

**Automobile Injury Appeal Commission  
Province of Saskatchewan**

**Citation:** *Y.R. v. Saskatchewan Government  
Insurance, 2007 SKAIA 015*

**Date:** 20070119

**File:** 088 of 2005

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**BETWEEN**

**Y.R., Applicant**

**and**

**Saskatchewan Government Insurance, Respondent**

**Appearances:**  
**Y.R. and N.F., for the Applicant**  
**Joan Eremko, for the Respondent**

**Before:** **Jeff Scott, Chair**  
**Tim Brown, 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**

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Heard at Regina, Saskatchewan  
May 31, 2006

## DECISION

### INTRODUCTION

[1] The Appellant, Y.R., was injured in a motor vehicle accident on August 7, 2001. The insurer, Saskatchewan Government Insurance (“SGI”) made a number of decisions concerning the benefits that the Appellant was entitled to pursuant to *The Accident Insurance Act* (the “Act”). By way of an Application Form, the Appellant is appealing from a:

- a) Letter dated March 13, 2002 from SGI with respect to SGI’s decision concerning the Appellant’s amount of past wage loss benefits;
- b) Letter dated March 9, 2005 from SGI with respect to SGI’s decision to terminate the funding of medication (and travel) costs related to depression;
- c) Letter dated April 20, 2005 from SGI with respect to SGI’s decision concerning the Appellant’s determined employment.

### PRELIMINARY MATTER: TIME LIMITATION

[2] At the beginning of the Hearing, Ms. Eremko, lawyer for SGI informed the Appellant and the Commission panel that SGI intended to rely upon the limitation period contained within the *Act* and that the Appellant’s time to appeal from the March 13, 2002 and March 9, 2005 letters had expired. In her “Respondent’s Opening Statement-May 31, 2006”, Ms. Eremko cited “section 197(a) of the old (AAIA) [Automobile Accident Insurance Act]” as the statutory basis for the time limitation defence. Section 197 (a) of the “old AAIA” reads as follows:

197 A claimant may appeal the insurer’s decision on review to the Court of Queen’s Bench:

(a) subject to clause (b), within 90 days after receiving the insurer’s written reasons pursuant to section 195.

[3] In response to Ms. Eremko’s position, N.F., Advocate on behalf of the Appellant cited section 194 (2) of the “old AAIA” and asked the Commission panel to “determine whether there are reasonable grounds for the setting aside of these time limits.” Section 194 reads as follows:

194(1) Within 60 days after receiving notice of a decision pursuant to this Part, a claimant may apply in writing to the insurer for a review of the decision.

(2) The insurer may waive the time limitation mentioned in subsection (1) if it is satisfied that the claimant has a reasonable excuse for not making the application within that time limitation”.

[4] Further, N.F. argued since the Appellant’s appeal was not being brought before the Court of Queen’s Bench, as contemplated by section 197, that the time limitation within that section does not apply to the Appellant’s appeal before the Commission.

[5] Following the Hearing, Ms. Eremko filed a letter dated June 5, 2006 with the Commission office. In her letter, Ms. Eremko stated, in part, as follows:

“... it appears that the relevant sections that I ought to have brought to the panel’s attention are **218.1(2)** and **191(1)(a)** of the **current** AAIA—and not s. 197(a) of the old AAIA”.

[6] Section 218.1(2) and 191 (1)(a) of the “current AAIA” read as follows:

**Transitional-appeals and commission**

218.1(2) In the case of a decision of the insurer with respect to an accident that occurred before the date that this section comes into force that is being appealed to the appeal commission, sections 188 to 196.5 apply, with any necessary modification, as if the accident had occurred on or after the date that this section comes into force.

**Right to appeal**

191 (1) A claimant may appeal a decision of the insurer pursuant to this Part to either the Court of Queen’s Bench or the appeal commission within the later of :

(a) 90 days after the date of insurer’s written decision; and

(b) if a claimant has requested mediation pursuant to section 190, 60 days after the date the mediator’s written statement pursuant to subsection 190(8) declaring that the mediation is completed.

[7] In this matter, mediation did not occur. We are of the view that sections 218.1(2) and 191(1)(a) of the “current AAIA” apply to this appeal. Pursuant to section 191(1)(a) the relevant time limitation, for the purpose of the Appellant’s appeal before the Commission, is “90 days after the date of insurer’s written decision”. The Application Form (the document that commenced the Appellant’s appeal) is dated July 1, 2005. The Application form is dated outside the 90 day period following the March 13, 2002 letter and the March 9, 2005 letter. Consequently, the time to appeal from each of the March 13, 2002 letter (wage loss benefit) and

the March 9, 2005 letter [termination of funding for medication (and travel costs) related to depression] is out of time. The Commission cannot extend the period of time for an appeal<sup>1</sup>.

[8] In the alternative, if we are wrong and section 197 of the “old AAIA” applies to this appeal then the Appellant is out of time since he has not appealed to the Court of Queen’s Bench within 90 days after receiving the letter of March 13, 2002 and the letter of March 9, 2005. The Court of Appeal and the Court of Queen’s Bench held in *Mintzler* (supra) that failure to file an appeal on a timely basis under section 197 is fatal.

[9] Before leaving our finding with respect to the Preliminary Matter, Ms. Eremko did candidly admit that SGI does not have a signed acknowledgement of receipt card from the Appellant for the March 13, 2002 letter (with respect the March 9, 2005 letter, SGI does have a signed Acknowledgement confirming receipt of the letter). During the Hearing, the Appellant was asked by the panel members whether he had received the March 13, 2002 letter. The Appellant testified that shortly after March 13, 2002 he received the letter at the post office. Further, he testified that upon receiving the March 13, 2002 letter he set it aside since N.F. was not available, at that time, to discuss the letter with him. The Appellant, also, testified that around 3 or 4 months later he discussed the March 13, 2002 letter with N.F. Given the Appellant’s testimony we are satisfied that the Appellant did, in fact, receive the March 13, 2002 letter from SGI shortly after March 13, 2002.

[10] Before leaving our finding with respect to the Preliminary Matter, during the Hearing N.F. made passing reference to the Appellant asking him to assist him in his dealings with SGI. Also, the Appellant testified that N.F. was assisting him. Further, N.F. stated during the Hearing that the Appellant suffered a head injury during the accident. However, N.F. did not argue and the Appellant did not testify that the Appellant is by reason of mental disability incompetent to manage his affairs. Consequently, and although it was not argued by N.F., we do not have reason to conclude that the relevant time limitation should be suspended due to an inability by the Appellant to manage his affairs pursuant to section 8(1)(b) of *The Limitations Act* S.S. 2004.c. L-16.1.

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<sup>1</sup> *Mintzler v. Saskatchewan Government Insurance* 2001 SKCA 54 (CanLII), 2001 SKCA 54

[11] In conclusion, the appeal from the March 13, 2002 letter and the March 9, 2005 letter is each statute barred and each appeal is dismissed.

### **IDENTIFICATION OF THE ISSUE AND POSITION OF THE PARTIES**

[12] Given our finding on the Preliminary Issue that the appeal from the March 13, 2002 letter and March 9, 2005 is each statute barred and therefore each appeal is dismissed, the only appeal remaining before the Commission is the appeal from the letter dated April 20, 2005.

[13] With respect to the appeal from the letter dated April 20, 2005, N.F. argued that the Appellant is, due to the injuries that he suffered in the accident, not able to work in any regular employment setting. Consequently, N.F. argued that section 132 of the “old AAIA” did not apply and SGI should not have “determined” employment for the Appellant. Ms. Eremko argued that the decision made by SGI, as outlined in the April 20, 2005 letter, is correct and should be upheld by the Commission.

[14] The issue for this Hearing is whether the Appellant was, due to the injuries that he suffered in the accident, unable to work when the April 20, 2005 decision letter was prepared.

### **NATURE OF THE HEARING**

[15] In reviewing a decision of SGI, the Commission has the jurisdiction under section 193(7) of the Act to:

set aside or vary the insurer’s decision; or make any decision that the insurer is authorized to make pursuant to this Part.

[16] In *George Allary v. Saskatchewan Government Insurance*<sup>2</sup>, the Saskatchewan Court of Appeal considered the nature of a hearing before the Commission and the standard of review of an appeal before the Commission. In *Allary*, as in this case, the claimant put the facts in issue before the Commission. The Court in *Allary* held, in part, as follows:

Where the facts are placed in issue, as they are here, the appeal commission has an obligation to receive and consider any new evidence submitted by the appellant and, depending on the nature of the hearing which is conducted, to consider as well the evidence received by SGI in making the finding of fact in

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<sup>2</sup> 2006 SKCA 89

dispute on the appeal. The appeal commission must determine whether the decision of SGI was erroneous having regard to all of the evidence (See Paragraph [20]).

[17] The Commission received and considered all of the new evidence submitted by the Appellant and SGI. As held by the Court of Appeal in *Allary*, we will determine whether "... the decision of SGI was erroneous having regard to all of the evidence".

## **FACTS and REVIEW OF EVIDENCE**

[18] On August 7, 2001 the Appellant was injured in an accident. The injuries were numerous and significant. The injuries included, for example, rupture of the descending aorta, fracture of the left wrist, requiring open reduction and internal fixation, scarring, left knee injury, right knee injury, Whiplash Associated Disorder I and Low Back II injury.

[19] On the date of the accident, the Appellant was employed as a carpenter's helper with [Carpenter Co.], [town], Saskatchewan.

[20] Due to the injuries that he suffered in the accident, the Appellant was admitted on January 20, 2003 to the Functional Rehabilitation Program at the Wascana Rehabilitation Centre for tertiary treatment. He was discharged from the Program on June 20, 2003.

[21] During the Functional Rehabilitation Program, the Appellant underwent a Functional Capacity Evaluation ("FCE"). The FCE occurred on June 19 and 20, 2003. Arising out of the FCE, a Functional Capacity Evaluation Summary was prepared. For the purpose this appeal, the relevant portions of that Summary include:

SIGNIFICANT DEFICITS: (see Appendix B for specific tolerances)

Restrictions for:

Elevated work-self-limited (due to report of shoulder fatigue)

Forward bending in sitting-self-limited (due to report of low back pain).

Forward bending in standing-self-limited (due to report of back pain).

Crawling }

Kneeling } These activities are restricted due to  
previously diagnosed knee pathology. Overall repetitive or sustained low level  
work is not recommended.

Crouching }

Repetitive squatting }

### CONCLUSIONS

**Physical impairment:** [The Appellant] has been diagnosed with left knee instability and bilateral patellofemoral syndrome (right greater than left). These physical impairments were consistent with demonstrated functional abilities with regard to low level lifting, sustained or repetitive squatting, kneeling and crawling.

**Effort/Consistency:** [The Appellant] gave a consistent, full effort during the majority of the Functional Capacity Evaluation. He self-limited 3 of 27 tasks, including forward trunk bending (in sitting and standing) and sustained elevated work. His perceived abilities were less than his measured abilities.

**Level of Work:** [The Appellant] would be classified into a modified medium level of work based on his physical findings and functional testing, with restrictions on lifting from floor level and low level work.

**Restrictions:** [The Appellant] should avoid repetitive or sustained low level work, including squatting, crouching, kneeling or crawling. Modifications may need to be made to limit this type of activity. As well, limitations were noted in some positional tolerances including sustained elevated work and seated or standing forward trunk bending due to reported low back pain.

[22] Following the FCE, SGI arranged through Innovative Rehabilitation Consultants (“IRC”) to explore potential vocational opportunities for the Appellant. By a letter dated June 24, 2003 Amie L. Lodoen, IRC corresponded with Dr. Barnard, one of the Appellant’s physicians. Ms. Lodoen asked Dr. Barnard whether he would be prepared to provided medical clearance for the Appellant to participate in a work placement with the [name] Casino in a maintenance/custodial capacity. Dr. Barnard checked “yes” he would give medical clearance. Dr. Barnard went on to state:

A gradual return to work program advised—[the Appellant] should be able to cope with duties as described.

Should [the Appellant] have any difficulties with this job, he should be seen by myself, OT or other team members asap.

[23] Ms. Lodoen, by a letter dated June 24, 2003, also corresponded with Dr. Ram Lambotharan, another of the Appellant’s physicians. She asked Dr. Lambotharan whether he was prepared to give medical clearance for the Appellant to participate in a work placement at the [name] Casino. Unlike Dr. Barnard, Dr. Lambotharan checked off “No” to whether he

would provide medical clearance. Dr. Lambotharan provided his reasons for his response as follows :

Severe psychological and mental barriers to return to work force. These are [?] his psychological trauma from the accident. Recently exacerbated from [?]. Depressed currently.

Totally disabled currently.

[?] on Prozac.

Reassess in 6-8 weeks. Need long term work up.

[24] By a letter dated August 5, 2003, Ms. Lodoen informed Wanda Filipchuk, Personal Injury Representative, SGI, that Dr. Lambotharan was not prepared to provide his medical clearance for the Appellant to participate in a work trial. She, also, informed Ms. Filipchuk that she would correspond with Dr. Lambotharan and ask him for his rationale for not supporting a graduated return to work program for the Appellant.

[25] Then by a letter dated August 5, 2003, Ms. Lodoen again asked Dr. Lambotharan whether he was prepared to provide medical clearance for the Appellant to participate in a work placement. Ms. Lodoen included with her letter a copy of the FCE and a copy of Dr. Barnard's June 24, 2003 letter.

[26] Once again, Dr. Lambotharan stated that he was not prepared to give medical clearance. Further, Dr. Lambotharan stated in the letter:

Psychological trauma [?] in Accident. Currently depressed. Post Traumatic Stress Disorder. Getting therapy. Referring to specialist for further assessment.

Total disability.

Increase Prozac dosage from 10 mg to 20 mg OD

Referral to Psychiatrist.

[27] On August 27, 2003 Ms. Lodoen met with Dr. Lambotharan. Ms. Lodoen summarized the meeting that she had with Dr. Lambotharan. In the summary there is stated, in part, the following:

You [Dr. Lambotharan] stated [the Appellant] has had a remarkable physical recovery from his motor vehicle accident and you do in fact agree that [the

Appellant] has the functional capacity to return to work however you reported it is [the Appellant's] psychological and mental issues inhibiting his return to the workforce. You went on the (sic) mention you feel [the Appellant] has Post Traumatic Stress Disorder and depression, which have been overlooked in the past and are directly related to the motor vehicle accident. You are attending to this and you have referred [the Appellant] to a psychiatrist. ... You noted [the Appellant] would likely be ready to return to the workforce in one month's time.

Dr. Lombotharan then signed the summary.

[28] Ms. Lodoen then again contacted Dr. Barnard. In a letter dated September 16, 2003. Dr. Barnard stated that his "first contact with the Appellant was on the day of his mva". In response to whether there might be "...pre-existing contributing factors that could be the origin of the Appellant's reported current depressive state", Dr. Barnard wrote:

I would suggest that reports be obtained from a psychiatrist /psychologist. There may be some contributing factors arising from teenage years.

[29] Then by a letter dated September 22, 2003 Dr. Lambotharan referred the Appellant to a "Specialist Psychiatrist, Mental Health Clinic, Weyburn". In his referral, Dr. Lambotharan stated:

Reason for Referral:

Sustained multiple injuries from motor vehicle accident in Aug 2001. had multiple surgeries and made a good physical recovery. Psychologically depressed and having symptoms of PTSD. For your assessment and advice.

[30] On October 2, 2003 Lesley McIntyre, IRC met with the Appellant and arranged for the Appellant to do a Transferable Skills Analysis. A Transferable Skills Analysis and Labour Market Survey was subsequently prepared by Lesley McIntyre.

[31] In a Progress Note Update dated December 1, 2003, Sam McClement, Outreach Program, Wascana Rehabilitation Centre wrote, in part, as follows:

[The Appellant] reports that he is continuing to have ongoing knee pain, which varies in intensity from day to day. He also continues to report depression even though he is on two medications for this. [The Appellant] reports further that the psychologist he is seeing in Weyburn tells him that this is the result of Post Traumatic Stress Disorder.

[32] A copy of Sam McClement's Progress Note Update was sent to Ms. Filipchuk.

[33] Then by a note dated December 9, 2003 Lesley McIntyre informed Ms. Filipchuk that she had arranged for a work trial for the Appellant with Kipling Industries to start January 5, 2004.

[34] In a note dated December 19, 2003, Lesley McIntyre corresponded with Dr. Barnard and sought his medical clearance for the Appellant to find employment “between the light to medium range”. The note was not completed by Dr. Barnard.

[35] In another note dated December 19, 2003, Lesley McIntyre corresponded with Dr. Lambotharan and sought his medical clearance for the Appellant to find employment “between the light and medium range”. In response, Dr. Lambotharan wrote:

PTSD-getting counselling session & medical treatment. Leg pain & Restless legs-seeing Dr. Rehman-neurologist. PTSD hasn't resolved or improved.

[36] In a note dated January 14, 2004, Lesley McIntyre informed Ms. Filipchuk of Dr. Lambotharan's response to her note dated December 19, 2003.

[37] By a letter dated March 2, 2004 Ms. Filipchuk received from L. Crassweller, M. A., Registered Psychologist, Sun Country Health Region a copy of the materials that were prepared as a result of the Appellant's attendance at the Weyburn Health Centre.

[38] Lori Nelson, Personal Injury Representative, SGI then assumed responsibility for SGI's file concerning the Appellant. By a Memorandum dated 03/06/04, Ms. Nelson asked SGI's Medical Consultants to review the file materials and provide her with an opinion on, inter alia, whether the injuries suffered by the Appellant would prevent him from participating in a work placement.

[39] In a letter dated July 16, 2004, Dr. J. F. Alexander, Medical Consultant, SGI concluded:

Based on the FCE [Functional Capacity Evaluation done by Wascana Rehabilitation Centre] it would be expected the Claimant is capable of gainful employment.

[40] Then by a Memorandum dated 03/06/04, Ms. Nelson arranged for Dr. G. Pancyr, Registered Doctoral Psychologist, Consultant to SGI to review a number of SGI's documents. In a report dated September 28, 2004, Dr. Pancyr identified the issues that he was asked to provide an opinion on:

1. Are the psychological issues [the Appellant] is currently being treated for the result of the August 7, 2001 motor vehicle crash (MVC)?
2. Are these psychological issues he is currently being treated for preventing him from doing a work placement?
3. Do you have any recommendation for furthering this customer's recovery and return to competitive employment?

[41] In his report, Dr. Pancyr stated, in part, as follows:

I do not find any psychological reason, pertaining to the effects of the car crash, which would prevent him from attempting some kind of work placement. On the contrary, it would be therapeutic if he could begin some form of gainful employment and establish a work routine. ...

If his current health care providers believe he is unable to attempt some kind of work placement, this may be true, but his work disability then is most accurately attributed to non-injury related health and mental health issues (i.e. severe reconditioning, possible sleep disorder, stresses including financial and relationship problems, depressed mood.

[42] In a report dated November 4, 2004 Lesley McIntyre prepared a "Supplement to Transferable Skills Analysis and Labour Market Survey".

[43] As a result of Dr. Pancyr's opinion, SGI sent to the Appellant the March 9, 2005 letter informing the Appellant that SGI believed there was no causal link between the injuries that the Appellant suffered in the accident and the "problems you are experiencing for which you are consulting a psychiatrist ...". Consequently, SGI informed the Appellant that "... because these problems are not accident related, we will not be able to fund medications you require for depression or other psychological problems. We will also not be able to fund travel expenses to the psychiatrist". As previously noted in this Decision, the Appellant did not appeal from this letter within the time limitation.

## **ANALYSIS OF THE LAW AND THE ISSUE**

[44] The relevant legislation are sections 132 and 134(1) of the "old AAIA":

132. Following the second anniversary date of an accident, the insurer may determine an employment for a victim of the accident **who is able to work but who is unable because of the accident to hold the employment** mentioned in section 112 or 112 or determined pursuant to section 131 (emphasis added).

134(1) In determining an employment pursuant to section 132 or 133, the insurer shall consider the following factors:

- (a) the education, training, work experience and physical and intellectual abilities of the victim at the time of the determination;
- (b) any knowledge or skill acquired by the victim in a rehabilitation program approved pursuant to this Part;
- (c) whether the employment is available in the region of Saskatchewan in which the victim resides;
- (d) the employment that the victim is able to hold:
  - (i) on a regular and full-time basis; or
  - (ii) if it would not be possible for the victim to hold employment on a regular and full-time basis, on a part-time basis;
- (e) any other prescribed factors.

[45] In the April 20, 2005 letter that the Appellant is appealing from we note there is no discussion by SGI concerning whether the Appellant is capable of employment. The only reference in the letter to the Appellant's ability to be employed is as follows:

If you are unable to hold your original employment or your determined employment at 180 days, you may have some capacity for employment. At maximum medical improvement and at least 2 years after the motor vehicle accident, **if you are capable of employment**, we will reduce your income benefit accordingly (emphasis added).

[46] Upon our review of the documents that were filed for this Hearing and hearing the testimony of the Appellant and N.F., we are all of the view that the injuries that the Appellant suffered in the accident were not preventing him from obtaining employment when the letter dated April 20, 2005 was prepared. In coming to that finding, we rely upon and accept the analysis and conclusions expressed in the report prepared by Dr. Alexander and the report prepared by Dr. Pancyr. N.F. and the Appellant did not file reports to contradict the conclusions of Dr. Alexander and Dr. Pancyr. Nor did N.F. and the Appellant testify that the reports of Dr. Alexander and Dr. Pancyr are not accurate.

## CONCLUSION

[47] Each appeal from the letter dated March 13, 2002 and March 9, 2002 are statute barred and are consequently dismissed.

[48] With respect to the appeal from the letter dated April 20, 2005, we find that the injuries that the Appellant suffered in the accident were not preventing him from working. Consequently, the April 20, 2005 letter from SGI dated is upheld and the appeal is dismissed.

**Dated** at Regina, Saskatchewan, on January 19, 2007.

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Jeff Scott, Chair

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Tim Brown, Commission Member

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Conrad Hnatiuk, Commission Member