

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *W.R. v. Saskatchewan Government Insurance,*
2005 SKAIA 057
Date: 20051121
File: 040 of 2004

BETWEEN

W.S., Appellant

and

Saskatchewan Government Insurance, Respondent

Appearances:
Peter V. Abrametz, for the Appellant
Dale Brown, for the Respondent

Before: **Beverly Cleveland, Chair**
Stan Loewen, 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 Prince Albert, Saskatchewan
January 18, 2005

DECISION

INTRODUCTION

[1] This is an appeal by W.R. (the Appellant), from a decision letter issued by Saskatchewan Government Insurance (SGI) dated February 6, 2003. The substance of the decision letter was to deny the Appellant any further benefits as, "...it is the opinion of the consultant that the present symptoms that you are experiencing are not directly related to the motor vehicle accident."

FACTS

[2] On February 9, 1999 the Appellant was traveling on a highway in Northern Saskatchewan when she encountered a patch of ice, skidded off the road, and hit the ditch. Her car overturned and she was left hanging upside down for approximately 45 minutes, unable to free herself from her seatbelt.

[3] The Appellant testified that she was, prior to the accident, in good health, and in particular, that she had experienced no prior back pain or problems in any way. She stated that she has been able to cut wood, haul water manually, walk for groceries, or drive a boat and a skidoo without any problems. At the time of the accident, she was unemployed.

[4] The Appellant has a Bachelor of Indian Social Work and is presently working on her Bachelor of Education degree. She has worked as a Life Skills coach, social worker and educator in remote northern communities. Her vision and goals are, as she describes it, to work with her people in the north.

[5] Her only prior medical difficulties were related to her diabetes which she said she handled on her own. She had no prior back injuries. She had one prior motor vehicle accident that had affected only her neck. Since the accident, her weight decreased from 205 to 170 pounds, and her back hurt her constantly. She related the pain particularly to lower back, and in especially to her

tail bone area. She indicated she did not like taking pain killers, inferring, that she did not do so regularly, but rather put up with the pain instead.

[6] The pain evidently got worse for the Appellant, and two weeks after the accident, she stated she could hardly get out of bed. Over the period following her accident, she found and continued to work, however, found driving very difficult. Although she was not very specific about dates, she stated that she worked a number of contracts for Northlands College which took her to Pelican Narrows. Her husband or son with traveled with her to help her set up her equipment, including her VHS, flipcharts and the like.

[7] She also obtained shorter contracts over time, and apparently did not miss much work, receiving only \$500.00 in Income Replacement Benefits from SGI. The last job she had was described as being one year prior to the hearing, or January 2004.

[8] Her health continued to deteriorate until July, 2003, when she fell, her legs having just given out from under her. She sustained cracked ribs and her back hurt again. At the time of the hearing, she was in the Suntep program, but found it difficult to manage, even to carry her books back and forth to school.

[9] On March 5, 1999, she attended at Dr Lalita Malhotra's office for her first physical check by Dr. Malhotra since the accident. Lubo-sacral pain was noted, and x-rays taken, showing a "faintly sclerotic nodule" in the right iliac wing that likely represents a bone island." She did not report any lower back pain.

[10] On March 10, 1999, the Appellant filled out a mandatory questionnaire supplied by SGI. In it she was asked to describe her pain on a scale of 1 – 10 in various body parts. She described pain in her neck, shoulder, low back, headache pain, arms, hands, face, legs, feet, mid back abdomen, chest and groin areas asked of her. She estimated her level of pain at the maximum level of 10 in each case and in each case she attributed the pain to the accident some four weeks earlier. On the other hand, she was asked to shade in areas of her body that she felt pain in, and in that exercise she shaded in only the fronts of both her legs, from the knees down, and the left upper to mid back area. She did not shade in any of the lower back areas.

[11] On April 13, the Appellant attended Fitzpatrick's physio clinic and a report was generated. Only thoracic spine and knee pain was noted.

[12] On June 25, 1999, Dr Malhotra filled out a second practitioner's report. In it she indicated that the Appellant could not return to work due to her diabetic condition. Dr. Malhotra later confirmed to SGI that the diabetes was the only reason for her not being able to return to work. In the same report the doctor indicated a marked worsening of the symptoms of back pain suffered by the Appellant.

[13] On November 11, 1999 Dr. Malhotra completed another practitioner's report with some similar findings as the previous one. Again, diabetes was the reason given for any difficulty in the patient not being able to return to work. WAD decreased from a grade III to a grade II.

[14] Dr. Malhotra testified that she has known the Appellant for a long time. She described the Appellant's primary complaints being the left shoulder and lower back but that since the motor vehicle accident, she has had aggravating pain and numbness particularly in her low back, radiating to her feet and legs. She reported difficult sitting and putting pressure on her left leg and hip in particular. Dr. Maholtra stated at times the Appellant was observed limping into the medical office and that, in her opinion, she has never recovered from the low back pain.

[15] Dr. Maholtra stated her opinion is that the Appellant's problems stem from the pain in her back and her inability to work. She commented that she doesn't think the Appellant is able to drive in the wilderness (north) anymore. Dr. Maholtra notes depression is frequently a common result of chronic pain and can be a vicious circle. Dr. Maholtra acknowledged that the Appellant has not been able to find gainful employment; is educated and wants to work and this has lead to poor self-esteem and depression. She states that the Appellant needs counseling on coping with chronic pain.

[16] FIT for living produced two comprehensive reports of the Appellant's injuries dated January 14, and April 28, 2000. The first report was not very satisfactory due to her poor attendance and commitment to the program. The second report was more complete and seemed accurate. Without getting into all the relevant details, it seemed that her health, while not entirely

perfect, was, by and large, pretty much resolved. As an example, her lumbar spine had mild to moderate limitations on rotation and flexion. Her range of motion upon discharge was not noted to be significantly reduced. “While her lumbar spine symptoms sound discogenic in nature, this is not supported by objective findings.” “The client’s performance in program was not consistent with her perceived level of ability as assessed...” In short, what she reported (the subjective), was not supported by the findings of others (the objective).

[17] Thereafter, there was no medical evidence about the Appellant until July, 2002 when she again saw Dr. Malhotra. She was then referred to Dr. Peter Davidson. Dr. Malhotra testified that she referred the Appellant to a neurologist because of the chronic and aggravating low back and left hip pain radiating to her legs and feet.

[18] Doctor Davidson produced two reports that were quite technical, however they end up with the opinion that the motor vehicle accident caused the symptoms that the Appellant continued to complain of.

[19] Portions of his report indicate as follows. First, the doctor says that “The fact that there was no sufficient changes or items demonstrated that required surgical intervention does not mean that the spondylosis and degenerative change could not cause pain in the low back on their own account which they certainly could.”.

[20] He indicates as follows, “Clearly, the neuropathy does not change whether she’s standing up, sitting up or lying down but the effects of spondylosis on the nerve roots maybe somewhat different when a patient is standing up as to when they are lying down and there is no imaging facilities available to us where we can get standing up MRI’s which is what we need to confirm or refute this.”. He also indicates as follows, “To try and summarize without going into a lengthy dictation my opinion is that [the Appellant] who suffers from diabetes and who is developing a mild neuropathy which may well be secondary to the diabetes and whose peripheral nervous system (that’s the nervous system outside of the brain and spinal cord) was rendered metabolically more prone to injury by that type of disorder has sustained some mild damage to her S1 root because of the accident and its after math but has no surgically remedial lesions and clearly surgery of the lumbosacral spine is not indicated.”.

[21] He also says as follows, “The fact that [the Appellant] may not have complained of back pain immediately after the accident no way negates subsequent development of back pain on the following or during the next few days. That’s not that uncommon with soft tissue injuries.”

[22] Dr. Davidson does not give a definitive answer to the primary question of causation, and on March 12th he wrote another letter as follows, “I am satisfied that, on the balance of probabilities, the soft tissue damage [the Appellant] sustained to her low back, its inherent tissues, and her S1 nerve root left more than right, is consequent to the accident of 9th of February 1999 resulting in the type of symptoms she has subsequently experienced from the injured structures.

[23] We would like to point out that the degree of her symptoms which appear to have stopped her carrying on working as an instructor in February 2003 was not due to worsening of the injury but increase of the symptoms no doubt aggravated in a vicious cycle mode by the emotional and psychological factors of depression and anxiety and aggravation etc.”.

[24] He indicates as follows, “I do not see how this vicious cycle can be broken until the Appellant has had a comprehensive psychological/psychiatric evaluation and that those dysfunctions are appropriately treated.” Dr. Davidson’s letter of March 12th is in response to a letter from the Appellant’s solicitors dated March 10th. Unfortunately we were not provided with a copy of that letter as it would have been helpful to review.

[25] Dr. Davidson’s latest opinion is based on MRI and a CT scan testing which note in part at S-174 as follows, “The L5-S1 intervertebral disc shows degenerative signal loss with minimal, if any, narrowing. A small central disc protrusion is present that encroaches on the ventral epidural space and touches but does not deform the ventral thecal sac. The L5 nerve roots exit normally. The traversing S1 nerve roots appear normal and symmetric. Early minimal facet joint overgrowth.” “Features of degenerative lower lumbar disc spondylosis as described with mild central bulging and annular tearing at L4-5 and a small central disc protrusion at L5-S1. No direct neurologic impingement is seen.”

[26] SGI's medical experts say that the issue, being causation, ought to be decided against the Appellant. Dr. Howlett's report relates as follows, "Be that as it may, it would seem that these are new symptoms, which cannot directly be related to the motor vehicle accident some four years ago. There is good medical evidence that towards the end of 2000 the customer was functioning at pre-motor vehicle accident level. It would appear that towards the end of 2000 the motor vehicle accident related injuries were resolved. Noting that the original injuries were soft tissue in nature, one must assume that tissue healing was concluded at that point in time."

[27] We suspect that some of the current symptoms the customer is experiencing may be related to her long-standing diabetes. She may in fact have the start of diabetic neuropathy in her lower legs and possibly her upper limbs. Hopefully Dr. Davidson will be able to shed some light on this problem for her."

DISCUSSION

[28] The issue in this case is causation and we are in essence required to decide between practitioners; Drs. Malhotra and Davidson supporting the Appellant's claim and Drs. Howlett and Pancyr supporting SGI's position. As a result, a brief review of the testimony and documents is required.

[29] In order for the Appellant to succeed, she must show that SGI's decision as evidenced by its decision letter of February 6, 2003 is either wrong in law, based on erroneous assumptions, or at the very least unreasonable.

[30] The Appellant argues that Dr. Howlett's letter of February 4, 2003, upon which the decision letter was based evidences that SGI's position was based on an erroneous assumption. Dr. Howlett's opinion was the symptoms the Appellant is experiencing are "new symptoms" unrelated to the accident.

[31] The Appellant argues that the symptoms indeed are not new, but have been well documented. The record shows the Appellant complained of stiffness and/or pain in her lower back at her initial attendance with Dr. Malhotra after the accident and continuing until she

returned to work as a child protection worker in August 2000 at [town]. There is a gap in the medical evidence until the fall 2002 when the Appellant contacted SGI wanting to return to therapy. The PIR initially treated her request as a relapse and requested updated medical information from Drs. Malhotra and Davidson.

[32] The Appellant did not offer an explanation for the gap in the medical evidence and it raises a concern about the nature of her complaints of low back pain but overall we find that her complaints of low back pain were consistently reported after the accident.¹ The Appellant's low back pain was reported by the secondary and tertiary teams and in the physical therapy discharge report that stated her lumbar spine symptoms sounded discogenic in nature but not objectively supported. This statement of course, was made without the benefit of the CT and MRI scans.

[33] A CT scan in January 2003 and MRI study in December 2003 revealed disc bulges at L4-5 and L5-S1 with no nerve root impingement. Dr. Davidson felt the pathology at L5-S1 was consistent with and at the right level for her complaints in the left leg. Dr. Hattingh's opinion is the Appellant does not have any nerve root compression and she is not a candidate for surgery.

[34] Dr. Howlett again reviewed the Appellant's file in January 2004 and specifically the January 2003 CT scan, April 2003 consultation with Dr. Hattingh, October 2003 letter from Dr. Davidson and the December 2003 MRI. He noted the disagreement between Drs. Hattingh and Davidson about the significance of the clinical findings at S5/L1 and states the clinical findings are mostly likely not significant as a significant portion of the population have disc bulges without correlating clinical symptoms or signs. His opinion remained unchanged and he commented that any directly related disc pathology would likely have been observed within a few weeks after the accident.

[35] In January 2004, Dr. Davidson raises the issue that the Appellant's long-standing diabetes may have played a role in her susceptibility to and in recovery from her injuries. He writes in part: "... (she) is developing a mild neuropathy which may well be secondary to the diabetes and whose peripheral nervous system... was rendered metabolically more prone to injury by that type

of disorder has sustained some mild damage to her S1 root because of the accident and its aftermath but has not surgically remedial...”² He goes on to say “...there is not a straight forward answer to the question of relationship to the Appellant’s subsequent medical problems to what occurred during the motor vehicle accident...Her definitely pre existent mild presumably diabetic neuropathy certainly would render lumbar sacral nerve roots more susceptible to soft tissue injury at the time...”

[36] In March 2004, Dr. Davidson states he is satisfied “on the balance of probabilities, the soft tissue damage the Appellant sustained to her low back, its inherent tissues, and her S1 nerve root left more than right, is consequent to the accident...resulting in the type of symptoms she has subsequently experienced from the injured structures.”³ Dr. Davidson further comments that he doesn’t feel the type of injury sustained to the low back/nerve root should prevent the Appellant from carrying on sedentary employment provided there wasn’t much driving. “I feel satisfied that the function of the interaction between the symptoms from her injury and her development of emotional and psychological dysfunction which magnifies in a vicious cycle way the pain and other symptoms noted, increasing their degree very significantly. I do not see how this vicious cycle can be broken until the Appellant has a comprehensive psychological/psychiatric evaluation and that those dysfunctions are appropriately treated...further appropriate physical therapy, weight strengthening exercises (treatment of the physical at the same time of the psychological aspects) should result in significant improvement symptom wise...”

[37] Dr. Howlett reviews the file again in May 2004 and reiterates his opinion there is a lack of objective findings to support Dr. Davidson’s conclusions. He suggests that because the issue is causation that an independent medical examination by a practitioner at arms length may be appropriate. To our knowledge an IME was not done and it would have been helpful.

¹ We acknowledge there are some inconsistencies such the Appellant not shading in her low back on the Application for Benefits as an injured part.

[38] In November 2004, Glen Pancyr, PhD, psychologist was asked whether the Appellant's complaints of psychological problems and depression stem from the direct effects of the accident. The consultation was in the nature of file review and no interview or contact with the Appellant occurred. Dr. Pancyr concluded with confidence there were no significant psychological problems, such as driving anxiety, depression, post-traumatic stress disorder, as a direct result of the accident. Dr. Pancyr qualifies his opinion by saying she likely did experience some stress that was not sufficient to merit a psychiatric diagnosis but would have stemmed from multiple sources that were non-accident related including family problems, financial stressors, and employment problems.

[39] In the end, we are left with the opinions of the Appellant's practitioners who know and have examined her and SGI's consultants who have conducted comprehensive file reviews. Each "side" is opposed in their views on the cause of her low back pain, associated neuralgia and so-called vicious cycle of psychological dysfunction are caused by the motor vehicle accident.

[40] Overall, we are satisfied on the facts before us that the Appellant has discharged the burden of proof required and we find her low back pain, associated neuralgia and related psychological/psychiatric dysfunction are caused to the February 1999 motor vehicle accident. Where there is a difference of medical opinion, we prefer the evidence of Drs. Malhotra and Davidson.

[41] Dr. Davidson did not testify and we did not have his curriculum vitae filed in the appeal record but we accept that he is a specialist in medical neurology and his medical letterhead shows that he is a Fellow of the Royal College of Physicians Canada. Because he didn't testify there was no process of "qualifying" him as an expert witness entitled to give opinion evidence but for this hearing we accept the opinions he gives in his letters over the opinions of Dr. Howlett who also did not testify.

[42] This doesn't mean that SGI can't or shouldn't rely on it's medical consultants (who may or may not have areas of specialty) to give opinions on reports made by specialists but in this particular fact situation we accept Dr. Davidson's opinion over that of Dr. Howlett's. Dr.

Davidson examined the Appellant on at least two occasions and his medical opinion is the CT scan and MRI study corroborate her complaints of pain and numbness particularly in the left leg. We accept Dr. Davidson's opinion is supported by objective evidence.

[43] We respect Dr. Howlett's opinion that a significant portion of the general population may have disc protrusions or bulges and not have any significant pain but the Appellant does complain of symptoms and Dr. Davidson believes that her subjective complaints are in the appropriate location for the objectively demonstrated protrusion (tear) at S5-L1.

[44] As well, we prefer the evidence of Drs. Malhotra and Davidson to that of Dr. Pancyr for similar reasons. They know and have examined the Appellant. In fairness, Dr. Pancyr acknowledges his opinion is qualified in that he hasn't interviewed or "examined" the Appellant. Dr. Malhotra has been the Appellant's family doctor for many years and testified at the hearing that the Appellant is (now) depressed. Drs. Malhotra and Davidson are, in our view, a better position to diagnose whether the Appellant is depressed knowing her medical history and having physically examined her. Their opinions are not just based on subjective complaints – it is more than that. As noted above, we accept that Dr. Davidson has expertise in the area of neurology and his opinion is that the Appellant requires psychological or psychiatric intervention arising from the chronic pain cycle that she is now in. We prefer the evidence of her medical doctors to that of Dr. Pancyr.

[45] Counsel for SGI submits that if we find in favour of the Appellant that we should consider apportionment particularly in view of Dr. Davidson's comments that her diabetes may have played a role in her present condition. Counsel for the Appellant replies there should be no apportionment and relies on the "thin skull" doctrine from tort law and essentially, that SGI must take the Appellant as she is at the date of loss. We are not satisfied however that "but for" the motor vehicle accident the Appellant would not have any neuropathy or low back pain based on Dr. Davidson's opinion.

[46] We agree with counsel for SGI on this issue and apportionment is necessary. We disagree with counsel for the Appellant that she is what's referred to as a "thin skull". We think she falls into what termed the "crumbling skull" and SGI is only responsible for those injuries or

losses she sustained as a result of the car accident and not for any “losses” or “damage(s)” she would have experienced anyway because of her diabetes. Dr. Davidson states she definitely had a mild presumably diabetic neuropathy that made her nerve roots more susceptible to soft tissue injury and also, that she is developing a mild neuropathy that may be secondary to the diabetes.

[47] The Appellant had a slip and fall injury in 2003 that *may* have aggravated her symptoms but we accept her testimony it was because her legs “gave out” – we find her testimony referring to this as meaning the low back pain and associated neuralgia caused her legs to buckle underneath of her. Regarding this particular incident, we find that any aggravation of her symptoms in the slip and fall incident, though not directly caused by the motor vehicle accident, are a foreseeable result of the injuries she sustained in the car accident and proportionately SGI’s responsibility.

[48] Although the Appellant did not report any low back pain or have neuropathic symptoms before February 1999, because Dr. Davidson’s comments about the developing mild neuropathy secondary to her diabetes, we find that she is a so-called “crumbling skull”. No information was provided by either party what would be an appropriate apportionment and we notionally apportion at 80:20 – that being, 80% of her symptoms are caused by the accident and 20% by her diabetes. This apportionment is arbitrary but we are required to do it. We think that if her diabetes had played a more significant role in her symptomology that Dr. Davidson could not have come to the conclusions that he did.⁴

[49] Lastly, the Appellant asks that if she is successful in her appeal that we reinstate her income replacement benefit retroactively to February 1999 less any income she has earned since then. This is not the appropriate case for that relief to be granted by us. In August 2000, the Appellant returned to her former employment in northern Saskatchewan. She testified that her husband and son assisted her by driving and carrying her equipment. Because there was a return to work in 2000 and she met sedentary to light job demands at that time, SGI must assess the

⁴ We acknowledge Dr. Malhotra reported to SGI stated the Appellant was unable to return to work because of her diabetes, this statement was made without the benefit of the CT and MRI studies and Dr. Davidson’s neurological opinion as to the cause of her LBP.

Appellant's present medical condition and carry out whatever testing, if any, is required regarding employment and entitlement to an income replacement benefit.

CONCLUSION

[50] SGI's decision is set aside and referred back to SGI for follow up regarding the Appellant's benefits, including rehabilitation, expenses and income replacement. She is entitled to her costs (double Column 3 on the QB tariff) capped at \$2500 together with reimbursement for expert reports as provided in the legislation.

Dated at Regina, Saskatchewan, on November 21, 2005.

Beverly Cleveland, Chair

Stan Loewen, Q.C., Commission Member

Al Knippel, Commission Member