

Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *K.Y. v. Saskatchewan Government Insurance*, 2006
SKAIA 072

Date: 20061122

File: 011 of 2005

BETWEEN

K.Y., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:

K.Y., the Applicant

Dale Brown, for the Respondent

Before: Stan Loewen, Q.C., Chair
Carolyn Jones, Commission Member
Marjory Gammel, 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
September 28, 2005

DECISION

[1] This is an appeal by the Appellant, K.Y., of a decision by Saskatchewan Government Insurance (SGI) dated December 1, 2004 concerning his permanent impairment benefits.

FACTS

[2] The Appellant was injured in a motor vehicle accident on February 19, 2003. The vehicle he was driving collided with the rear end of a tractor-trailer unit on a northern highway during a winter storm. He suffered an open dislocation of his right ankle and lacerations on the left side of his face. He attended at Victoria Hospital, Prince Albert and was admitted for surgery later that day. The findings were that the “*lateral ligament was completely ripped, especially the anterior middle talofibular ligaments.*” He was given “*a guarded prognosis regarding the significant ligamentous injury.*”

[3] At the time of the accident the Appellant resided at [town], Saskatchewan, and worked for [employer], near [location], as a refiner. He was later moved to the cement crew, which he advised is a much more physically demanding job. He was trying to return to his former position.

[4] The Appellant testified that his ankle “locks up” and must be manipulated, massaged, or “pulled apart” to restore mobility. At times he attends at his chiropractor for treatment but he also relies on a co-worker to mobilize the ankle when it “locks up” at work. This is accomplished by massage and by “yanking” on it. He claimed he was told by his doctor “everything’s stretched in there and that’s why you’ve got so much movement, the bone can move around in there”, and he also testified that he can feel it (the bone) moving.

[5] Under cross examination by counsel for SGI, the Appellant described the treatment needed to mobilize his ankle as very painful at the time but that the pain subsides in

approximately one half to one hour. He denied using any pain medication at the time of treatment.

[6] The Appellant wears special work boots which he claims give his ankle more support. He advised that it was company policy to share the cost of work boots with the employee on a fifty-fifty basis, but, at the time of the hearing, he had not incurred any cost because the company wanted to try out this new type of work boot.

[7] Brian Thompson gave evidence on behalf of SGI. Mr. Thompson is a physical therapist with the firm of Saskatoon Musculoskeletal Rehabilitation Centre (SMRC) in Saskatoon. The Commission agreed to have Mr. Thompson qualified as an expert witness in these proceedings in the field of musculoskeletal injuries.

[8] Mr. Thompson was a participant in interdisciplinary reassessment reports, dated June 12, 2003, December 16, 2003 and February 10 & 11, 2004. In addition, he completed the August 5, 2004 SGI Progress Report Supplement wherein he conducted the range of motion measurements which became the basis for the Appellant's permanent impairment benefit.

[9] The Commission did not have access to the June 12, 2003 report, but impressions and recommendations of the assessment team of December, 2003 are included in the February 10 & 11, 2004 report as follows:

Diagnosis

Right ankle articular dysfunction, primarily at the talocrural joint and to a lesser degree at the subtalar joint and forefoot.

Widened right ankle mortis.

Ankle ligamentous laxity may be identified once talocrural mobility is re-established.

The recommendations are lengthy but include *“further biomechanical treatment to restore talocrural mobility”* and *“in addition he will require mobilization of the subtalar and to a lesser degree the forefoot”*. It is noted in the recommendations that *“once the talocrural joint has been successfully manipulated, the right ankle may be hypermobile due to the widened mortis”*, and *“that the hypermobility could be managed with bracing and a proper work boot”*. The report stated *“Based on the nature of the injury and widened right ankle mortis it is possible that the talocrural restriction could be recurrent in the future. It is impossible to predict this frequency. Access to manipulation of the talocrural joint as necessary in the future will have to be considered”*.

[10] In the February 10 & 11, 2004 Reassessment report we find the following diagnosis:

Right talocrural joint dysfunction.
Mild right subtalar joint stiffness.
Slightly widened right ankle mortis, lessened from December evaluation.
Resolved parasthesia that was associated to a likely traction injury to the peroneal nerve.

It was noted in the report that “*during the examination and upon joint distraction, the right ankle joint released. Increased right ankle dorsiflexion and increased talocrural mobility was observed*”, and further, “*the ankle joint was re-evaluated for stability and there were no signs of ligamentous laxity. There was a mild increase in AP sheer talocrural joint compared to the left but a firm end feel was present*”.

[11] Mr. Thompson testified at length regarding the February assessment. He testified that at the time of the assessment the ligaments were still stable; however, the team identified that once the normal motion of the joint was re-established, then you need to re-evaluate the ligaments because “*that status on the normal testing may change because the ankle changes position*”. He also stated, as did the report, that, as of February, 2004, the Appellant had not reached maximum medical improvement.

[12] Included in the recommendations under the heading *Physical* was the following:

[The Appellant] may require an occasional biomechanical treatment to the right talocrural joint if the joint restriction returns. Access to a practitioner in the local community that could provide this intervention would be beneficial. This treatment to the ankle (if required) could be provided either by a physical therapist or a chiropractor. It is difficult to predict if this intervention will be required and at what frequency in the future.

[13] The Appellant attended one more time at SMRC on August 5, 2005 to have range of motion measurements done to his right ankle. The measurements were completed by Mr. Thompson and an SGI Progress Report Supplement was completed. The Appellant was awarded a permanent impairment for range of motion loss to the right ankle of 5%. Mr. Thompson testified that since the range of motion measurements in August were very similar to those done in February that it was likely that he had reached maximum medical improvement.

LAW AND ARGUMENT

Permanent Impairment Benefits

[14] Section 152 of *The Automobile Accident Insurance Act 2002*¹ provides for permanent impairment benefits as follows:

152 Subject to this Division and the Regulations, an insured who suffers a permanent impairment because of the accident is entitled to a lump sum benefit for the permanent impairment

[15] Part 4 of Appendix B of *The Personal Injury Benefits Regulations*² provides for permanent impairment to the ankle and foot as follows:

4.1 Amputations including associated scarring and disfigurement

4.2 Fractures

4.3 Musculotendinous Disruptions

4.4 Ligamentous and Other Soft Tissue Disruptions

Ligament injury resulting in chronic ankle instability.....1.5%

4.5 Range of Motion Loss at the Foot or Ankle

(a) Anklylosis of the ankle or foot:

(b) Range of motion loss:

(i) tibiotalar plantar flexion in degrees:

1 – 10.....6%

11 – 20.....3%

>20.....0%

(ii) tibiotalar dorsiflexion in degrees:

0 – 10.....3%

>10.....0%

(iii) sub-talar.....2%

(iv) midtarsal.....1%

Standard of Review:

[16] The Commission’s power on appeal is provided in 193(7) of *The Automobile Accident Insurance Act* c. A-35 (“the Act”). The Commission may:

- (a) set aside, confirm, or vary the insurer’s decision; or
- (b) make any decision that the insurer is authorized to make pursuant to this Part

¹ RSS 1978, c. A-35 (2002)

² c. A-35 Reg 3 (2002)

[17] Recently the Court of Appeal for Saskatchewan addressed the standard of review applicable for appeals to this Commission in *Allary v. Saskatchewan Government Insurance*, 2006 SKCA 89. In this case, the Court of Appeal noted that more than one standard of review was indicated by the legislation. The Court of Appeal suggested that the standard of review depends on whether SGI has discretion to grant or deny the particular benefit claimed. In *Allary*, the claimant was seeking reimbursement for payments for medical and paramedical care as provided under Subsection 163(1) of the *Act*. The Court of Appeal held that because SGI does not have a discretion to decide whether to pay the claimant benefits, the standard of review is correctness.

[18] The Court of Appeal concluded that, where an appellant disputes SGI's decision and places SGI's findings of fact in issue and there is no discretion whether to grant or deny the benefit, the standard of review is correctness.

Analysis

[19] SGI argued that the following sections of Appendix B of *The Personal Injury Benefits Regulations* 4.1 (amputations), 4.2 (fractures), and 4.3 (musculotendinous disruptions) do not apply to the impairments suffered by the Appellant. This Commission agrees.

[20] 4.5 (range of motion measurements) were completed by Mr. Thompson. The Appellant did not dispute their accuracy. Therefore, we find that the Appellant was properly compensated for loss of range of motion at 5%.

[21] Council for SGI argued that 4.4 (ligamentous and other soft tissue disruptions) did not apply to the Appellant's impairments. SGI advised that they relied on Dr. Howlett's reasoning for why 4.4 should not apply. Dr. Howlett opined:

Specifically in this case there was a finding of ligament disruption at the time of surgery. However there is documentation that the ankle joint does not demonstrate instability. This fact is documented in Dr. Kukkadi's January 27, 2004 clinic note wherein he states

“no evidence of instability”. Additionally in the February 10th, 2004 reassessment report from SRMC, it is indicated on page 7 that, “the ankle joint was re-evaluated for stability and there were no signs of gross ligamentous laxity. As such there is medical evidence that there is no chronic ankle instability”.

[22] Dr. Howlett relied on reports of January 27, 2004 and February 10-11, 2004 to form his opinion, yet the same February report, previously noted, contains the opinion that “*once the talocrural joint has been successfully manipulated, the right ankle may be hypermobile due to the widened mortis*”.

[23] It is interesting to note that the talocrural joint was manipulated or “it released” during the February 10, 2004 examination. In spite of Mr. Thompson’s evidence that “*we did identify that that would need to be re-evaluated because once the normal motion of the joint is re-established, then you need to re-evaluate the ligaments because that status on the manual testing may change because the ankle changes position*”, there is no evidence before us that the Appellant was ever re-examined for ligamentous laxity or hypermobility. The only examination done for stability was one day following the “joint release”.

[24] The Appellant was a forthright and believable witness. He testified that his ankle has “locked-up” on numerous occasions, as recently as one month before the date of the hearing. Each time this happens he must be assisted by either a friend or a professional to “yank” on it or manipulate it to restore his mobility. On one occasion the joint released itself, but not before the Appellant was nearly dropped to his knees by the joint locking up.

CONCLUSION

[25] The Appellant has placed SGI’s findings of fact in issue and has testified as to the instability of his ankle. This injury was caused by his motor vehicle accident. SGI does not have the discretion as to whether to grant or deny the permanent disability benefit.

[26] Where the facts are placed in issue, as they were in this case, the appeal commission has the obligation to receive and consider any new evidence submitted by the appellant, as well as the evidence provided by SGI.

[27] The Appellant's testimony confirmed signs of chronic ankle instability and he is entitled to be compensated in accordance with 4.4 Ligamentous and Other Soft Tissue Disruptions.

[28] The decision made by SGI dated December 1, 2004 is set aside.

Costs

[29] As the Appellant has been successful in his appeal, he is entitled to reasonable costs of his appeal, (including his appeal fee), in accordance with Section 193(11) of *The Automobile Accident Insurance Act* and Section 86(4) and Section 96 of *The Personal Injury Benefits Regulations* to a maximum of \$2500.

[30] The Appellant is also entitled to pre-judgment interest on the increased permanent impairment benefit.

Dated at Saskatoon, Saskatchewan, on November 22, 2006

Stan Loewen, Q.C., Chair

Carolyn Jones, Commission Member

Marjory Gammel, Commission Member