

Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *E.N. v. Saskatchewan Government Insurance,*
2004 SKAIA 048

Date: 20050926

File: 082 of 2003

BETWEEN

E.N., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:

Michael Owens, for the Applicant

Dale Brown, for the Respondent

Before: **Ann Phillips, Q.C., Chair**
Joy Dobko, 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 Saskatoon, Saskatchewan
August 9, September 8, and October 29, 2004

DECISION

FACTS

[1] The Appellant, E.N., appeals a decision of Saskatchewan Government Insurance (“SGI”) made July 2, 2003 that denied him permanent impairment benefits on the ground that he was under the influence of alcohol or drugs so that he was incapable of having proper control of his car.

[2] The relevant provision of *The Automobile Accident Insurance Act* in force at the time of his accident on June 1, 2002,¹ (“the old Act”) provided:

“186(1) Notwithstanding any other provision of this Part, a victim is not entitled to any lump sum benefits for permanent impairment pursuant to Division 6 to which the victim would otherwise be entitled if:

- (a) the victim is more than 50% responsible for an accident; and
- (b) the victim:
 - (i) at the time of the accident:
 - (A) was the driver or had the care and control of an automobile involved in the accident; and
 - (B) was under the influence of alcohol or drugs to such an extent that the victim was incapable for the time being of having proper control of the automobile...

(3) The insurer shall determine whether a victim mentioned in subsection (1) was more than 50% responsible for the accident.”

[3] SGI relied on the written opinion of Dawn L. MacAuley dated June 26, 2003 that the Appellant’s blood alcohol level at the time of the accident was between 0.131 to 0.218%, and that all drivers are impaired with respect to the safe operation of a motor vehicle once their blood alcohol level reaches 0.1%.

¹ c. A-35.

[4] The Appellant's case was based on establishing that a key assumption upon which Ms. MacAuley relied, that he had not consumed alcohol after the accident, was incorrect. The Appellant and his friend, K.V., who drove him from the accident scene to the hospital in [town], and then to the hospital in [town], testified that Hopkins had stopped at his own home in [town] where he obtained a bottle of water and a mickey of rye, which he gave to the Appellant to use as a pain killer during the drive to [town]. They estimated that the Appellant had approximately 9 ounces of rye during the 45 minute drive.

[5] The injuries to the Appellant were serious: an unstable neck fracture which required fusion of the occiput to C3, internal fixation and bone graft, (He was initially diagnosed as whiplash associated disorder IV, due to the fracture, and following surgery reduced to WAD III, and further to WAD II after discharge from the FIT for Active Living program in April, 2003.) The difficulty he was experiencing with breathing was attributable to multiple rib fractures and a hemothorax with bilateral pulmonary involvement. His left shoulder and chest were scarred and he developed a post traumatic stress disorder. He was hospitalized at Royal University Hospital for about two months, then treated in [town] an additional two weeks due to post-surgical infection.

The Appellant's Friend's Testimony

[6] At the hearing August 9, the Appellant's friend described how he came upon the accident scene. He had taken his uncle on a drive to check crops and run an errand in [town]. On a back road in the small rolling hills about 20 miles from [town], he saw a rolled over vehicle which he recognized as belonging to the Appellant, whom he had known for 8 to 10 years. It was at the bottom of a little hill which he could see from some distance away. The Appellant's friend was northbound, and the vehicle was on the west or left side of the road. The Appellant was lying against his truck on the driver's side, propped against a duffel bag. The truck door was open, and the Appellant was behind the door. His shoulder and arm were covered in blood. He was conscious and recognized his friend. He was able to walk slowly and at one point sat on the tailgate of the truck. He eventually walked to his friend's small car, where they moved some of the vehicle contents to let the passenger seat recline.

[7] The Appellant was short of wind and had a hard time talking. He had dirt in his mouth, on his lips and teeth. He told his friend that his neck hurt and his arm hurt. He appeared to be in pain if his head moved. The Appellant's friend helped him to walk, but said that there was nothing to show that he was affected by alcohol.

[8] Leaving his uncle at the scene (his car was not big enough to hold three men) after an interval he estimated as between five and ten minutes, the Appellant's friend drove the Appellant to the hospital at [town]. He said that he left the Appellant in the car while he spoke to the two nurses on duty. They advised that there was no doctor on staff and that it would take between one-half to three-quarters of an hour to get the [town] ambulance and team to take the Appellant to the nearest hospital in [town].

[9] The Appellant's friend said that he decided to drive the Appellant to [town] himself. He then went to his own house in [town] to get water for the Appellant, and because he saw that he was in pain and wincing, he grabbed a mickey of rye to serve as a pain killer. He said that he did not know what else to give him and did not have anything else to give him. The bottle was a 13 ounce mickey. It was not sealed. He estimated that two glasses (two ounces) were gone from it at the time.

[10] The Appellant was sipping from the bottle during the 45 minute drive to [town]. By the time they arrived, the Appellant's friend thought there was not much left in the bottle, maybe one to two ounces, which meant that about eight to nine ounces had been consumed. He said that the bottle said that the contents were 40% beverage alcohol.

[11] At the [hospital], they took the Appellant right away. The Appellant's did not accompany the ambulance to Saskatoon. He said he disposed of the bottle before he left [town], on the grounds that he knew that he was not supposed to have open liquor in the car. He said he told the nurse there that he had given the Appellant water and rye as a pain killer.

The Appellant's Testimony

[12] At the time of the accident, the Appellant lived in [home town], worked in [town], and had a girlfriend who lived on a farm outside [town], about 100 kms. from his home town. On May 31, he was given the day off by his employer who had to attend a funeral. He drove to his house in his home town, got some clothes and then went to his girlfriend's, driving in the late afternoon about 4:00 to 5:00 p.m. That evening he went alone to the house of a friend in [town] at about 7:00 p.m. The friend left the house about one-half hour to an hour later, leaving the Appellant with two other men. The Appellant said that he drank two bottles of beer, fell asleep and woke up at about 2:30 a.m. The other two men were still there, asleep. The homeowner had not returned as far as he knew. The Appellant left and drove back to his girlfriend's farm.

[13] When asked on cross-examination about the positive test for marijuana in the urinalysis, he acknowledged that he "possibly could have used it". He said that he hung around friends who did, and said that based on his previous experience in the oil patch where they do drug testing, it takes a long time to come out of the system.

[14] The following day he had to work beginning at 8:00 a.m. in [town]. He said he awoke at 5:30 am, and drove to [town] to get diesel fuel for his truck. He arrived there just before the station opened up at 7:00 am, filled the truck himself, paid for it² and headed towards [town] when he realized that he had forgotten his thermos at the farm, so he went back via the [road]. This road is gravel for the first three miles, then, after the grid road crossing, is just dirt: a summer road. He had got about half way, heading northerly, through rolling hills, when he came over a knoll and his rear wheels contacted a grader ridge on the right hand or passenger side of the road. His truck spun and he tried to correct, but the truck rolled driver's side first and he went through a fence, the truck landing on its wheels. The area is mostly pasture, and was fenced on both sides. There was no deep ditch: there was a dip of about one foot. He said that he did not know how long he was unconscious.³ He got out and began to walk across the fields

² The Appellant was asked to look for the gas receipt and, if located, provide it, as possible confirmation of the time of his purchase. He did not do so.

³ The Ambulance report, says under history "Patient states he had no loss of cx". When questioned by the Commission, the Appellant denied that he said this; in fact, he said that he told them he had lost consciousness.

as he estimated he was about a mile from the farm. He got about 100 yards, when he decided it would likely be better to remain near his vehicle and returned there.

[15] Although he had a cell phone which he had used to contact his employer from [town] to say that he would be late, the phone had been ripped out during the accident and was unusable.

[16] He estimated that the accident had occurred at about 7:30 a.m., based on having been at the service station in [town] at 7:00 a.m. He said that he did not wear a watch at work and did not have one at the time.

[17] The Appellant said that when he was taken to the first hospital, he stayed in the car. The Appellant's friend went in and talked to the nurses, then came out and said it would take one-half to three-quarters of an hour for the ambulance and suggested "I might as well take you".⁴ After leaving the first hospital, he said that they had stopped at his friend's house because he said he needed something to drink: he had been lying out for 4-5 hours with nothing to drink⁵. Hopkins brought a bottle of water and part of a mickey of whiskey: The level of the liquor in the bottle was "down a bit from the neck". "By the time he hit the highway I was drinking out of the bottle." His last drink was in [town] just before they arrived at the hospital.

[18] The Appellant testified that they drew fluids at Royal University Hospital after his arrival there at about 2:30 p.m., which he said he noted from a clock there.⁶

MacAuley's Report and Testimony

[19] Ms. MacAuley's opinion was based on the following information provided to her by the Appellant's personal injury representative:⁷

⁴ On examination by the Commission, the Appellant said the nurses were outside, and could see him, but did not come close to the car.

⁵ The ambulance report states: "Pt was in MVA, layed in ditch for 4 h waiting for help." The source of this information is not known, but the Appellant would have been the only person who could have provided this information initially, if not to the ambulance attendants, then to the Appellant's friend.

⁶ As discussed below, this does not correspond to the ambulance record showing ongoing care at ten minutes to 6 (17:50 p.m.) Also the times on the toxicology report are between 18:20 and 18:36.

⁷ Letter dated June 19, 2003.

- “1. [late 30’s] male; height 5’8”; weight 205 pounds (7 months after accident – gained weight following the accident)
2. Time of accident: 10:00 a.m.
3. Blood sample collected at 6:20 p.m.
Result: 14 mmol/L (serum alcohol level)
This is equivalent to a whole blood alcohol level of somewhere between 51 and 58 mg% (.051 to 0.58%)”

[20] She concluded:

“In calculating a back extrapolation I will make two assumptions. I will assume that there was no alcohol consumed for 30 minutes prior to the time of the accident and also that there was no alcohol consumed between the time of the accident and the time that the blood sample was taken. This being said and assuming an elimination rate somewhere between 10 and 20 mg% per hour, it is my opinion that [the Appellant’s] blood alcohol level would have been somewhere in the range of 131 to 281 mg% (.131 to .218%) at 10:00 a.m.

It is my expert and professional opinion, based on the scientific evidence to date, that all individuals are impaired with respect to the safe operation of a motor vehicle once their blood alcohol level reaches 100 mg% (.1%). However, there are some individuals, those who are inexperienced drinkers and who are also inexperienced drivers as well for example, who can be impaired with respect to driving at much lower levels – as low as 30 or 40 mg%. [The Appellant], having a blood alcohol level up to two times as high, would have likely been in a very advanced state of impairment better described as intoxication...

You have also enclosed lab reports showing a positive drug screen for THC. THC is a central nervous system depressant that may cause ataxia, confusion, dizziness, somnolence, euphoria, hallucinations, speech difficulties, weakness, malaise and vision difficulties. Concomitant use of alcohol may result in additive effects.”

[21] Ms MacAuley testified on the second day of the hearing. She was tendered, without objection, as an expert with respect to the absorption, distribution and elimination of alcohol and the general effects of alcohol on the human body.

[22] She had had an opportunity to consider the testimony of the Appellant and his friend, and provided a series of calculations, first assuming no consumption of alcohol after the accident, and, alternatively taking into account the consumption of 8 or 9 ounces of whiskey after the accident. In tabular form, these are the results:

[23] Assumption A: No alcohol 30 minutes before the accident, and none after, 205 pounds, elimination rate 10-20 mg% per hour:

[24] Assumption B: No alcohol 30 minutes before the accident, 8 ounces of 40% alcohol consumed between 1 and 4 pm, 205 pounds, elimination rate 10-20 mg% per hour

[25] Assumption C: No alcohol 30 minutes before the accident, 8 ounces of 40% alcohol consumed between 1 and 4 pm, 225 pounds, elimination rate 10-20 mg% per hour

Time of accident	Blood alcohol level Assumption A	Blood alcohol level Assumption B	Blood alcohol level Assumption C
10 am	131-218 mg%	14-101 mg%	11-98 mg%
9 am	141-238 mg%	24-121 mg %	(no evidence)
7:30 am	154-264 mg%	37-141 mg%	48-158 mg%

[26] On cross-examination, she provided further calculations on assumptions posited by the Appellant's counsel.

[27] Assumption D: No alcohol 30 minutes before accident, 9 ounces of 40% alcohol between 1 and 4 pm, 200 pounds, elimination rate 10-20 mg%.

[28] Assumption E: No alcohol 30 minutes before accident, 9 ounces of 40% alcohol between 1 and 4 pm, weight 205 pounds, elimination rate of 18.5 mg% per hour⁸.

[29] Assumption F: No alcohol 30 minutes before accident, 9 ounces of 40% alcohol between 1 and 4 pm, weight 250 pounds, elimination rate of 18.5 mg% per hour.

Time of accident	Blood alcohol level	Blood alcohol level	Blood alcohol level

⁸ Ms MacAuley acknowledged that 18.5 mg% was the "average" elimination rate — for about 50% of the population — as opposed to the "range" of 10-20 mg%.

	Assumption D	Assumption E	Assumption F
10 am	0-87 mg%	68-75 mg%	91-98 mg%
9 am	10-107 mg%	87-94 mg%	110-117 mg %
7:30 am	23-133 mg%	105-112 mg%	128-135 mg% ⁹

[30] It can be seen from the tables above that if we find that the Appellant did consume 8 or 9 ounces of whiskey between 1 and 4 pm, or indeed, at any time after the accident¹⁰, his blood alcohol level *could* have been at a level where he was not incapable of proper control of his vehicle. Since there was no evidence as to the Appellant's own elimination rate, which had never been measured, it was not possible to state whether he was at the low (10 mg%), average (18.5 mg%), or high (20 mg%) part of the range of elimination. If the level ranges from well below 100 mg% (the level at which Ms MacAuley testified all persons would be impaired, compared to 80 mg%, the legal limit) to above it, then SGI would not have not met the burden of proving that the Appellant was incapable for the purpose of section 186(1)(b)(B) of the *Old Act*.

Timing Issues

[31] The Appellant's friend estimated that he and his uncle arrived at the accident scene between 12:00 noon and 1:00 p.m. He was at the scene five to ten minutes and the drive to [town] was another 10 minutes. There was no evidence to show when he arrived or left the hospital in [town], or how long he stopped at his house. The drive from [town] to [town] was 45 minutes. He does not know when he got to the Hospital, but the Ambulance report shows the following:

⁹ Ms MacAuley testified that the more a person weighed, the less effect post-accident consumption of alcohol has on the BAC at the time of the accident. For this reason, the levels are higher in Assumption F, in which the person weighs 250 pounds, than in Assumption E, where he weighs 205 pounds, because when the blood is drawn, the post-accident alcohol is having a greater effect.

¹⁰ Ms MacAuley explained that for the purposes of her calculations, the amount of post-accident consumption is subtracted in its entirety.

Time of call	1638
Time responded	1642
BLS Arrived Scene	1643
At Patient's Side	1644
Departed Scene	1703

[32] There were further notations of the ambulance attendants from 1707 to 1750, made en route to Saskatoon. The arrival time in Saskatoon is not noted on the ambulance report.

[33] Royal University Hospital took blood and urine samples. These were taken at 18:20 and 18:36 on the same date.

[34] We accept the Ambulance report as correct with respect to time. We find that the Appellant arrived at Royal University Hospital in Saskatoon between 17:50 and 18:20. We also accept that it would take about 45 minutes to drive from [town] to [town].

Discussion

[35] The Commission has concluded that we cannot accept the evidence of the Appellant's friend and the Appellant. It is not credible evidence for the following reasons:

[36] We accept the testimony of Sharon Bregg, SGI adjuster, that she asked the Appellant by telephone a series of questions including whether or not he had had anything to drink after the accident, and that he had answered "No". She recorded that information that day in a note. She told him that before he could be considered for permanent impairment benefits (PI), she had to ask him questions because the hospital toxicology reports indicated alcohol in his system, which would affect his eligibility for PI benefits (although not rehabilitation benefits). In response to her questions, the Appellant stated he had had 2 or 3 drinks the previous evening before he fell asleep at 11:30, woke up at 2 am, went home, got up at 5:30 am, left for work, filled up with gas at about 7 am. He consumed no alcohol and had nothing to eat "after the MVA".¹¹ He had had toast for breakfast at about 6 am. He did not know if any intravenous drugs were administered after the MVA on the way to the hospital. He told her he could not recall seeing anything in the hospital reports, asked why he had not been charged with drunk driving (but had been exonerated

¹¹ The Appellant testified that he did not understand the meaning of the term "MVA".

from charges of driving without a licence and driving too fast for road conditions). He also told her that he ate a lot of Listerine Pocket Packs, that dissolve on the tongue. He requested a copy of the hospital records.¹²

[37] The Appellant's counsel challenged both the making of the note and Ms Bregg's recollections of her telephone conversation of June 16. She had said that her recording of the questions and answers was verbatim, and eventually admitted that this was not the case. Moreover, she admitted that the questions she asked the Appellant were not identical to those she had obtained from her supervisor, in some cases because she had the information already, in others, to follow up. She paraphrased both her questions and his answers in the note. She acknowledged that she had not taken a statement from the Appellant to confirm his story, although she had earlier taken one from him, which had corrections made in it, and had ample opportunity to attend personally to obtain a written statement.

[38] The Appellant testified on the first hearing day, August 9, that Ms Bregg had never asked about having any alcohol to drink after the accident. He had not mentioned it because nobody asked him and he did not think it was important. His testimony in cross-examination showed little recall of the occasion, although he again repeated that she had not asked him at any time about consuming alcohol after the accident. In rebuttal on the third hearing day, October 29, he recalled two telephone conversations with the adjuster in June and July of 2003: in the mid-June conversation (which we find is the one recorded by Ms Bregg) the discussion about drinking alcohol after the accident did not come up. The only other information he volunteered in connection with this telephone conversation was that he had finally gotten through to her after at least half a dozen phone calls to inquire about his permanent impairment benefits. With respect to the July 3, 2003 conversation, which followed the letter denying benefits¹³, he acknowledged discussing the readings with her.

[39] The Commission is satisfied that, while it would of course have been preferable to have a statement signed by the Appellant, the substance of Ms Bregg's telephone conversation with him as recorded was adequately recorded, and that, in particular, she asked him about post-accident

¹² Ms Bregg sent them the following day.

consumption of alcohol, that he understood the question, and answered “No”. We do not believe that he did not mention it earlier because he did not think it important: we are sure that he knew it was important. We find he later attempted to attribute the alcohol reading to Listerine Pocket Packs, which are in fact alcohol-free. His recollection of his discussion with Ms Bregg (in his testimony in chief, on cross-examination, and in rebuttal) was sufficiently vague that we do not accept his denial on this important point as convincing.

[40] Secondly, their accounts of what happened in [town] are hard to credit. The Appellant’s friend said the nurses could not even help the Appellant get out of the car, although they came out to see him. The Appellant said his friend went in to see them. They did not want to give the Appellant anything for pain, he did not ask them for water, nor did they suggest it, and the Appellant’s friend decided on his own to provide liquor to a man about whose injuries he knew nothing, an especially unusual procedure for someone whose wife was an emergency medical technician.

[41] Thirdly, the accounts of the Appellant’s friend and the Appellant, while generally consistent with each other¹⁴ (which does not therefore persuade us of their reliability), do not correspond well with other (independent) evidence. The timing in particular is difficult to reconcile: neither the Appellant nor his counsel could provide an explanation for a missing two and a quarter hours or more in their account.

[42] Table 1 has been compiled working backwards from the independently recorded times of 16:38 for the time the ambulance in [town] was called, the approximate time of arrival in [town] by the Appellant and the Appellant’s friend.

Table 1

Time	Event	
7:00	The Appellant at gas station when it opens	

¹³ July 2, 2003.

¹⁴ Except as noted in the preceding paragraph.

7:30	The Appellant's third estimate of time of accident: told police 10 am, tells SGI adjuster Solicsy 9 am; told adjuster Breggs February 27, 2003 that it was after leaving for work at 7:00 am and filling up with diesel fuel in [town], then leaving there taking the [road] 3 miles north from Highway [number] (confirmed in testimony)	
12:00 to 13:00	Found by his friend 12 – 1 pm 4-5 hours after accident	
	GAP in timing of 2 hours 13 minutes	
Say 15:13	Started for [town] in 5-10 minutes; distance is 20 miles; time about 10 minutes	
Say 15:23	At first hospital 10 minutes	
Say 15:33	To and at the Appellant's friend's house in [town]: no evidence, say 20 minutes maximum	
Say 15:53	Drive from [town] to [town]: 45 minutes (or less)	
16:38	Ambulance called. (The Appellant and his friend at the Hospital.)	
17:03	Ambulance leaves for Saskatoon	
17:05 and 17:50	Vital signs recorded in ambulance	
18:20 and 18:36	Blood and urine samples drawn, Royal University Hospital	

[43] If we started working forwards from the very approximate time that the Appellant's friend said he arrived on the scene (12 – 1 pm), we do have a scenario in which the Appellant arrived at the hospital in Saskatoon at 2:30 pm, which is when he says he saw the clock on the wall.

Table 2

Time	Event	
7:00 am	The Appellant at gas station when it opens	
7:30	The Appellant's third estimate of time of accident: told police 10 am, tells SGI adjuster Solicsy 9 am; told adjuster Breggs February 27, 2003 that it was after leaving for work at 7:00 am and filling up with diesel fuel in [town], then leaving there taking the [road] 3 miles north from Highway [number] (confirmed in testimony)	
12:00 to 13:00	Found by his friend 12 – 1 pm 4-5 hours after accident	
Say 12:10 to 1:10 pm	Started for [town] in 5-10 minutes; distance is 20 miles; time about 10 minutes	
Say 12:20 to 1:20 pm	At first hospital 10 minutes	
Say 12:40 to 1:40 pm	To and at the Appellant's friend's house in town: no evidence, say 20 minutes maximum	
Say 1:25 to 2:25	Drive from [town] to [town]: 45 minutes (or less)	

pm		
2:30 pm	The Appellant sees clock at Royal University Hospital when they are drawing fluids	
	GAP of at least 2 hours 13 minutes	
16:38	Ambulance called. (The Appellant and his friend Hospital.)	
17:03	Ambulance leaves for Saskatoon	
17:05 and 17:50	Vital signs recorded in ambulance	
18:20 and 18:36	Blood and urine samples drawn, Royal University Hospital	

[44] We find as a fact that he was delivered to Royal University Hospital between 17:50 and 18:20 (i.e. between 5:50 and 6:20 pm, about 3 ½ hours later. We believe that the testimony of the Appellant and his friend was worked backwards from the Appellant's mistaken assumption as to the time of his arrival in Saskatoon, and that their evidence is fundamentally flawed as a result.

[45] The Appellant has failed to satisfy us that he consumed alcohol following the accident. It follows that we accept Ms MacAuley's calculations as set out in Assumption A, all of which show a blood alcohol level of anywhere from 131 mg% to 264 mg%, which would mean he was so impaired at the time of the accident as to be incapable of operating his vehicle properly. What the time of the accident might have been is difficult to say. If it occurred around 7:30 am, as the Appellant testified, the impairment would have been at the highest level calculated by Ms MacAulay. We find it more likely that the accident occurred around 10 am, as the Appellant first advised the police. While some questions were raised with respect to his weight at the time of the accident, he did not himself testify on this point, and in any event, Ms

MacAuley explained ¹⁵ that her calculations used elimination rates which are not dependent on body weight.

[46] It was not disputed that the Appellant was more than 50% responsible for the single vehicle rollover.

[47] As a result, we conclude that SGI's decision of July 2, 2003, denying permanent impairment benefits under section 186(1)(a) and (b) of the old Act was appropriate. The decision is confirmed, and the appeal is dismissed.

Dated at Regina, Saskatchewan, on August 11, 2008.

Ann Phillips, Q.C., Chair

Joy Dobko, Commission Member

Al Knippel, Commission Member

¹⁵ "Once again, the calculated blood alcohol levels in my report dated June 26, 2003 would not change if the weight of [the Appellant] were different than indicated."