

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *W.A. v. Saskatchewan Government Insurance,*
2005 SKAIA 064
Date: 20051205
File: 28 of 2005

BETWEEN

W.A., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
W.A., for the Applicant
Jane Wootten, for the Respondent

Before: **Ann Phillips, Q.C., Chair**
Conrad Hnatiuk, 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
November 30, 2005

DECISION

INTRODUCTION

[1] The Appellant, W.A., appeals from a decision made by Saskatchewan Government Insurance (“SGI”) dated November 25, 2004 (the “Decision Letter”) in which SGI terminated benefits to her that “...deal with [her] low back strain”.

[2] The issue in this appeal is whether SGI acted reasonably when it terminated those benefits to the Appellant under *The Automobile Accident Insurance Act* (the “Act”).

PRELIMINARY MATTERS

[3] In her Opening Statement, the Appellant stated that she believes that her low back pain is due to the injuries that she suffered in two motor vehicle accidents. More will be said later in this Decision about the low back injury. The Appellant went on to assert that due to the accidents, she requires treatment for an injury to her jaw.

[4] In response, Ms. Wootten, counsel on behalf of SGI, stated that the Decision Letter only terminated benefits related to the Appellant’s low back strain. In other words, Ms. Wootten asserted that the Decision Letter does not address whether the Appellant is entitled to benefits (for example, TMJ treatments) under the Act due to a jaw injury.

[5] Upon a review of the Decision Letter, it is not clear whether SGI made a decision concerning the Appellant’s entitlement to benefits for a jaw injury. In the Decision Letter, Michelle Sparrowhawk, Personal Injury Representative, SGI states, in part, as follows:

“A report from Stapleford Physiotherapy in November 2002 indicates that your TMJ symptoms had resolved.”

[6] Then, with respect to the issue of benefits, Ms. Sparrowhawk concludes as follows:

“As a result SGI will no longer participate or provide funding for any treatment or associated expenses that **deal with your low back pain.**” (emphasis added)

[7] Given Ms. Wootten's position that the Decision Letter does not address the issue of whether the Appellant is entitled to treatment for a jaw injury and given the uncertainty created by the wording of the Decision Letter, we conclude that the Decision Letter does not decide the issue of whether the Appellant is entitled to benefits due to a jaw injury. Consequently, we do not have jurisdiction to hear from the Appellant concerning the injury to her jaw.

[8] Ms. Wootten stated that SGI will now determine whether the Appellant is entitled to treatments for a jaw injury. On that point, we note that SGI did file for this appeal a copy of a letter from Dr. E.W. Gherasim, Orthodontist, addressed to SGI dated 3/07/05 which addresses the issue of TMJ treatment for the Appellant. In due course, SGI will inform the Appellant of its decision concerning her entitlement to benefits under the Act due to an injury to her jaw.

[9] Finally, the Appellant was injured in two accidents. The Decision Letter only references one date of loss. Since Ms. Wootten said nothing on this point, we are assuming that for the purpose of this appeal nothing turns on the fact that the Appellant was injured in two accidents.

FACTS

[10] The Appellant was injured in two motor vehicle accidents: December 14, 2001 and June 30, 2002. The Appellant testified that in each accident she was rear-ended.

[11] Due to the injuries that she suffered in the first accident, SGI arranged for the Appellant to undergo treatment and rehabilitation. The treatment and rehabilitation continued after the second accident.

[12] After some time had elapsed, Dr. Endsins, Medical Consultant, SGI offered an opinion on "...whether the need for medication is a result of injuries sustained in the motor vehicle accident of the indicated date". In his report dated November 18, 2004, Dr. Endsins stated, in part, as follows:

"The only thing that seems to be an ongoing problem is low back pain and this appears to be the reason for ongoing treatment and ongoing referral. A recent CT scan lumbar spine of March 18, 2004 did not reveal any abnormality which would account for ongoing pain. Dr. Fink, in his note

of March 19, 2004 indicates that there is no significant structural source for radiculopathy or symptoms. In his note of March 1, 2004 he indicates that the claimant had a **problem** (emphasis added) with increased BMI (Body Mass Index) that pre-dates the motor vehicle accident of the above date. It is my opinion that the reason for her continued low back symptoms are as a result of her body mass, and not because any anatomical or pathological process.”

[13] The Decision Letter followed.

LAW AND ANALYSIS

[14] 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, confirm or vary the insurer’s decision; or
make any decision that the insurer is authorized to make pursuant to this Part.”

[15] The discretion to make decisions must be exercised in a judicial manner. The discretion can only be exercised in favour of the applicant if it is demonstrated that the decision of SGI (i.e. that the Appellant’s low back symptoms are not as a result of the injuries that she suffered in the accident) 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

[16] The March 1, 2004 note prepared by Dr. Fink, referred to by Dr. Ends in his November 18, 2004 report, was filed for the appeal. In his note, Dr. Fink refers to the Appellant’s weight and states as follows:

“She tells me that she lost between 15-20 pounds since her accident. I understand she has been quite heavy all her life. She gives a pre-accident of 208-210 pounds for a height of 5’4”. Currently she tells me she weights between 180-190 pounds”.

[17] Dr. Fink does not, in his note, offer an opinion on whether there is a causal link between the Appellant’s weight and her low back pain.

[18] Dr. B.W. Laursen testified on behalf of the Appellant. Dr. Laursen testified that the Appellant has been a patient of his for more than 20 years. He testified that before the Hearing, he reviewed his chart materials on the Appellant.

[19] Dr. Laursen testified that before the accident of December 14, 2001 the Appellant did not complain about back pain. He went on to testify that after the accident of December 14, 2001 the Appellant did complain about back pain. Dr. Laursen further testified that following the accident, the Appellant had objective clinical findings of back pain (i.e. muscle spasms and reduced range of motion).

[20] In cross-examination, Ms. Wootten brought to Dr. Laursen's attention the findings of Dr. S. Jugdeo, Orthopaedic Surgeon, that the Appellant had pre-existing degenerative changes to her spine. Dr. Laursen did not take issue with Dr. Jugdeo's findings. However, he did testify that before the accident the pre-existing degenerative changes to her spine did not cause the Appellant any pain or discomfort. As stated earlier, Dr. Laursen testified that after the accident the Appellant did complain of back pain.

[21] Further in cross-examination, Ms. Wootten put to Dr. Laursen that it is a mere coincidence that the Appellant began to complain about low back pain after the accidents. Dr. Laursen conceded that it is possible that the timing of the back pain, following the accidents, is mere coincidence. However, he testified that it is more likely that there is a link between the injuries suffered in the accidents and her complaints of back pain since she never complained of back pain prior to the first accident but she did complain of back pain after the first accident.

[22] In response to a question put to him by a member of the Commission, Dr. Laursen stated that Dr. Endsing did not have the benefit of all of the information contained within his chart when Dr. Endsing arrived at the opinion that the Appellant's increased Body Mass Index is the cause of her low back pain. As stated earlier in this Decision, Dr. Laursen testified that there are no

¹ *Belchamber v. Saskatchewan Government Insurance* [1997] TWL QB97557; *Donan v. Saskatchewan Government Insurance* [1998] TWL QB98224; *Collis v. Saskatchewan Government Insurance* [1998] TWL QB98113.

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

references in his chart notes to the Appellant complaining about low back pain before the first accident.

[23] The Appellant testified that although she has lost weight since the accidents she continues to suffer from some low back pain. However, she testified that her low back pain is significantly improved. She testified that her low back pain seems to be related to changes in the weather.

[24] The Appellant also testified that her husband's insurance policy from his work is paying for the medication costs that she is incurring due to the back pain. The Appellant further testified that since March 8, 2004 she has been employed. She testified that her employer accommodates her need to stand up and move around when she is experiences back discomfort.

[25] Given the evidence of Dr. Laursen we are all of the view that there is a causal link between the injuries that the Appellant suffered in the accidents and her complaints of low back pain. Consequently, it was unreasonable for SGI to conclude that her back injury is not due to injuries that she suffered in the accident.

[26] Further, and given the testimony of Dr. Laursen, we are all of the view that SGI made an erroneous assumption that the Appellant's low back symptoms were due to "problems that predate the accident". More particularly, we are of the view that Dr. Endsinn made an erroneous assumption that the "reason for [the Appellant's] continued low back symptoms are as a result of her body mass..."

CONCLUSION

[27] The decision by SGI that the Appellant's low back symptoms are not due to the injuries that she suffered in accidents is set aside. We are satisfied that the injuries that the Appellant suffered in the accidents caused or materially contributed to her low back pain. Fortunately, it would appear that the low back pain is not currently significantly affecting her. Due to the success that the Appellant has had with her appeal, she is entitled to reimbursement of her filing fee in the amount of \$75.00 and any expenses associated with Dr. Laursen's report of February

14, 2005 and his testimony before us, subject to section 169 of the Act and section 76 of *The Personal Injury Benefits Regulations* (the “Regulations”) and section 193(11) of the Act and section 96(1) of the Regulations.

Dated at Regina, Saskatchewan, on December 5, 2005.

Ann Phillips, Q.C., Chair

Conrad Hnatiuk, Commission Member

Jeffrey Scott, Commission Member