

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *P.S. v. Saskatchewan Government
Insurance, 2006 SKAIA 085*
Date: 20061201
File: 050 of 2005

BETWEEN

P.S., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
Michael Griffin, for the Applicant
Joan Eremko, for the Respondent

Before: **Ann Phillips, Q.C., Chair**
Beverly Cleveland, Commission Member
Conrad Hnatiuk, 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
December 19, 2005

DECISION

[1] The Appellant, P.S., appeals from a decision by Saskatchewan Government Insurance (SGI) dated January 18, 2005 to terminate Income Replacement Benefits.

BACKGROUND

[2] On July 10, 2001, the Appellant was riding his motorcycle. He was struck from behind by another vehicle, while he was stopped for construction.

[3] The Appellant was thrown off the bike and subsequently taken by ambulance to Regina General Hospital Emergency Department. Upon admission, the Appellant was combative during initial exam. He tested positive for cocaine, benzodiazepine and opioids. He was diagnosed with severe injuries including laceration to the right side of his forehead and fractures of both 4th and 5th metacarpals. The Appellant tested 13-14/15 on the Glasgow Consciousness Scale (GCS). His right hand and forearm were casted. The Appellant also had road rash. He was initially very confused and suffered memory loss.

[4] The Appellant was also diagnosed on July 15, 2001 with “indeterminate right adrenal gland lesion. Possibilities include an adenoma.....or pheochromocytoma. Clinical and biochemical correlation is suggested.”

[5] By July 18, 2001, the Appellant’s memory was improving and a referral was made to the Acquired Brain Injury program for follow-up services when the Appellant would be discharged. The CT Brain scan indicated no significant intracranial abnormalities, however, the CT of the Abdomen and Pelvis indicated an “incidental adenoma”. All other tests indicated no abnormalities except for an “underplaced fracture through the right L2 transverse process. “

[6] On July 31, 2001, the Appellant was transferred to the Wascana Rehabilitation Centre. On August 2, 2001, the Appellant was assessed as steadily improving, walking unaided, with no localized neurological deficits. Strength, balance and co-ordination satisfactory.

[7] He was orientated to time, place and person, however, the therapists reported the day before “he was unable to recall things at the end of the session that had been told to him earlier on in the session.”

[8] The Appellant was discharged from Wascana Rehabilitation Centre on August 17, 2001. He continued as an out-patient with supervision at home from his partner, E.R.. On August 23, 2001 Dr. Capp reported to SGI that “[the Appellant] still needs cueing with medication administration and assistance with organizing. Fatigue, irritability and adjusting to home are still issues....”

[9] On September 10, 2001, the Appellant was assessed at Wascana Rehabilitation Centre by Recreation Therapy for the purpose of allowing the Appellant to pursue activities which did not require the use of power tools or welding which was a leisure time activity The Appellant was employed as a technician at the time of the accident. A program to engage him in the pursuit of activities of stained glass was recommended.

[10] The Appellant was reviewed by Dr. Capp on October 2, 2001. The report was positive. The Appellant was no longer in need of supervision and his partner was able to return to her job on this date. The ABI Outreach team talked to his employer who indicated he wanted the Appellant back, even on a very limited basis.

[11] Dr. Capp next reviewed the Appellant on November 5, 2001. The Appellant attempted working two half days which seemed too much, leading to fatigue and Dr. Capp suggested a half day a week and continued physical therapy at Wascana.

[12] The next review occurred on December 10, 2001. The Appellant was working two half days per week. Fatigue was a continuing problem and medication was adjusted. The Appellant continues in physical therapy.

[13] On December 17, 2001, the Appellant was discharged from Wascana Rehabilitation Centre. At this time he was working two mornings per week as a technician and attending computerized cognitive retraining twice per week. The growth on his kidney, pending knee

surgery and personal issues continue to be “stresses in his life at present besides his brain injury.”

[14] Dr. Capp reviewed the Appellant on April 4, 2002 at which time he identifies some problems with his employer –“employer felt he was capable of working more and in fact full time.....lasted about four days. He is studying....to see if he can get into the auto-body course at SIAST.”

[15] In May 2002, the Appellant had a lesion removed from his right Adrenal gland which was an incidental finding when he was injured. The Appellant discontinued his part time work at [employer]. The employer and the Appellant disagreed on the amount of work that the Appellant was capable of performing. The Appellant was studying for his journeyman’s papers.

[16] Through June to October, the Appellant, with the assistance of tutoring, the ABI program, SIAST and financial support from SGI prepared to take the journeyman and interprovincial exams. He wrote the exam in November and by January 2003, was informed that he had passed the written exams. The Appellant had arthroscopic surgery on his knee in January 2003 and through on-going counseling and tutoring prepared to take the practical journeyman’s examination. He resumed welding and in his February review by Dr. Capp was doing well.

[17] The Appellant passed the practical exam in May 2003. His work trial at the employer ended in April and the employer expected a return to full time as a condition of continued employment. When the Appellant was unable to work full time a new work trial was established at the SGI Technical Research Centre beginning July 2003. The Appellant was to participate mornings, Monday to Friday, with plans to increase time as tolerable. The main issue was the issue of reported fatigue. The plan was for a six week trial.

[18] After the first week of work trial, time was increased. By August 2003, the Appellant was working three full days and two half days. The work trial was extended to September 2003. Upon review by Dr. Capp at the end of August, the Appellant was reported as doing well, however, after the work was increased to four full days per week, increase in fatigue was reported and work time was reduced to two half days, two full days and Wednesdays off.

[19] In October 2003, the Appellant continued to have left knee problems. The Appellant had a Workers Compensation claim pre-accident for knee problems which had been repaired to satisfactory condition until the motor bike accident. He received further surgery on the knee, continued in the work placement and reviewed by Dr. Capp on February 18, 2004. Progress was reported as satisfactory.

[20] On February 23 and 24, the Appellant completed a Neuropsychological assessment at the request of SGI, by Dr. Landry. The results indicated that a moderate brain injury had occurred as a result of the accident, that the Appellant had made a good recovery and that he could return to all pre-injury activities. Dr. Landry reported that the Appellant faced on-going barriers including self-reported fatigue, neck pain and sleep difficulties. Dr. Landry reported that the Appellant had returned to his pre-accident level of cognitive ability.

[21] In May 2004, SGI referred the file for review to Dr. Alport, Medical Consultant, to determine the appropriateness of a Residual Capacity Evaluation (RCE). Dr. Alport recommended “that further massage or chiropractic treatments were not medically necessary or appropriate; that there is no evidence that neck pain is disabling to him; that clarification regarding problems with the knee were required as there are no relevant clinical notes related to this problem from the accident but there is however information related to pre-accident problems and that a referral be made to Dr. Pancyr to clarify the severity of the brain injury and the cause of his ongoing fatigue. Further, if the fatigue is caused by brain injury, will the RCE to useful to quantify the fatigue?”

[22] On September 27, 2004, Dr. Pancyr responded to SGI’s request and concluded....”there is no doubt he suffered a brain injury, whether it was mild or moderate is difficult to determine....The most common index of brain injury is the GCS rating, and this places his brain injury on the mild range. whether the injury is mild or moderate in severity is not as important as the clinical expectation for positive outcome.

[23] “There is no continuing evidence that PTA which remits within 14 days will result in any functional disability (i.e. his confusion, disorientation was only documented to July 18, ten days).

Neuropsychological examination confirmed that his cognitive skills had recovered to premorbid levels.”

[24] Dr. Pancyr also indicates that the Appellant's ability to obtain his journeyman’s written and practical status; that Dr. Capp’s evaluations indicating disappearance of neck and back pain; that lack of accounting for the cocaine found in his system and possibility that the Appellant developed some expectations for his recovery that may be affecting his perception of fatigue... do not support evidence that the accident would account for sleep disturbance leading to fatigue.

[25] Dr. Pancyr offers that ...”fatigue may be perceived due to an expectation or belief that recovery will be slow and difficult and that he may be unable to perform certain tasks normally.”

[26] In April 2005, the Appellant was released from his job at SGI due to not being able to increase his hours due to fatigue. The ABI program consistently reports fatigue as the major barrier to recovery to pre accident status.

THE LAW

[27] The Commissions’ jurisdiction comes from Section 193(7) of the *Act* to:

- a) set aside, confirm or vary the Insurers decision, or
- b) make any decision that the insurer is authorized to make pursuant to the Part”

[28] 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. The Court of Appeal noted that more than one standard of review was indicated by the legislation and that the appropriate 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 discretion to decide whether to pay the claimant benefits, the standard for review of SGI's decision was correctness. The Court said:

{19} There is no discretion on SGI's part with respect to these benefits. The victim is entitled to a benefit for medical and paramedical care, including transportation. The Regulations in effect at the appropriate time impose limits on the amount paid but none of the limitations appear to apply here. For example, s.43 provides that an expense for which the insurer may be or is required to reimburse a victim pursuant to Division 7 of Part VIII of the Act or this Part is subject to any limit set out in the Act or these regulations or, where there is no limit as to amount, to an amount that the insurer considers reasonable. Thus, where there is no discretion to provide a benefit, asking whether the decision was "unreasonable" is not the appropriate standard. The appropriate standard is correctness.

[29] As the Appellant seeks the reinstatement of Income Replacement Benefits, which are not subject to SGI's discretion, correctness is the appropriate standard in this appeal.

ANALYSIS

[30] Counsel for the Appellant argued that:

- a) SGI has not met the onus to prove that income replacement benefits are no longer payable;
- b) SGI's decision was based on an erroneous medical report;
- c) There are no medical findings to support the SGI decision, but rather based on the expectations of their medical consultants.

[31] First, in regard to onus, the Commission agrees that it falls upon SGI to substantiate the disentitlement to benefits having accepted responsibility in the first place.¹ SGI argues that they have met the tests based on the medical reports of Drs. Pancyr and Alport. The Appellant's lawyer points out however that these reports were based on an erroneous assumption. This assumption was that Dr. Capp indicated that neck pain was resolved. In passing this misinformation onto Dr. Pancyr in his referral, Dr. Alport caused Dr. Pancyr to make an assessment on wrong information.

[32] SGI argues that the substantiation is found in the reports of Drs. Alport and Pancyr.

[33] The Appellant's counsel however, argues that in referring the case to Dr. Pancyr, Dr. Alport did not provide correct information. The information that is relevant is in regard to neck pain. Dr. Alport indicates that Dr. Capp in his assessments indicates this is a resolved problem.

¹ K.A. v. SGI, 2005 SKAIA 013

This is found to be incorrect as per Dr. Capp's report of February 18, 2004 to Dr. Khaladkar as well as a report from Dr. Ekong on September 20, 2004.

[34] Prior to the accident the Appellant worked Full Time and was very active in many leisure activities. Post accident recovery and after two lengthy attempts at work at [the employer] and SGI Technical Centre, fatigue prevented full time employment. Rehabilitation workers and ABI program providers continuously referred to "fatigue" as a barrier to full time employment.

[35] During the two lengthy work placements, SGI did not subject the Appellant to further testing regarding fatigue. Dr. Alport also recommended against an RCE which was contemplated by Dr. Pancyr.

If fatigue is neurologically based rather than physically based, or related to sleep problems and/or medications or even substance abuse, none of these possible factors have been fully investigated.

The evidence presented by SGI is clear that the Medical Consultants expected the Appellant to recover. The Appellant's counsel argues that SGI based their disentitlement of Income Replacement Benefits as an expectation rather than a finding.²

[36] An Independent Medical Examination (IME) agreed to by both parties to assess the physical, mental and emotional health would address the evidence which is incomplete, contradictory and based on interpretations of various reports.

CONCLUSION

[37] The Commission sets aside SGI's decision to terminate benefits.

[38] The medical and psychological evidence is contradictory and speculative. SGI has not demonstrated that the Appellant is capable of working at this pre accident status.

[39] The Commission finds the testimony of both the Appellant and that of his partner, E.R., compelling and credible.

² P. 11 Applicants' Brief

[40] The basis of the “fatigue” has been characterized in a confusing manner and the degree of brain injury is unclear. The behaviours of the Appellant, post accident, described by E.R., as dangerous, regarding anger and arousal are of concern to the Commission. There is no evidence that these issues existed pre-accident or that they have been addressed post accident.

[41] The Commission is not satisfied that the psychological aspects have been addressed. No evidence was presented of pre-accident inappropriate behaviours and emotional responses compared to post accident behaviours.

[42] No evaluation of job requirements (assessment of essential job duties) have been presented which leaves the Commission to accept the evidence of the Appellant and E.R. that the effects of fatigue create a danger to the Appellant and others. The SGI Technical Service Centre did not dispute that the Appellant suffered from fatigue. The Appellant has been unable to obtain work even though he is supported by an array of agencies and a supportive spouse. SGI bearing the onus, has not satisfactorily demonstrated that fatigue is unrelated to the accident and due to non accident related factors.

COSTS

[43] As the Appellant is successful in his appeal, SGI will also reimburse him for his costs in accordance with subs. 193(11) of the Act, to a maximum of \$2,500.00 as prescribed by S. 96 of the Regulations.

Dated at Regina, Saskatchewan, on December 1, 2006.

Ann Phillips, Q.C., Chair

Beverly Cleveland, Commission Member

Conrad Hnatiuk, Commission Member