

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *K.R. v. Saskatchewan Government
Insurance, 2006 SKAIA 008*
Date: 20060110
File: 54 of 2006

BETWEEN

K.R., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
K.R., Applicant
Allan McLeod, for the Respondent

Before: **Jane Lancaster, Q.C., Chair**
Stephanie Pfefferle, 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 Saskatoon, Saskatchewan
November 29, 2006

DECISION

[1] This is an appeal by the Appellant, K.R., of a decision made by Saskatchewan Government Insurance (SGI) dated January 11, 2005 with respect to the denial of benefits for living assistance.

FACTS AND FINDINGS

[2] The Appellant was involved in a motor vehicle accident on May 26, 2002. As a result of this accident, the Appellant initially reported pain in her left shoulder, right knee, neck and low back. In addition, the Appellant reported pain in her left elbow. She had received a total elbow replacement on March 21, 2002.

[3] Following the motor vehicle accident, the Appellant was booked for surgery in October 2002, with Dr. Loback as her left elbow prosthesis was determined to be damaged in the motor vehicle accident. Dr. Loback tried to correct the problem initially by casting her arm in an attempt to repair her ligaments, but the Appellant indicated that the joint was subluxing again.

[4] In December 2002, the Appellant was referred to Dr. Johnston, an orthopaedic surgeon. He recommended that the Appellant's ball and socket prosthesis be replaced by a hinge type prosthesis.

[5] In April 2003, Dr. Johnston replaced the ball and socket joint in the Appellant's left elbow with a hinge prosthesis. In his report dated October 23, 2003, he advised SGI that the Appellant had opted to have further surgery on January 27, 2004 to further reconstruct of a subluxed extensor mechanism.

[6] In his report dated April 13, 2004, Dr. Johnston advised that the Appellant could drive and 'would allow resumption of a normal post arthroplasty activities by the end of this month.'

Physical Condition prior to the motor vehicle accident

[7] .Prior to the motor vehicle accident, the Appellant had suffered from rheumatoid arthritis. She applied for long term disability from Canada Pension in 1998 as a result of her condition. She was successful in her application.

[8] Her specialist in rheumatology was Dr. Pollock. On November 26, 1998, Dr. Pollock wrote to Canada Pension in support of the Appellant's disability application. She advised that the Appellant had been a patient since 1997. Prior to that she had a two and half year history of inflammatory polyarthritis which affected the small joints of her hands, wrists, elbows, shoulders, feet, and knee. Dr. Pollock advised that the Appellant had previously had knee replacements for both knees.

[9] Dr. Pollock advised that she had 20 degree flexion contracture at the left elbow and marked restriction movements in the left shoulder. In her report to Canada Pension, she stated as follows: **“Any changes in therapeutics will not have impact on the elbow deformity, which completely limits her use of that limb. The small joint arthritis precludes even sedentary tasks.”** (emphasis added)

[10] Dr. Pollock advised the Appellant's counsel in a letter dated June 7, 2005, that: “Elbow replacement is designed to improve pain relief and typically does not result in full (normal) range of motion of the elbow. Patients are typically left with significant flexion contracture, which means they lack the ability to fully extend their arm. This is the case for the Appellant.”

[11] Dr. Johnston put a weight restriction following the Appellant's elbow replacement of lifting no more than 5 pounds. Dr. Loback advised that after an elbow replacement, his practice was to restrict patients to a 10-15 pound restriction, but he indicated that most patients receiving elbow replacements have rheumatoid arthritis and function at a fairly low level to begin with and “not many of them really are in a position to do any heavy lifting. The combination of elbow, hand and shoulder deformities basically require that people like the Appellant function at the activities of daily living level. This means that they basically

are able to dress themselves, feed themselves and do other light chores around the home. Most of these people never do get to a level of function with lifting more than five or ten pounds and often even much less than this.”

ISSUE:

[12] Was SGI reasonable in terminating the Appellant’s living assistance based on the fact that her limitations for daily living activities were pre-existing the motor vehicle accident and were as a result of her chronic arthritis condition?

LEGISLATION AND ANALYSIS

[13] Because the Appellant motor vehicle accident occurred May 26, 2002, it is *The Automobile Accident Insurance Act* S.S. 1994, c.A-34 (hereinafter called the *Act*) and *Personal Injury Benefits Regulations* pursuant to that *Act* which is the governing legislation. Section 158(1) of the *Act* states as follows:

s 158(1) Subject to the regulations, if a victim is unable because of an accident to care for himself or herself or to perform the essential activities of everyday life without assistance, the insurer may pay a benefit to reimburse the victim for the expenses related to personal home assistance.

[14] The Commission derives its jurisdiction from section 191 of *The Automobile Accident Insurance Act* as amended in 2002. The section indicates that appeals may be made to the Commission in respect of decisions made by SGI under Part VIII of the *Act*. By section 193(7), the Commission is empowered, upon appeal, to:

- (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.

[15] The Commission’s standard of review has been addressed by the Court of Appeal in *Allary v. Saskatchewan Government Insurance*, 2006 SKCA 89. At paragraph 14 of the decision, Justice Vancise said, “A reading of the relevant statutory provisions would indicate that there is more than one standard of review potentially applicable to a review of a decision of SGI.” He went on to say that where there was no discretion on SGI’s part with

respect to the payment of a benefit, the appropriate standard of review is correctness.” Pursuant to the 1995 legislation, SGI had discretion whether to provide living assistance benefits and so the appropriate standard of review is reasonableness.

[16] The Appellant was assessed by an occupational therapist from Innovative Rehabilitation on December 2002, July 24, 2003, May 4, 2004, and December 14, 2004. In addition, the Appellant had another occupational therapist from Bourassa and Associates Rehabilitation Centre perform an home assessment report using the same grids and assessment that SGI required and were performed by Innovative Rehabilitation.

[17] All the reports, noted that the Appellant had limitations in the areas of purchasing supplies, heavy housekeeping, and preparation of supper. Innovative Rehabilitation had provided the Appellant with some aids to assist her which the Appellant felt were of little value to her.

[18] Pursuant to the 1994 legislation, SGI **may** pay living assistance benefits for those activities that the Appellant is dependent when that dependency is the result of injuries received in the motor vehicle accident.

[19] The Appellant was candid that before the motor vehicle accident, she relied on her husband, her family, and paid outside help to assist her with her daily living assistance and this was because of her rheumatoid arthritis condition. This condition was so severe that her doctor wrote to Canada Pension in support of the Appellant’s application for a disability pension in 1998 and stated that: “Rheumatoid arthritis is a chronic condition characterized by painful swelling in numerous joints. Symptoms may be controlled by medication. Unfortunately, the Appellant has problems with side effects to many of the commonly used medications making her management difficult. As well, she has a severe flexion contracture of her left elbow which greatly limits her manual dexterity, precluding even sedentary tasks. It is not likely that this will ever change.” It should be noted that the Appellant advised the panel that recently she has been receiving weekly injections of empril which is assisting her with the pain of her arthritis.

[20] The Appellant argues that prior to the April 2003 elbow replacement; she was not under a weight restriction with regard to how much weight she could lift. Now, she says if she lifts more than the 5 pound restriction that Dr. Johnston placed on her, she could damage the elbow replacement. Previously, she would simply suffer the pain of over exerting herself.

[21] The Appellant argues that we should not consider her pre-accident condition in making our decision nor should we consider that she had required a permanent elbow replacement before the accident occurred. She feels strongly that the accident is the only factor which should be held responsible for her condition now.

[22] This argument would be more persuasive if there was not ample medical evidence that the Appellant's arthritic condition, especially of her shoulder, elbow, and hands, were such that she would not have been able to lift more even if she did not have an elbow replacement. In addition, her condition was such that she had an elbow replacement, not because of the motor vehicle accident, but because of her pre-existing medical condition.

[23] Pursuant to the *Act*, Part VIII s.101(1), SGI is responsible for providing benefits for “ **bodily injuries caused by an automobile arising out of an accident** that occurs on or after this Part comes into force.” (emphasis added)

[24] In addition, SGI is not responsible to pay for living assistance for activities that the Appellant did not perform prior to the motor vehicle accident. In this case, we note that it appears that SGI was quite generous in paying permanent impairment benefits for a surgery scar that the Appellant would have had for her first elbow replacement which occurred prior to the accident. In addition, SGI paid permanent impairment for the ulnar nerve damage which arguably was not caused by the motor vehicle accident and in paying some living allowance for tasks that in retrospect, the Appellant had not been regularly doing prior to the accident. SGI advised that they were not contesting that the Appellant's March 2002 elbow replacement was aggravated by the May 2002 motor vehicle accident.

[25] We uphold SGI's decision to terminate the Appellant's living assistance benefits based on the grounds that the Appellant was able to perform her activities of daily living which she was able to perform prior to the motor vehicle accident. In our view, SGI acted reasonably in making this decision.

[26] There is no order as to costs as the Appellant was unsuccessful in her appeal.

Dated at Regina, Saskatchewan, on January 10, 2007.

Jane Lancaster Q.C., Chair

Stephanie Pfefferle, Commission Member

Marjory Gammel, Commission Member