

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *E.Y. v. Saskatchewan Government Insurance,*
2005 SKAIA 016
Date: 20050310
File: 027 of 2003

BETWEEN

E.Y., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
E.Y., Applicant
Tamara Harasen, for the Respondent

Before: **Ann Phillips, Q.C., Chair**
Beverley 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
May 18, 2004

DECISION

[1] The Appellant, E.Y., appeals a decision of Saskatchewan Government Insurance (SGI) dated January 8, 2003 denying him income replacement benefits.

FACTS

[2] At the age of [number], the Appellant was seriously injured in a motor vehicle accident on April 9, 2000. In particular, he incurred an unstable fracture of his tenth thoracic vertebra, and after neurosurgery, he had four thoracic vertebrae, T8 to T12, internally fixated with a Moss-Miami hook rod system and autologous iliac bone graft. After about a month's bed rest, he began six to seven months of physiotherapy, which was relatively successful. A Functional Abilities Evaluation carried out at the physiotherapy centre in Moose Jaw in mid-December, 2000 assessed his abilities against work demands of the job he held immediately before the accident as a seismic surveyor's assistant, and with some exceptions noted below found that his current abilities "functionally matched" those job demands.

[3] The report by his family physician, Dr. R. Brandon Thorpe, dated November 23, 2000 stated:

"This letter serves to confirm that I have examined [the Appellant] as of November 22, 2000 and found him to be in fairly good condition.

[The Appellant] still continues to have backache but appears to be very functional. He feels that he is almost able to perform at levels similar to his pre-injury status, but obvious (sic) continues to have back pain. Basic general examination in the office reveals a fit healthy young male with normal cardiovascular status who on musculo-skeletal examination demonstrates almost full range of motion of his back with the ability to bend, twist and turn appropriately for a gentleman of his age. I do not have the facilities in my office to test for strength, but it is apparent that [the Appellant] should be able to return to his previous vocation as a surveyor helper at [the survey company].

I feel it important to mention that [the Appellant] has unfortunately scarred fairly significantly on his back with some development of keloid. He has a 215 mm. x 5 mm scar along the dorsum of his spine. [The Appellant] has a similar type of keloid scar of 90 mm x 5 mm on the left hip from the area of bone graft.

Although I expect [the Appellant] to be able to return to work at this point, sufficed (sic) to say that with the severity of his injury, I do believe that there may be potential to develop osteoarthritis in the dorsal spine over years as a result of the injury and anticipate that [the Appellant] will continue to have pain, life long. At this time I do not feel that the pain is

debilitating enough to preclude him from returning to work and thus authorize, by means of this letter, a full return to work.”

[4] As a result of the Functional Abilities Evaluation and Dr. Thorpe’s report, SGI wrote the Appellant on January 2, 2001, as follows:

“Taking into account the following information, I understand that you are now substantially able to perform the essential duties of the employment you performed at the time of the accident.

1. Practitioner’s Report dated November 23, 2000.
2. Discharge report from Julian’s Fitness and Rehab dated December 22, 2000.”

[5] As income replacement benefits are available to persons injured in car accidents as long as they are entirely or substantially unable to perform the essential duties of the employment they performed at the time of the accident, he was no longer entitled to income replacement benefits and they were terminated as of December 31, 2000.

[6] The Appellant did not appeal this decision. He did not return to his employment at [the survey company], but made plans to travel in Southeast Asia and Australia with a friend, which he did from April, 2001 to April, 2002. During his travels, he worked to support himself on a banana farm: he drove tractor, pruned bananas and repaired irrigation tubing, eventually quitting because of problems with his back. He acknowledged that he could do the work, but found it painful. He then worked spraying cotton for a month or two.

[7] Upon his return to Canada, he obtained employment as ground crew with a company building communication towers from July to November, 2002. By the end of this time, he was again experiencing problems with his back. Dr. Thorpe wrote on December 10, 2002:

“Enclosed please find a copy of [the Appellant’s] chart as of January 1, 2002 to current.

Please note that [the Appellant] has been complaining of significant back pain recently. He has been doing quite significant labour but has been complaining that his thoracic spine is becoming more and more painful, despite doing stretching and home exercises shown to him by physiotherapy when he was enrolled in their program after his MVA in Year 2000.

The patient works as a labourer climbing communication towers. The repetitive action of pulling himself up on ladders is causing both shoulder girdles and parascapular region to flare up and come painful in the thoracic region. Examination did not reveal any physical signs however, but I have recommended that he consider looking for alternative employment. I suggest that he seek work that is less labour intensive and more white collar/office type work as his current employment requires him to work for two weeks continuous on 10 hour shifts. I have booked [the Appellant] off for a short period of time and found that his back improved significantly with rest

but his muscles now feel stiffer. I have suggested that perhaps he stay off work for a little longer and have indicated that he should do this and inform SGI know that perhaps the reason for this enquiry (sic).

Please note, my findings of November 23, 2000 where I mentioned in a letter to Jeff McNaughton of Disability Management Services and cc to Leanne Jewell of SGI, Moose Jaw that although I expected [the Appellant] to return to work at that point, I felt that with the severity of his injury that there may be potential to develop osteoarthritis in his dorsal spine over the years as a result of the injury and I also anticipated that [the Appellant] would continue to have life long pain.

I felt at that time that the patient did not have pain debilitating enough to preclude him from returning to work and thus I authorized a full return to work as of November, 2000. I feel that it is important to mention that his accident was quite significant with an unstable fracture of his 10th thoracic vertebra, at which time he was referred to Dr. Buwembo, Neurosurgeon who did a T8-T12 internal fixation with a Moss-Miami hook rod system plus autologous iliac bone graft.

Note that the CT of his T10 showed a wedge compression of at least 50% of the body extending into the posterior elements, pedicles and lamina. Note also that the patient is left with hardware in-situ which may cause problems with time and it is my opinion at this time that [the Appellant] should seek alternative work if he is starting to develop back pain.

I hope that this information is satisfactory. Please find enclosed a copy of his chart as requested.”

[8] Dr. Thorpe’s letter was forwarded by SGI to Dr. Murray Flotre, its medical consultant.

Dr. Flotre stated:

“There is no doubt that [the Appellant] does not have a normal back, and he probably is somewhat predisposed to some degenerative changes in his back as a result of the injury. However, this is already included in the permanent impairment rating for the fusion. There is no further entitlement in this regard.

I would not have a problem with SGI funding a short course of physiotherapy for [the Appellant]. I would also agree with Dr. Thorpe’s assessment that [the Appellant] should be looking for work that is not labour intensive, as heavier work would certainly exacerbate his back pain. That having been said, it appears from the medical information that [the Appellant] would have been fit to return to his pre-accident employment (surveyor) as of November 23, 2000. It is possible that he would have been able to continue at that job, which I would consider to be less labour intensive than climbing communication towers.

This opinion is based on the information available on the file at this time. Should further information be available in the future, we would be prepared to review the file again. If you have further questions regarding this file, please don’t hesitate to contact me.”

[9] The Appellant testified that he began to attend the University of Regina after he left the tower construction job. He is majoring in anthropology and philosophy and is beginning his

third year.¹ He has decided that his back is not fit for well paying, labour intensive jobs, and is therefore furthering his education.

[10] The Appellant's argument has two aspects:

- (1) SGI's decision was wrong in that it is based on the assumption that he had exceeded job requirements at the tower construction job, although he was fit to return to his job as a surveyor's assistant.
- (2) The medical evidence showed that he had osteoarthritis and should not have been required to return to a heavy labour job which would debilitate his condition.

[11] SGI defended its decision on the basis that the medical evidence supported its decision, and that the income replacement benefits he sought were based on the employment he held at the time of the accident rather than any he might obtain in the future.

[12] We do not accept the Appellant's argument that the medical evidence supports that he *now* has osteoarthritis. He said that his doctor had told him this, but we do not draw that inference from the letter provided at the hearing dated May 6, 2004 as follows:

“[The Appellant] was in to visit me this week and asked my opinion with regard to the prognosis for his back relating to his motor vehicle accident in April 2000.

As you are aware, [the Appellant] underwent surgery for an anterior wedge compression deformity at T10 by posterior metallic hardware stabilizing the thoracic spine from T8 – T11. Due to the injury he had a mild degree of kyphosis.

With the surgery, [the Appellant] had been able to maintain an active lifestyle and fairs (sic) reasonably well overcoming more than average back pain with his attitude and non-steroidal anti-inflammatories and Tylenol when required.

In answer to [the Appellant's] question – my opinion is that the metal ware and the extent of his original injury, it is very likely that his road to osteoarthritic degenerative disease is going to be quicker and certainly hard labor as he currently practices would accelerate the degenerative process even further. As [the Appellant] has been complaining of increased back pain over the past year or two, I support his decision to seek alternative work type in the white collar industry.

I believe that osteoarthritis is likely going to debilitate [the Appellant] over time and that his decision to seek lighter duties is a sensible and wise one and certainly this change should be supported by SGI as well. I believe that [the Appellant] is going to appeal SGI decisions and I was hoping that this letter would be taken into account when the process occurs. My professional

¹ He had taken nine credits earlier at the University of Saskatchewan.

opinion is that although [the Appellant's] back is stable, it certainly is likely to deteriorate with time due to the accident and surgery."

[13] The Appellant also referred to a handwritten question and answer document, with the questions in his handwriting and answers apparently signed by Dr. Thorpe, as follows:

- "1. is arthritis debilitating? Yes
2. is my back going to debilitate over time or stay the same? Yes
3. is my osteoarthritis a result of my injury? Yes
4. if I were to continue with labour oriented work for extended periods of time would my condition worsen faster than if I pursue white collar employment. Yes"

[14] He laid stress on question 3. Again, we do not draw the inference from this document that Dr. Thorpe intended to say that he now had osteoarthritis.

[15] However, this does not end the matter. The Appellant presented good evidence that his job as ground crew with the tower construction company *was* functionally equivalent to the job as a surveyor's assistant. Moreover, his family physician had completely misunderstood what he did on the tower construction job, thinking that he would strain his shoulder and back muscles while climbing communications towers. In fact, as ground crew, he seldom did climb towers. Moreover, the method of climbing (with a slider attached to the belt) permits climbing of the tower virtually without the use of arms at all, but just legs.

[16] He outlined these duties and was questioned about them extensively by SGI and by the Commission. They are set out in a note prepared by his foreman, who makes clear that very little time up the tower was required of the Appellant, and that lifting requirements were limited to 35 pounds, by company policy.² The angle irons he lifted weighed between 20 and 30 pounds, and he carried them 40 yards, at most. Reaching, pushing and pulling were required, but were not a significant problem. Walking on uneven ground (hills, deep snow, sloughs) was a problem on this job as well as on the survey crews, although he walked less than as a surveyor's assistant. His work hours were generally the same: two weeks continuous, 10 hour job shifts, with days off if it rained. Driving time varied: from 8 hour drives, to two weeks at a single job site. His

² Heavier loads were handled by two men, or with the crane truck.

hourly rate of pay was about the same, but his hours were about 100 over a two week period, with overtime.

[17] He was further questioned about the duties of his work as a surveyor's assistant. The Functional Abilities Evaluation, which the Appellant acknowledged was generally accurate, described the surveyor's job as follows:

“- client's 8-10 hour work day is spent primarily carrying flags, survey rods, and necessary tools whilst walking over varied terrain. He may walk up/down hills, through muskeg, through deep snow, etcetera. His work is seasonal, primarily in winter. Coffee and lunch breaks occur when they can be accommodated, and days off occur on occasion.

KEY WORK DEMANDS:

TASK	WORK DEMAND
Sitting	- Usually riding in a 4 x 4 or quad. May be done for a few minutes or most of day. - May be required to do some mapping/charting, spending as much as 2 hours at a time doing same.
Walking	Most of day is spent walking over varied terrain with 15 lb weighted vest, 15 – 20 lb backpack filled with lath, and 10 lb equipment in hand. May walk large distances
Kneeling/Crouching	Involved in the placement of seismic flags etcetera into ground. May hold crouch or kneel for as long as 20 – 30 sec at a time.
Climbing Hills	May be as much as a frequent to constant job demand.
Reaching - Vertical - Horiz.	Frequent demand, primarily dynamic, few seconds/position, vertical waist or below. May occasionally be horizontal, somewhat static, approx. chest height. (Clarify further with client).
Whole Body Push/Pull	On a very rare occasion may be involved with helping to push/guide/drive a quad up ramp into back of 4 x 4 truck. Task involves mostly driving the quad. As such, medium to heavy job demand.
Lifting - Unilat. - Bilat.	U/B – heights vary from F to Ch/Shoulder - may lift 10 lbs., 100x/day. (Frequent demand) - 15 – 20 lbs, a few times/day. (Occasional demand – bundle of lath and vest). - Client reports that the absolute maximum weight that he would ever have to lift would be 30 lbs., bilaterally. (Very occ. demand)
Carrying - Unilat.	U – carries +/- 10 lb rod in hand (alternates hands) U/B – may have to carry 15 lb vest or 15 – 20 lb lath for a short distance, very occasionally, with hands.”

[18] He further testified that this job involved long hours (7:00 am. to 6:00 p.m.) working just about every day. He was paid at a high daily rate and took the job to make good money to enable him to travel. He earned \$3,000 (gross) in four weeks. It was not a job that he intended to do on a full time basis.³ He referred to walking up and down hills, through thick forest into northern Alberta, carrying gear, transits, bundles of lath, and driving over extremely rough terrain. The Commission doubts, with respect, whether the conclusion that his current ability reported as “functional match” is realistic as set out below, in particular the match between treadmill walking for twenty minutes, or climbing twenty one stairs, versus 11 hours.

TASK	WORK DEMAND	PREVIOUS ABILITY	CURRENT ABILITY	COMMENTS
Walking	Most of day is spent walking over varied terrain with 15 lb weighted vest, 15 – 20 lb backpack filled with lath, and 10 lb equipment in hand. May walk large distances	Client reports same abilities on treadmill as per last FAE	- Client reports being able to walk on the treadmill for 20 mins , up to 11% grade, and carrying 15 lbs on his back. (Observed client completing this task.)	- Client reports that he know his legs will be stiff when he returns to work but he feels they would be even if he did not have an injury. - Functional match.
Climbing Hills	May be as much as a frequent to constant job demand.	Client remains unsure of same. (Note, client has no biomechanical or CV concerns with climbing 21 stairs today.)	See Walking results.	Functional match Mild limitation

[19] Dr. Flotre did agree that the Appellant should be looking for work that was not labour intensive, and that heavier work would exacerbate his back pain. He went on to say:

“That having been said, it appears from the medical information that [the Appellant] would have been fit to return to his pre-accident employment (surveyor) as of November 23, 2000. It is

³ However, this is irrelevant from the point of view of income replacement benefits – both payment and termination.

possible that he would have been to continue at that job, which I would consider to be less labour intensive than climbing communication towers.”

[20] The medical information referred to is Dr. Thorpe’s statements:

“...very functional...fit, healthy young male with normal cardiovascular status who on musculoskeletal examination demonstrates almost full range of motion of his back, the ability to bend, twist and turn appropriately for a gentleman of his age. I do not have the facilities in my office to test for strength, but it is apparent that [the Appellant] should be able to return to his previous vocation as a surveyor helper at [the survey company].

...At this time I do not feel that the pain is debilitating enough to preclude him from returning to work and thus authorize, by means of this letter, a full return to work.”

[21] Dr. Flotre appears to have some doubt about the Functional Abilities Evaluation as reflected in his sentence: “*It is possible* (emphasis added) that he would have been able to continue at that job, which I would consider to be less labour intensive than climbing communication towers.”

[22] It is evident that Dr. Flotre was relying on Dr. Thorpe’s November 10, 2002 letter when referring to climbing communication towers. As previously stated, the family physician’s misunderstanding of the nature of the Appellant’s job created a false impression in the mind of anyone who read it, including Dr. Flotre. It was an erroneous assumption.

[23] We conclude that Dr. Flotre’s opinion, and SGI’s decision of January 8, 2003, which was based upon his opinion, are based on an erroneous assumption that the tower construction job he held was more labour intensive than that of a surveyor’s assistant.

[24] Accordingly, we set that decision aside, with a recommendation that SGI arrange for a Functional Capacity Evaluation to ascertain whether the Appellant’s abilities in fact correspond to the job demands of the surveyor’s assistant, over a 10 hour day, and if not, what his capacity in fact might be.

[25] The Appellant is entitled to his reasonable expenses of the appeal, including application fee.

Dated at Regina, Saskatchewan, on March 10, 2005.

Ann Phillips, Q.C., Chair

Beverley Cleveland, Commission Member

Al Knippel, Commission Member