI results to be as follows:

Her follow-up cervical spine MRI reveals a residual left paracentral spinal stenosis at C4 to C7 level with patchy signal changes in the cord from C4 to C7 region. There is also a slight kyphotic angulation of the cervical spine at C5/6 level. Her electrophysiological studies are consistent with the left ulnar motor neuropathy.

[7] Dr. Pirouzmand further reported:

This young patient’s symptoms have improved significantly with no gross change in her neurological examination. She is currently off her narcotic analgesic and is able to work long hours with no major difficulty. *[Emphasis mine]* I am however concerned about the patchy signal change in her cervical spine as less persistent numbness in the left hand which is her dominant arm. I have recommended to complete laminectomy at C3 to C6 level to achieve further posterior decompression knowing this can lead to possible weakening of the posterior tension band in her neck and subsequent progressive kyphotic deformity. I have warned her about this long-term problem, which might require cervical fusion in the future. The potential complication of the operation including spinal cord damage, CSF leak, infection and pain was explained to the patient. I do not think the operation will change the pattern of her neck pain. I also think she will require left cubital tunnel release to hopefully improve her left hand sensory symptoms. The major complication in this operation also includes permanent nerve or joint damage, neuropathic pain at the site of the scar and lack of improvement, which are collectively around 7%. She is eager to proceed with the operation and I will try to arrange the operation in the near future.

[8] We note from the report of Dr. Pirouzmand that the Appellant reported to Dr. Pirouzmand that she was working full-time and had recently obtained a second job. The Appellant was advised that she required surgery to further decompress the spine. The Appellant stated that at the time of meeting with Dr. Pirouzmand she agreed to go ahead with the surgery but upon leaving his office and thinking about the decision more, she decided to seek a second opinion regarding the proposed surgery. The Appellant’s testimony in this regard is supported by her Application for Benefits completed on September 10, 2003 and the clinical notes of Dr. Shukla. We note Dr. Pirouzmand would “try to arrange the operation in the near future”.

[9] The Appellant testified at the Appeal Hearing that she was waiting for a second opinion in order to determine if the surgery proposed by Dr. Pirouzmand, which she understood would leave a portion of her spinal cord exposed, was necessary. We have reviewed the clinical notes of Dr. Shukla and we are satisfied that the Appellant had decided to seek a second opinion from Dr. Kumar prior to the motor vehicle accident. We have also reviewed the Request for Consultation to Dr. Kumar dated September 3, 2003 and find that although the Request is dated one day after the accident we are of the opinion that it arises out of the August 29, 2003 clinical notes of Dr. Shukla. The Appellant believed that obtaining a second opinion would give her a couple more months to earn some extra income until she saw Dr. Kumar and decided if she would proceed with the surgery. This was of particular concern to the Appellant because she was a single mother. The Appellant was contacted for surgery on September 2, 2003 and September 19, 2003. She testified that she turned down both of these dates because she was waiting to see Dr. Kumar. The Appellant was unsure when she received the calls for the proposed surgery date and could not say whether the call for September 19, 2003 came before or after her September 16, 2003 meeting with Dr. Pirouzmand. The Appellant wrote in a letter to the Appeal Commission that she had no intention of having the surgery done for at least two months and probably closer to six months.

[10] On September 16, 2003, the Appellant attended upon Dr. Pirouzmand regarding her injuries sustained in the motor vehicle accident. The Appellant reported neck pain with radiating right shoulder and posterior scapular pain and a generalized numbness of her right hand without any weakness. Dr. Pirouzmand reported:

On her examination, she is in moderate amount of pain with somewhat limited forward flexion with good lateral rotation and extension. There is minimal right paravertebral muscle spasm. Her motor examination reveals good muscle power in all the extremities with close to normal muscle tone. She is generally hyperreflexic with equivocal plantar reflexes bilaterally in today's examination. She continues to have positive Tinel's sign in the left cubital tunnel region. **She has a new onset of reduced sensation along the ulnar aspect of the 2 fingers in the right hand.** [*Emphasis mine*] Her gait is normal.

I think the recent accident highlights the importance of prophylactic posterior decompression for her spinal cord to prevent potential progressive myelopathy. Obviously the recent exacerbation of her pain is due to possibly soft tissue injury. I again have talked to her in length about the rationale and overall technique of the operation and complications, which unfortunately include further neurological compromise. She understood my explanation and is agreeable to proceed with the posterior laminar decompression in the near future. She would like to postpone her left

ulnar nerve decompression until she is in better general condition in terms of neck and shoulder pain. I will try to arrange the operation in the near future.

[11] On September 19, 2003, Dr. Shukla examined the Appellant following her motor vehicle accident. He diagnosed her with a Grade III Whiplash Associated Disorder which he expected to last three to six weeks in duration. Dr. Shukla noted that the Appellant's pain in neck and shoulders was worse since the motor vehicle accident. Dr. Shukla also noted that the Appellant was going for neck operation on September 22, 2003 on an urgent basis. The Appellant testified that after the motor vehicle accident the pain in her neck and shoulders and the locking of her arms was so severe that she could no longer work and felt that she had no choice but to proceed with the surgery before obtaining the second opinion from Dr. Kumar.

[12] On September 22, 2003, the Appellant underwent surgery to remove the bone fragment which was impinging on her spinal cord. The operative report states "we were able to get excellent decompression of the spinal cord from the C4 to C6 levels and the laminoplasty segment was completely removed". Dr. Hattingh examined the Appellant for follow-up on November 18, 2003. Dr. Hattingh reported that the Appellant continued to have symptoms on her right side and severe painful neck spasms and referred her for EMG for her ulnar nerve problems and a follow-up MRI. Dr. Hattingh also reported that because the compression was mainly on the left side, her weakness should be on the same side. An MRI completed on May 17, 2004 still showed some of the bone dislodged and impinged on the spinal cord on the left side of the bottom of the laminoplasty. Dr. Hattingh recommended surgical removal of part of the laminoplasty.

[13] SGI's medical consultant, Dr. Howlett, reviewed the medical files of the Appellant on November 13, 2003 and September 2, 2004. In his November 13, 2003 report, Dr. Howlett concluded on the basis of medical evidence available to him that the surgery on September 22, 2003 was not required as a result of the motor vehicle accident. Dr. Howlett prepared a more detailed report on September 2, 2004¹, which was available to the Commission at the Appeal Hearing. Dr. Howlett concluded:

¹ This report was not available to the personal injury representative at the time that she made her October 7, 2003 decision.

The motor vehicle accident of September 2, 2003 did not impact on the surgical options. As of August 27, 2003 Dr. Pirouzmand had already advised the customer of the surgery that was required. The surgical intervention required as of August 27, 2003 (sic) was inevitable. The motor vehicle did not “force her hand” in terms of the type of medical intervention she might choose.

[14] Dr. Howlett also reported:

In Dr. Pirouzmand’s letter of September 15, 2003 he indicates that the customer has had neck pain with radiating right shoulder and posterior scapular pain. These symptoms would be consistent with a motor vehicle accident injury involving soft tissues of the upper back and neck. These symptoms are not consistent with the bony fragment that was located in surgery. At the time of seeing Dr. Pirouzmand the customer also described generalized numbness of the right hand without any weakness. **This can be attributable to soft tissue injury of the upper back and neck but could also be related to the bone fragment impinging on the spinal cord.** [*Emphasis mine*]

...

In Dr. Pirouzmand’s September 16, 2003 letter he refers to the importance of prophylactic posterior decompression for her spinal cord. His concern I presume is that when there has been a previous surgery to allow for more room for the spinal cord in the spinal canal one has created some instability of the bones at the back of the spine. Because of the loose bone fragment that was caused by the previous surgery and its subsequent malposition he may have concerns that the malpositioning could worsen. I do not interpret from Dr. Pirouzmand’s letter that there has been a worsening of the position of the bone fragment after the motor vehicle accident but that the potential for that to occur existed. Thus his advice to have further surgery to reduce the risk of future impingement of the spinal cord.

[15] Dr. Howlett is unable to state whether the right handed numbness is due to soft tissue injuries or whether it is due to the bone fragment impinging on the spinal cord. Although, he concludes that the surgery was not caused by the accident, he does not provide an opinion with regard to whether the intervening motor vehicle accident and the right handed symptoms forced the Appellant to accept an earlier date for surgery. In our opinion, Dr. Howlett agrees that the position of the bone fragment could have been worsened by the motor vehicle accident but can not report conclusively one way or the other what the cause of the right handed numbness would be.

[16] On August 13, 2004, the Appellant again underwent a third spinal surgery to remove bone fragments impinging the spinal cord at C5 to C6 and C6 to C7. The Appellant reported that she is doing much better following the third surgery as opposed to the first two.

LAW AND ANALYSIS

[17] The issue on Appeal is whether or not the surgery of September 22, 2003 was caused or necessitated by the motor vehicle accident. SGI submitted that the Appellant would have required the surgery in any event as a result of her pre-existing condition and that the motor vehicle accident did not cause the surgery. The Appellant submitted that she was waiting to seek a second opinion regarding the proposed surgery and that as a result of the motor vehicle accident and her injuries, she had no choice but to proceed with the surgery before obtaining her second opinion from Dr. Kumar. The Appellant admitted at the Appeal Hearing that she would likely have required surgery of some kind in the future, however, she submitted that she was functioning prior to the accident and therefore could have waited to obtain the second opinion from Dr. Kumar.

[18] The Commission's jurisdiction to review a decision of SGI is set out in section 193(7) of the *Automobile Accident Insurance Act* (the "Act"). The Appeal Commission may:

- (a) set aside, confirm or vary the insurer's decision; or
- (b) make any decision that the insurer is authorized to make pursuant to this Part.

[19] The Commission determined in *R.C.*² that its discretion under section 193(7) 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 wrong in law; or based on erroneous assumptions; or at the very least, the decision was unreasonable.³

[20] SGI submitted that this is a case where the "crumbling skull" rule would apply. SGI submitted that the Appellant had a pre-existing condition of cervical spinal stenosis which would require further surgery and/or other medical interventions. In *Athey v. Leonati*, the Court reiterated the "crumbling skull doctrine" as follows:

The so-called "crumbling skull" rule recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his

² *R.C. v. Saskatchewan Government Insurance* 2003 SKAIA 1

³ *Belchamber v. Saskatchewan Government Insurance*, [1997] TWL QB 97557; *Donen v. Saskatchewan Government Insurance*, [1998] TWL QB 98224; *Collis v. Saskatchewan Government Insurance*, [1998] TWL QB 98113.

or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experience anyway. The defendant is liable for the additional damage but not the pre-existing damage.⁴

[21] In relying upon this doctrine, SGI submitted that the Appellant is not entitled to any further benefits beyond September 22, 2003. The difficulty with this argument is that SGI ignored the medical diagnosis of a WAD III by Dr. Shukla and the medical findings of Dr. Pirouzmand on September 16, 2003 of a new onset of reduced sensation along the ulnar aspect of the 2 fingers in her right hand as well as generalized numbness of her right hand. **Dr. Pirouzmand reported on August 27, 2003, numbness in the Appellant's left hand not her right hand.**

[22] We agree with SGI's submissions and the Appellant's admission that she would likely have required surgery in the future as a result of her pre-existing condition therefore placing her within the doctrine of a "crumbling skull", however, we are also satisfied that the Appellant was seeking a second opinion at the time of the motor vehicle accident and that but for the motor vehicle accident and the onset of extreme pain and the development of numbness in her right hand, she would not have proceeded with the surgery until she had obtained a second opinion from Dr. Kumar, which could have taken several months. We are unable to conclude that the motor vehicle accident caused the September 22, 2003 surgery, however, in our opinion, the motor vehicle accident and the new presentation of injuries sustained to the right hand forced the surgery at an earlier date than the Appellant would originally have considered.

[23] There were submissions made regarding the urgency of the surgery and we note that the Appellant waited three and one-half months for her first surgery in 2002, when Dr. Pirouzmand reported that he would "try to arrange the operation in the near future". Dr. Howlett opined that this statement would likely mean within the next couple of weeks however, there is no testimony by Dr. Pirouzmand in this regard. We accept the Appellant's submissions that she would not have proceeded with the surgery for a couple of months but following the motor vehicle accident she felt she had no choice because of the extreme pain and the onset of symptoms in her right hand. We accept Dr. Pirouzmand's referral to the importance of the surgery due to the recent

⁴ *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paragraph 35.

motor vehicle accident, and SGI's Medical Consultant, Dr. Howlett's, opinion that there was potential for the bone fragment to worsen with a motor vehicle accident. The Appellant pointed out that an MRI was not completed prior to her surgery on September 22, 2003 which would have shown if the position of the bone fragment worsened. Dr. Howlett concluded that the right hand numbness experienced after the motor vehicle accident could be related to the bone fragment impinging on the spinal cord. As this was a new symptom for the Appellant, and without the benefit of a new MRI and the testimony of Dr. Pirouzmand, in our opinion, it was reasonable for the Appellant to conclude that as a result of her increased pain and numbness in the right hand and fingers, that the position of the bone fragment may have worsened and therefore forced her to accept surgery at an earlier date rather than waiting for a second opinion.

[24] It is with great difficulty that we must determine a future point in time at which the Appellant's pre-existing condition would have necessitated the second surgery. We must consider how long it would have taken to obtain a second opinion from Dr. Kumar and also give consideration to the length of time it took to schedule her first surgery in 2002. As no evidence was given with respect to the length of time it would take to see Dr. Kumar, and the Appellant's own testimony is that she would have waited at least two months and probably closer to six months to save money before having surgery, we find that a reasonable length of time that the Appellant would likely have put off having surgery was three and one-half months.

[25] SGI further submitted by way of written argument that there was no objective evidence of any other injuries from the accident for which the Appellant would have been entitled to Part VIII benefits. We do not agree and note that Dr. Shukla reported WAD III and Dr. Pirouzmand reported exacerbation of pain due to soft tissue injuries. Dr. Howlett also reported:

Dr. Pirouzmand indicates the customer had a soft tissue injury of the upper back and neck. I cannot find any further documentation with regard to this. It would be assumed that some of these symptoms would continue past the September 22, 2003 date. I am unsure if there was any treatment i.e.: physiotherapy, etc. for these symptoms.

[26] Therefore, we conclude that but for the intervening surgery of September 22, 2003, the Appellant would have been entitled to some kind of rehabilitation benefits for her soft tissue

injuries as a result of the motor vehicle accident and would have been entitled to income replacement benefits for a further period of three and one-half months.

CONCLUSION

[27] The decision of SGI dated October 7, 2003 regarding the termination of income replacement benefits is set aside.

[28] We are unable to conclude that the motor vehicle accident caused the September 22, 2003 surgery, however, it is our opinion that the injuries suffered to the right hand in the motor vehicle accident forced the Appellant to accept surgery at an earlier date than she would have if she had not been in the motor vehicle accident. Therefore, we find that the Appellant would not have proceeded with the surgery for at least three and one-half months until she had obtained a second opinion and therefore should be entitled to income replacement benefits for a further period of three and one-half months from the date of the surgery.

[29] As the Appellant has been successful in her Appeal she will be entitled to all reasonable costs of the Appeal including her Appeal fee, travel expenses, meals and lodging in accordance with Section 193(11) of *The Automobile Accident Insurance Act* and Section 86(4) and 96 of *The Personal Injury Benefits Regulations*..

Dated at Saskatoon, Saskatchewan, on December 7, 2004.

Ann Phillips, Q.C., Chair

Beverly Cleveland, Commission Member

Joy Dobko, Commission Member