

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *E.Y. v. Saskatchewan Government Insurance*,
2005 SKAIA 058
Date: 20051123
File: 35 of 2004

BETWEEN

E.Y., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
E.Y. and E.R., for the Applicant
Joan Eremko and Bill Elliott, for the Respondent

Before: **Beverly Cleveland**
Carolyn Jones, Commission Member
Jeffrey Scott, 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
October 11, 2005

DECISION

INTRODUCTION

[1] The Appellant, E.Y, appeals from a decision made by Saskatchewan Government Insurance (“SGI”) dated December 18, 2003 (the “Decision Letter”) concerning the Appellant’s request for a replacement labour benefit.

[2] The issue in this appeal is whether SGI pursuant to *The Automobile Accident Insurance Act* (the “Act”) provided a reasonable replacement labour benefit to the Appellant.

PRELIMINARY MATTERS

[3] The jurisdiction of the Commission for this Hearing is restricted to the decision that is the subject of the appeal. In response to item number 5 of the Application Form the Appellant stated that he is appealing from SGI’s decision dated December 18, 2003.

[4] In the documents that were filed by the parties for the Hearing there are a number of letters addressed to the Appellant from SGI. In those letters, SGI informed the Appellant of SGI’s decisions with respect to his entitlement to benefits under the Act. Those decisions were not appealed by the Appellant. Consequently, we do not have jurisdiction to hear from the Appellant with respect to those matters.

[5] During the Hearing, the Appellant advanced a claim for the costs associated with chiropractic treatment. Those costs are not referred to in the Decision Letter.

[6] Mr. Bill Elliott, Personal Injury Representative, SGI did, however, testify during the Hearing that SGI has not sent a letter to the Appellant with respect to past and future chiropractic treatment costs. Mr. Elliott undertook to promptly review all past chiropractic invoices submitted by the Appellant and consider whether SGI will pay those costs. With respect to future chiropractic treatment and the costs related to such treatment, Mr. Elliott intends to arrange for a review of that issue by a SGI chiropractor consultant. As an observation, we do

note that under the “Recommendations and Opinions” section of the Secondary Assessment Report it is stated as follows:

“[The Appellant] has mild to moderate residual biomechanical dysfunction that would likely benefit from 1-2 time per week chiropractic intervention over a period of 6-8 weeks”.

[7] The results of the chiropractic consultant review will be disclosed to the Appellant. In due course, Mr. Elliott will provide the Appellant with a decision letter with respect to future chiropractic treatments.

[8] During the Hearing there was a reference by the Appellant to the payment of past massage therapy treatment costs. Mr. Elliott stated that the Appellant has not submitted any massage therapy invoices to SGI. The Appellant testified that he does not have any massage therapy invoices to submit. In the event the Appellant submits massage therapy invoices to SGI, we are assuming that SGI will provide the Appellant with a letter informing him of SGI’s position concerning future massage therapy costs.

[9] The Appellant filed a list of expenses. Included in the list of expenses are a number of items that are not the subject matter of this Appeal. However, Mr. Elliott did undertake to review and determine SGI’s position with respect to the payment by SGI of those items. Mr. Elliott agreed, for example, to determine SGI’s position with respect to the payment of an Elliptical exercise machine for \$668.79 and prescription drugs for \$177.24. We are assuming that Mr. Elliott will, in a letter, inform the Appellant of SGI’s position with respect to those items.

[10] Finally, the Appellant filed a document in which he claims compensation from SGI for “reseeding costs and loss of income for 700 acres”. Mr. Elliott acknowledged that SGI has not sent a letter to the Appellant with respect to that claim. Mr. Elliott undertook to review the reseeding claim. Mr. Elliott will inform, by letter, the Appellant of SGI’s decision with respect to that claim.

FACTS

[11] The Appellant was injured in a motor vehicle accident near Swift Current, Saskatchewan on February 27, 2003 (the “Injuries”). Due to the Injuries, the Appellant received benefits under the Act.

[12] The Appellant is a farmer. He farms near [town].

[13] Due to the Injuries that the Appellant suffered, SGI arranged for rehabilitation treatment. The treatment included an occupational assessment, a vocational assessment, and a secondary assessment.

[14] In the Secondary Assessment Report under the heading “Recommendations and Opinions” and with respect to the issue that is before us in this Hearing (replacement labour benefit) it is stated as follows:

“[The Appellant] was tested to meet his pre-injury job demands over a two hour duration. It would be reasonable to assume that he may have a temporary reduced capacity of his job over a longer time period and during strenuous work times like harvest due to general deconditioning and self-limitation due to symptoms. Thus, we **recommend that funding for part-time farm help immediately preceding harvest be considered over a 6 week period with a gradual decrease in funding during that period to allow [the Appellant] to gradually increase his work hours and duties over the same time frame**” (emphasis added).

[15] In the Decision Letter, Mr. Elliott states in part as follows:

“In reference to your request for replacement labour.

I have reviewed the secondary assessment, and spoke directly with Mark Lemstra who is responsible for functional testing and giving recommendations with regards to you abilities on the farm.

Mark advised that you are able to operate farm equipment and do physical activities as required. However to aid in the completion of your harvest, you would need assistance for the more physical heavy job demands. Activities where you require assistance are such as, moving farm chemicals, moving seed, moving equipment such as grain augers, and assist with mechanical repairs where you may have to lift, carry or hold items into place.

You also advised that you would need this assistance for six weeks on a declining basis (emphasis added). By having extra labour, it will help you in your day to day operation. For example, while you are operating your combine, your replacement labour individual could unload fertilizer, farm chemicals and do farm repairs.

To determine a fair labour rate, I have spoken with Joe Novak, an Agrologist with Sask. Agriculture on December 16, 2003. He is an expert when it comes to determination for farm labour. The wage survey for farm labour on a part-time basis is a low hourly rate of \$8.00 an hour, to a high of \$10.00 an hour, with the mean average of \$9.63. For all employees the mean average is \$8.94. I will pay you \$12.00 an hour.

I advised Joe Novak of an hourly wage for all of the duties required, which would include manual labour, operating farm equipment, etc. and he advised that \$12.00 would be more than fair.

I will pay the following amounts:

Week		
1.	4.0 hours/day x 6 days/week @ \$12.00 an hour	\$288.00
2.	4.0 hours/day x 6 days/week @ 12.00 an hour	\$288.00
3.	3.0 hours/day x 6 days/week @ 12.00 an hour	\$216.00
4.	3.0 hours/day x 6 days/week @ 12.00 an hour	\$216.00
5.	3.0 hours/day x 6 days/week @ 12.00 an hour	\$216.00
6.	2.0 hours/day x 6 days/week @ 12.00 an hour	\$120.00
Total		\$1,344.00

I have sent to you on December 17th a cheque to you in the amount of \$1,344.00.”

LAW AND ANALYSIS

[16] In reviewing a decision of SGI, the Commission has the same jurisdiction under section 193(7) of the Act that the Court of Queen’s Bench previously had under section 198(3) of the Act then in force to:

“set aside or vary the insurer’s decision; or make any decision that the insurer is authorized to make pursuant to this Part”.

[17] The discretion to make decisions must be exercised in a judicial manner. The discretion can only be exercised in favour of the claimant if it is demonstrated that the decision of SGI (i.e. the amount of labour replacement benefit) was erroneous or based on erroneous assumptions, or at the very least, the decision was unreasonable.¹ The Commission will exercise its discretion in the same way.²

[18] Mr. Elliott testified that he was in error when he stated in the Decision Letter that “[the Appellant] also advised that [he] would need this assistance for six weeks on a declining basis”.

¹ *Belchamber v. Saskatchewan Government Insurance* [1997] TWL QB97557; *Donan v. Saskatchewan Government Insurance* [1998] TWL QB98224; *Collis v. Saskatchewan Government Insurance* [1998] TWL QB 98113.

² *R.C. v. Saskatchewan Government Insurance*, 2003 SKAIA 001.

Mr. Elliott testified that it was the Secondary Assessment Team (not the Appellant) that made the recommendation for replacement labour on a declining basis.

[19] The Appellant testified that the labour replacement hourly rate, as set out in the Decision Letter, of \$12.00 is not reasonable. He asserted that given the isolated location of his farm that he would need to pay more than \$12.00 per hour in order to entice a worker to his farm. The Appellant testified that he believed a more reasonable hourly rate is \$20.00 to \$25.00.

[20] Other than his own testimony, the Appellant did not offer any evidence on what would be a reasonable hourly rate for replacement labour. On the other hand, as set out in the Decision Letter, Mr. Elliott did rely upon the opinion of Mr. Joe Novak, an “Agrologist with Sask Agriculture” to arrive at an hourly rate of \$12.00.

[21] Given Mr. Elliott’s reliance on the information that he received from Mr. Novak to arrive at the hourly rate of \$12.00 we are all of the view that \$12.00 per hour is a reasonable hourly rate. We will now consider the reasonableness of the number of hours per week that Mr. Elliott set out in the Decision Letter.

[22] As noted earlier in this Decision, the Secondary Assessment Team recommended “...funding for **part-time** farm help immediately preceding harvest be considered over a 6 week period with a gradual decrease during that period ...” (emphasis added). When determining the number of hours that he would allow for each week during the six week period, Mr. Elliott testified that he did not rely upon any particular document. He testified that he arrived at the number of hours by estimating the number of hours that he believed would be devoted to performing heavy labour tasks.

[23] We are all of the view that the number of hours that Mr. Elliott provided for replacement labour, leading up to harvest and then during harvest, is not reasonable. Instead we are of the view that a more reasonable allowance for part time hours is as follows:

Week

1.	8.0 hours/day x 6 days/week @ \$12.00 an hour	\$576.00
----	---	----------

2.	8.0 hours/day x 6 days/week @ \$12.00 an hour	\$576.00
3.	6.0 hours/day x 6 days/week @ \$12.00 an hour	\$432.00
4.	6.0 hours/day x 6 days/week @ \$12.00 an hour	\$432.00
5.	6.0 hours/day x 6 days/week @ \$12.00 an hour	\$432.00
6.	4.0 hours/day x 6 days/week @ 12.00 an hour	\$288.00
Total		\$2,736.00

[24] When arriving at our decision we note that the Secondary Assessment Team did not specifically reference and/or link, as did Mr. Elliott, the need for part time replacement labour to heavy labor tasks. Instead the Secondary Assessment Team merely stated that the Appellant "...may have a temporary reduced capacity for completion of his job over a **longer time and during strenuous work times like harvest** due to general deconditioning and self-limitation of activity due to symptoms." The hours that we have set out in our Decision more reasonably sets out the part time replacement labour that the Appellant would require over a "... longer time and during strenuous work times like harvest..."

CONCLUSION

[25] The decision by SGI to pay a replacement labour benefit of \$1,344.00 is not reasonable. A reasonable replacement labour benefit is \$2,736.00. Since SGI has already paid the Appellant the replacement labour benefit of \$1,344.00, SGI will immediately pay the Appellant an additional sum of \$1,392.00 (\$2,736.00 less \$1,344.00 = \$1,392.00) plus interest from December 18, 2003. Given the success that the Appellant had in his appeal, he is entitled to reimbursement by SGI of his filing fee in the amount of \$75.00, travel, meals, lodging and any other permissible expenses pursuant to section 193(11) of the Act and section 96 of the *Personal Injury Benefit Regulations*.

Dated at Regina, Saskatchewan, on November 23, 2005.



Beverly Cleveland, Chair

Carolyn Jones

Carolyn Jones, Commission Member

Jeffrey Scott

Jeffrey Scott, Commission Member