

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *H.R. v. Saskatchewan Government Insurance,*
2005 SKAIA 011
Date: 20050215
File: 047 of 2003

BETWEEN

H.R., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
H.R., Applicant
Jocelyn Clement, 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
April 20, 2004

DECISION

[1] The Appellant, H.R., appeals a decision of Saskatchewan Government Insurance dated February 26, 2003 terminating her income benefits because she was substantially able to perform the essential duties of the employment she held at the date of loss on January 31, 2002.

[2] This matter first came on for hearing on October 20, 2003. After brief presentations by both parties, Dr. Alport, medical director for SGI, stated an out of province MRI consultation would be reasonable following a discussion with the Appellant's family doctor. The hearing was adjourned by consent and reconvened April 20, 2004 as the parties remained unable to reach an agreement.

FACTS:

[3] The Appellant was injured when the motor vehicle in which she was a belted front-seat passenger was struck broadside on the right on January 31, 2002 in Regina, SK. Following the accident, she was driven to the Regina General Hospital by her boyfriend and diagnosed with a right shoulder dislocation and injuries to her right collar bone, neck and back. Her shoulder joint was reduced in the hospital and she was discharged after a couple of days wearing a sling.

[4] The Appellant lived in [location] and had been working at [employer one] as a meat packer/box runner for about three months prior to the accident. At the date of the hearing she had not returned to work at any employment since the accident.

[5] Following discharge from the hospital she attended for chiropractic and physiotherapy treatments in Moose Jaw. She relocated to [Alberta] in April 2002 when her boyfriend was transferred there for work. An injury note dated April 2, 2002 from Carolyn Lamb, personal injury representative, stated in part:

“(S)he will also discuss possible employment opportunities with Dr. Reihl to see if it is OK for her to return to work in some capacity. She plans on job hunting once she gets to [Alberta]...”¹

[6] While in [Alberta] the Appellant attended [physiotherapy] on a regular basis for treatment primarily to her lower back. In July 2002 she attended counselling sessions at [mind and body].²

¹ Note: Dr. Reihl is Moose Jaw chiropractor

[7] X-rays taken on January 31, 2002 were reported as follows:

Right shoulder: Post reduction films have been obtained. Inferior dislocation is noted at the humeral head which following reduction is noted in good position. Underlying fractures are not seen.

Cervical spine: No bone, joint or disc space abnormality is seen.

[8] X-rays taken on March 6, 2002 were reported as follows:

Cervical spine: Flexion and extension films have been taken. There is slight anterior subluxation of all the cervical vertebrae on flexion but no localized abnormality is seen.

Lumbar spine: The appearances are with normal limits.

Pelvis: No bone or joint abnormality is seen.

Right scapula and sternoclavicular joint: No abnormality is seen.

[9] In November 2002 the Appellant was seen by a team of practitioners at Northern Assessment Services for a secondary assessment. The Appellant subjectively reported no improvement in her right shoulder and lower back pain but about 90% improvement in her neck condition. Physical examination revealed:

“(C)ervical range of motion was full with some discomfort at end of range of side flexion. Lumbar spine range of motion was full in all direction. She reported some discomfort at end of range of flexion. She was able to touch her toes. Right shoulder range of motion was full. Behind the back reaching was symmetrical to the level of T9. There were no impingement signs. Rotator cuff strength testing was normal. There was no winging of the scapula and no sign of impairment. There was no sign of glenohumeral joint laxity. Apley’s apprehension test was negative. There was tenderness over the sternoclavicular joint but no deformity or swelling. Straight leg raise was to 90 degrees with no nerve root tension signs. She has difficulty to do a sit-up. There was diffuse tenderness over the entire lumbar spine, including the lumbar paraspinal muscles. She had general hypermobility (able to touch her wrist with her thumb, and both the knees and elbows hyperextended).

[10] It was reported that the Appellant did not provide maximal effort during the functional testing. The evaluating practitioners noted the Appellant rated her pain 10/10 on every task but there were no signs of physical exertion observed; her lifting and carrying were limited to 15 lbs and mopping and vacuuming exacerbated her lower back pain.

² reported in the Secondary Assessment Report – “the psychophysiological findings were indicative of depression/anxiety and post traumatic stress disorder...”

[11] The clinical impressions/diagnosis for injuries related to the accident are reported as:

1. Nearly resolved mechanical neck pain (WAD I);
2. Post traumatic right shoulder dislocation (normal examination);
3. Persistent mechanical low back pain (grade 1) without frank neurological deficit;
4. Deconditioning due to physical inactivity and fear of injury.

[12] Despite her previous chiropractic treatments and on-going physiotherapy, the Appellant reported no improvement in her back and right shoulder condition. At the conclusion of the assessment, the team recommended the Appellant participate in a functional secondary level treatment program daily for 8-10 weeks. It was also stated that if she had a job to return to following treatment she should participate in a 4 week gradual return to work program. Lastly the team recommended that if she made no improvement during the first 4 weeks of her secondary program she should immediately be referred for a tertiary level program.

[13] The Appellant attended Central Avenue Physiotherapy in Swift Current from December 10, 2002 to February 21, 2003. The treatment team was Carey Jones, physiotherapist and Lyriss Cappelle, exercise therapist. The discharge report stated in part:

Treatment to date:

1. Manual therapy
2. Specific lumbar stabilization exercises
3. Specific scapular stabilization exercises
4. Supervised general conditioning
5. Education: anatomy of the back, stress, hurt vs. hart, pain vs. function, posture, lifting, carrying, pain, circumstantial pain, chronic pain, nutrition, fitness and lifestyle, return to normal life, stages of soft tissue healing

Subjective Findings

[The Appellant] reports minimal lower back pain and feels confident in independent pain management and looking forward to returning to work.

Physical Findings

Lumbar:

- full range of motion
- improving abdominal stability
- neurodynamic tests and neurological testing normal

Hips:

- improved extension (predominantly myofacial in nature)

Cervical:

- full and pain free

Right Shoulder:

- full and pain free range of motion

Analysis & Plan

[The Appellant] has successfully completed 10 weeks of secondary level rehabilitation. Her success is a direct result of the hard work that she has put into the program.

[The Appellant] does not have a job to return to. We have not identified any restrictions in terms of returning to work. Ideally, she could have done a gradual return to work program, but we have educated [the Appellant] on **hurt** vs. harm, and she feels confident in the independent pain management techniques to manage any symptoms associated with returning to work.

We have discharged [the Appellant] with an exercise program, and SGI has agreed to provide her with a 1 year gym membership.

[14] Based on the secondary program discharge report indicating no restrictions in returning to work, SGI terminated the Appellant's income benefit effective February 24, 2003 and provided funding for a 1 year gym membership.

[15] The Appellant said she believed the following errors were made and resulted in SGI's decision to terminate therapy and income benefits:

- a) the assessment conducted by Central Avenue Physiotherapy was not an accurate assessment of her condition at the time;
- b) the tests used to assess her condition did not reflect the intensity and duration of activities carried out during a typical workday at [employer one];
- c) some of the written results of the assessments were inconsistent with what Lyris Cappelle had told her.

[16] The Appellant wrote in her summary of rehabilitation efforts that the 10 week secondary program focused on her back and that her pain decreased and range of motion in her upper back improved during the 10 week rehabilitation. However, she stated as her back pain decreased the pain in her right shoulder and neck increased.

[17] The Appellant testified that she currently experiences a lot of pain in her right shoulder and neck and has a pinching sensation in her lower back and neck. She reported the pain in her neck and right shoulder is constant and ranges in intensity from 5/10 to 10/10 depending on her level of activity.

[18] She stated the assessment conducted by Central Avenue Physiotherapy primarily involved (1) lifting an object once from ground level to waist height and then over the head, (2) carrying an object once for 100 feet and (3) sitting stationary. She estimated the total testing time for the functional abilities evaluation was 30-45 minutes and the daily functional ability exercises lasted about 30 minutes. She commented although she could perform activities such as lifting and carrying on a one-time basis, this was not an accurate reflection of her ability to perform her job duties for an eight-hour day. The Appellant also stated that she was not required to sit for periods over 30 minutes (whether or not she knew she was being timed) and suspected this observation was incorrectly reported due to the inability of staff to supervise her during the entire assessment because of high client to staff ratio.

[19] In her written argument supporting her appeal, the Appellant noted although Central Avenue Physiotherapy did not find any restrictions of her returning to work, that exercise therapist, Lyris Cappelle, said it was best she did not get an office job unless she could do exercises and stretching during the work day, or a job that required repetitive movements for more than 20 minutes in duration. The Appellant also said that Ms. Cappelle advised her not to run, exercise on a stationary bike, roller blade or ice skate for more than 15 minutes at a time.³

[20] Both Carey Jones and Lyris Cappelle testified. Ms. Jones received a Bachelor of Physiotherapy in 1990 and subsequently a Master's degree. Her post-graduate studies were in skeletal dysfunction. Ms. Jones has been conducting secondary assessments referred to her by SGI since 1996.

[21] Ms. Carey testified the goal of a secondary program is to try and get a claimant back to his or her pre-injury job demands. A job analysis questionnaire completed by employer one identified the Appellant's job demands. The weight-testing component of the functional abilities evaluation was based on a standard protocol using repetitions of barbell curls. Ms. Carey stated that the Appellant met the physical requirements of her former employment when discharged from the secondary program.

³ The Appellant noted Lyris Cappelle did not sign the Discharge Report of Central Avenue Physiotherapy; Ms. Cappelle testified however that she agrees with the findings of the report.

[22] Lyris Cappelle is a registered exercise therapist who obtained a Bachelor of Education in Physical Studies in 1995. After graduation she worked in cardiac rehabilitation and for the past five years has worked at Central Avenue Physiotherapy. Ms. Cappelle testified that the Appellant worked extremely hard during at her rehabilitation and commented she is the strongest woman she has ever met.

[23] The functional ability evaluation showed the Appellant progressively improved during the 10 week period she attended secondary rehabilitation. According to that evaluation, just before being discharged in February 2003, the Appellant met the job demands of her former employment and her perceived low back pain was minimal.

[24] The job demands used in the evaluation were provided by employer one even though the Appellant no longer lived in [location]. The physical job analysis sheet clearly stated in block letters at the top of the front page that it was to be completed by the employee's immediate supervisor (and the employee if available). The Appellant's immediate supervisor was listed as R.D. but the form was completed by D.C. D.C. stated the total weight that the Appellant was required to repetitively lift was 20 – 50 lbs. He also said she was required to do overhead lifting every 5 seconds for an entire shift of 7.5 hours.

[25] The Appellant said her job required repetitive heavy lifting and included the following duties:

- packing boxes with pork loins, shoulders and butts (approximately 15 lbs. each), carrying boxes (approximately 50 lbs. each) to a conveyer belt (approximately 20 ft. away) at a rate of 1 box/minute;
- carrying boxes (up to 40-100 lbs. each) for a distance of 5 – 600 ft. and then lifting and stacking boxes at a height of 0-6 ft.

[26] Despite the discharge report conclusion, the Appellant continued to report poor sleep and pain and weakness particularly in her right arm, shoulder and low back⁴ and attended physiotherapy at the Moose Jaw Union Hospital seeking some relief.

[27] On July 4, 2003, Jolene Wilson, physiotherapist, reported to the Appellant's family doctor, Dr. Thorpe, that her symptoms were consistent with a C5-C6 neuropathy and

radiculopathy. Ms. Wilson said because of the Appellant's vast physical therapy history and continued complaints that primary care would be limited success and requested Dr. Thorpe recommend a treatment plan.

[28] On September 9, 2003, Dr. Thorpe requested SGI arrange a tertiary assessment to assist in the diagnosis and management of the Appellant's complaints. In preparation for the initial hearing of this appeal and as a result of Dr. Thorpe's request for further assessment, Dr. Alport contacted both Ms. Wilson and Dr. Thorpe to discuss the Appellant's medical file. Neither were aware that the Appellant had attended and been discharged from secondary treatment with no restrictions in returning to work.

[29] On September 24, 2003, the Appellant saw Dr. DeJager, orthopedic surgeon. He reported:

"I saw [the Appellant] again on 24th of September 2003 in my Cast Clinic. She is [age] and she came back after she had a electroconduction study done in Regina. He found no significant abnormalities and on the x-rays that were taken on the 26th of August, the lumbar spine were unremarkable and the shoulder and the AC joint were also normal. I've discussed the examination with her and she is discharged from the orthopedic clinic as there is nothing I can do for her."

[30] Dr. Alport's notes of a telephone conversation with Dr. Thorpe state he requested a tertiary program because the Appellant presented with significant pain that he thought might be caused by a pinched nerve in the neck and the quickest way to get a diagnosis was by an assessment team. After discussing it with him however, it was agreed that an out of province MRI would be quicker than a neurological consultation and a reasonable approach for a diagnosis. It was reported Dr. Thorpe stated if the MRI findings were negative, he was very willing to accept the opinion from the secondary treatment team from several months previous and that the Appellant could and should return to work.

[31] The Appellant attended at Canada Diagnostic Centres in Calgary, AB on December 8, 2003 for an MR study of her cervical spine. The findings reported "(T)he cervical spine is in normal alignment....the C4-5 and C5-6 levels are normal with no disc protrusion or

⁴ The Appellant's journal Aug. 20/02 – June 23/03

central/neural foraminal stenosis...No evidence of an annular tear. The cervical cord demonstrates normal signal throughout.” The clinical impression was a normal cervical spine.

[32] At the hearing the Appellant questioned Dr. Alport why the MRI was of her neck rather than her shoulder and back. He replied that Dr. Thorpe had requested investigation of her cervical spine only. The Appellant stated the chronic pain she experiences has been in her shoulder and back for many months and doesn't understand why her neck was examined.

LAW AND ANALYSIS

[33] 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.

[34] The Commission determined in *R.C.*⁵ 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 determined the decision of SGI was wrong in law, based on erroneous assumptions or at the very least, was the decision was unreasonable.⁶ In this case, SGI bears the burden of proof.

[35] The Appellant suffered a dislocated right shoulder and injuries to her right collar bone, neck and back as a result of an accident on January 31, 2002. She received primary and secondary treatment consisting of chiropractic and physical therapy. All diagnostic studies of her neck, shoulder and back were normal and the dislocation was observed to have been successfully reduced and in good position. A functional abilities evaluation at Central Avenue Physiotherapy showed that at the time of her discharge from secondary treatment, the Appellant was at her pre-accident status and was able to perform those job duties identified by her former employer.

[36] The job evaluation on which her functional testing was based was not completed by the Appellant's immediate supervisor and she says it underestimated her workplace requirements.

⁵ *R.C. v. Saskatchewan Government Insurance* 2003 SKAIA 1

⁶ *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

However, other than her own testimony, the Appellant did not offer any information from employer one to support her evidence. If the job evaluation was significantly wrong I would have expected the Appellant to have raised it during the functional abilities evaluation. At the very least, she could have obtained confirmation of her duties from her supervisor and presented them at this appeal hearing. Where there is a difference in what was required of the Appellant in her daily job duties at employer one, I prefer the documentary evidence signed by D.C.

[37] The Appellant also said the evaluation did not prepare her for the workforce or prove that she was strong enough to go to work. She commented the results were different from what she had been told by Ms. Cappelle, exercise therapist. Both therapists, Ms. Jones and Ms. Cappelle, from Central Avenue Physiotherapy testified. They are professionally trained in their respective fields and their evidence was given considerable weight. Each testified the protocol used in examining the Appellant was an industry standard for evaluation of functional ability. I accept their evidence in this regard and the Appellant did not convince me in any way the testing was inadequately performed. I also note Ms. Cappelle's comments that the Appellant is the strongest woman she has met and both therapists' statements that to her credit, the Appellant worked extremely hard at her rehabilitation.

[38] Lastly, I must consider the medical evidence. All of the diagnostic imaging and physical evaluations were normal. I accept the Appellant continues to report chronic pain and period of acute flare-ups particularly in her shoulder and back however there is nothing in the evidence to support a diagnosis of any injury. As a result, I find that SGI acted reasonably and appropriately in making its decision to terminate the Appellant's income replacement benefits.

CONCLUSION

[39] SGI's decision dated February 26, 2003 is upheld and the appeal is dismissed.

DATED at Regina, SK, on February 15, 2005.

Beverly Cleveland, Chair

