

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *O.I. v. Saskatchewan Government Insurance,*
2005 SKAIA 067
Date: 20051214
File: 147 of 2004

BETWEEN

O.I., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
Jonathan Abrametz, for the Applicant
Dale Brown, for the Respondent

Before: **Beverly Cleveland, Chair**
Darleen Topp, Commission Member
Carolyn Jones, 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
March 16, 2005

DECISION

[1] The Appellant, O.I., appeals a decision of Saskatchewan Government Insurance (SGI) dated January 28, 2004 awarding her 3.9% permanent impairment for scarring. The issue in this appeal is whether SGI reasonably assessed and categorized the scarring to the Appellant's lip area as per Part VI of the *Personal Injury Benefit Regulations* (the "regulations").

FACTS

[2] The Appellant was injured in a motor vehicle accident on September 14, 2002 and suffered a lacerated lip that required stitches and resulted in scarring. Due to the scarring to her face, the Appellant received a benefit calculated as follows:¹

Class 3 Scars

	Length (cm ²)	Width (cm)	Surface Area (cm ²)	Flat Scar (x 1%)
Stitch marks 1-4	0.50	0.10 (x 4)	0.20	0.20%
Long scar 5	2.80	0.10	0.28	0.28%
Stitch mark 6	0.50	0.20	0.10	0.10%
Stitch mark 7	1.00	0.20	0.20	0.20%
Scar 8	0.50	0.20	0.10	<u>0.10%</u>
			Total:	0.88%

Permanent Impairment for scarring to the face	0.90%
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Change to form and symmetry to the face

Class 3	Conspicuous change and:
Minor impairment	(a) affecting one anatomical element: 3%

Permanent Impairment for facial disfigurement	3%
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[3] The above determined benefits were added together for a total of **3.9%**.

[4] Counsel for the Appellant submits that SGI erred in three parts of the assessment: the scar is “faulty” and not “flat”; it comprises two anatomical elements and not one; and it is class 4 moderate impairment and not a class 3 minor impairment.

[5] Dr. Adel A. Mohamed testified on behalf of the Appellant and was considered as an expert in anatomy. He described the anatomical regions of the lower lip, chin and the defined border between the lower lip and chin. His initial opinion that the scarring comprises two anatomical elements – the lower lip and upper border of the chin was based on anatomical definitions, chiropractor scar measurements and gross examination of digital photographs. Dr. Mohamed conceded the scarring on the enlarged photograph of the Appellant appeared to be on the lip only. He was however able to observe the Appellant in the hearing room and his opinion remained the same that the scarring comprises two anatomical elements - the lower lip and touches on the upper chin.

[6] Dr. Mohamed is not an expert on scarring but his medical opinion is the scar is faulty. He bases his opinion on the definition of faulty scar in the regulations and describes her lower lip as having a clear asymmetry and noticeable pigmented scarring.

[7] Dr. Mohamed was also of the view that the scarring was a conspicuous change that held one’s attention. His opinion was partly based on the following narratives:

“Facial scars in women or in any patient whose vocation requires meeting the public can be considered a long term disability....Scars on areas other than the face carry less cosmetic significance. It is generally accepted for our society that the cosmetic disability of a permanent scar on a woman’s hands or legs is more significant than in a male patient.” (p. 76, *Injury Evaluation Medicolegal Principles*, 1991)

“Facial scars are given worth consideration for cosmetic reasons. Facial beauty, especially for women, is an irreplaceable asset which is recognized universally. Visible scars on the face are more compensable than those elsewhere. Consideration is given to depression of the scar, attachment to underlying muscle, tattooing, discoloration, and cicatricial misalignment.” (p. 26, *Medicolegal Examination, Evaluation, and Report*, 1987)

¹ One document included a hand-drawn schematic of the scar

[8] The Appellant testified that her lower lip was normal before the accident and the left and right sides looked alike. She stated that one or two people (strangers) have asked her what happened and that about one month after the accident a man standing next to her in a doughnut shop asked “what happened to you”. She also stated that dozens of people who know her have asked her what happened but that most people at work know about the accident.

[9] At the date of the hearing, the Appellant was a financial services representative in a call center. Her work is principally dealing with people over the telephone and she isn’t required to meet the public.

[10] Lastly, the Appellant described a persistent numbness of her lower lip, as if she had been at the dentist’s office, as well as a lump, like a hard candy, being inside her lower lip. She stated her bottom teeth irritate the scar.

LAW AND ANALYSIS

[11] The Commission can review the legal correctness of SGI’s decision. In reviewing a decision of SGI, the Commission has the same jurisdiction under s. 193(7) of the Act that the Court of Queen’s Bench previously had under s. 198(3) of the Act then in force to “set aside, confirm or vary the insurer’s decision or to make any decision that the insurer is authorized to make pursuant to this Part (VII)”.

[12] 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 (in awarding the permanent impairment benefit for facial scarring) was erroneous, or based on wrong assumptions, or at the very least, the decision was unreasonable.² The Commission will exercise its discretion in the same way.³

² Belchamber v. Saskatchewan Government Insurance [1997] TWL QB97557; Donan v. Saskatchewan Government Insurance [1998] TWL QB98224; Collis v. Saskatchewan Government Insurance [1998] TWL QB98113

³ R.C. v. Saskatchewan Government Insurance 2003 SKAIA 001

[13] Calculation of permanent impairment benefits for facial scarring are found in the Regulations, Appendix B, Division 12, Subdivision 1, Tables 12.1 and 12.2.⁴ Assessment of a permanent impairment benefit is determined partly by the class of impairment and partly by the change in form and symmetry. There are six classes of impairment that are categorized according to scarring and change in the form and symmetry of the face. Table 12.1 deals with classes 1-4 and is reproduced in part below.

[14] The issue in this appeal is whether the scarring, for the purpose of Table 12.1 of the Regulations should be classified as a Class 3 (“conspicuous change”) or Class 4 (“conspicuous change that holds one’s attention), whether the scar is faulty or flat and how many anatomical elements are involved.

Table 12.1 Evaluation of Facial Disfigurement

Classification According to Appearance	Alteration in Form and Symmetry	Scarring	Maximum Impairment Percentage for the Class
Class 1 No impairment	Inconspicuous change	Inconspicuous	0%
Class 2 Very minor impairment	Inconspicuous change	Conspicuous 1% per cm ²	3%
Class 3 Minor Impairment	Conspicuous change and: (a) affecting one anatomical element: 3% (b) affecting two anatomical elements: 4%	Conspicuous and: (a) flat scar: 1% per cm ² (b) faulty scar: 2% per cm ²	7%
Class 4 Moderate Impairment	Conspicuous change that: Holds one’s attention and: (a) affecting one anatomical element: 10% (b) affecting two anatomical elements: 12%	Conspicuous and: (a) flat scar: 1% per cm ² (b) faulty scar: 3% per cm ²	15%

⁴ Table 12.2 is Evaluation of Facial Disfigurement Part 2 for Classes 5 and 6, Severe impairment and Disfiguration and was not considered in this appeal

[15] A “faulty scar” refers to a scar that is misaligned, irregular, depressed, deeply adhering, pigmented, scaly, retractile, keloidal (thickened and raised) or hypertrophic. A “flat scar” refers to a scar that is almost linear, at the same level as the adjoining tissue and almost the same colour, causing no contraction or distortion of neighboring structures.

[16] “Alteration in form and symmetry” refers to a skin disfigurement that results in a change in tissue bulk, consistency, length, pigmentation, or texture. It does not refer to the presence of a scar.

[17] Schedule 1 prescribes that for purposes of rating facial disfigurement, reference is made to each of the following anatomical elements: forehead, orbits and eyelids, visible parts of the ocular globes, cheeks, nose, lips, ears and chin.

[18] Where there is evidence of both scarring and alteration in form and symmetry, both impairments are rated and the percentages for both are added up to the maximum prescribed for that class.

Flat or faulty scar

[19] We are all of the view that SGI’s determination that the scar was flat was incorrect based on the definitions of flat and faulty in the regulations. In coming to our conclusion, we accept Dr. Mohamed’s opinion the scar is pigmented and there is a clear asymmetry of the lower lip. As well, Ms. Solomon, the occupational therapist, who was hired by SGI to conduct the initial scar measurements reported “when (her) face is relaxed the scar fades primary (sic) towards the midline of the lip but remains quite obvious towards the edge of the lip....the four stitch marks located on the outside of the lip tend to cause a light bubbling along the stitch lines when (she) smiles”. Lastly, we observed under the artificial light of the hearing room an irregular scar on the Appellant’s lip area when in a relaxed state and which was more noticeable when she smiled.

Class

[20] We agree with SGI's decision the scar to the Appellant's lip area is properly categorized as a Class 3 impairment and a conspicuous change. There is no question that the Appellant's scar holds her attention however, the inquiry giving rise to this part of the appeal is whether the scar would hold the attention of someone else – the “reasonable bystander”.

[21] There are opposing views in this matter. The Appellant testified that many people have asked her how she received the scar. Dr. Karen Gray, D.C. and Dr. Mohamed are of the opinion the scarring hold's one's attention because of the location of scar, change in pigmentation and the increase in tissue bulk. The Appellant's family physician, Dr. Andres, reported the scarring was a not conspicuous change that would hold the attention of an observer for very long. Lastly, Dr. Howlett (concurring with Dr. Jutras' opinion) stated a Class 3 impairment was scarring or change in form or symmetry that is easily recognized by an observer but is not the focus of the overall observation of the person's face.

[22] There is no definition in the regulations what constitutes holding one's attention. We accept Dr. Howlett's statement there must be a noticeable change in the tissues that is the complete focus for an observer for some period of time in order for the impairment to be considered a Class 4. Overall, we prefer the opinions of Dr. Howlett and Dr. Andres the scarring would not hold one's attention. Based on our observations of the Appellant, we find the scarring is conspicuous but it does not hold our attention. We are satisfied the appropriate categorization is a Class 3 impairment.

Number of anatomical elements

[23] We find the scarring comprises two anatomical elements – the lower lip and upper left chin. Dr. Mohamed is an expert in the area of anatomy. We accept his opinion of the anatomical definitions for the affected areas and as reported by him in a letter dated December 23, 2004. He placed emphasis on the hand drawing by Dr. Gray in arriving at his initial opinion and agreed the scarring appeared to be only on the lip in the enlarged photograph of the Appellant. He remained

convinced however the scarring involved two anatomical elements – the lip and chin - although only touching on the upper chin area.

[24] Dr. Howlett agreed with Dr. Mohamed’s anatomical descriptions but from his review of the photographs the scar doesn’t cross the labiomenal groove onto the chin. In the end, we are persuaded by Dr. Mohamed’s evidence that the scarring involves two anatomical elements.

Measurement of Scar

[25] We reject the submission that Dr. Jutras missed a suture line in his calculations. The schematic drawing provided with his assessment clearly shows seven “hatch” marks. He refers to six of those marks as being stitch marks and the one labeled “8” as being a scar.

[26] Two sets of measurements were conducted.⁵ Dr. Gray’s measurements show the long scar is of equal width and the suture marks are of equal length (height) compared to Ms. Salamon’s measurements that show a thickening of the long scar towards the outside edge and a slight variance in width and length of the stitch marks. Where there is a difference, we accept the measurements by Lynne Salamon as accurately reflecting the actual scarring. Our observations are the scar width is thicker at the outside edge being consistent with Ms. Salamon’s assessment.

CONCLUSION

[27] We find the Appellant’s facial scarring to be a Class 3, faulty scar that is conspicuous, not holding one’s attention and involving two anatomical elements. We accept the measurements completed by Lynne Salamon that SGI relied on are accurate. SGI’s decision is partly set aside and referred back for recalculation of the award for permanent impairment based on our findings.

[28] As the Appellant has been partially successful in her appeal, she is entitled to all reasonable costs of the appeal up to a maximum of \$2,500.00 pursuant to any written fee agreement calculated on double Column 3 of the Queen’s Bench Tariff and including her appeal

⁵ Dr. Gray; Lynne Salamon

fee, attendance of Dr. Mohamed, expert reports in accordance with s. 193(11) of the Act and ss. 86(4) and 96 of the regulations.

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

Beverly Cleveland, Chair

Darleen Topp, Commission Member

Carolyn Jones, Commission Member