

Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *V.L. v. Saskatchewan Government
Insurance, 2007 SKAIA 018*
Date: 20070131
File: 100 of 2004

BETWEEN

V.L., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
V.L., for the Applicant
Rod Rath, for the Respondent

Before: **Beverly Cleveland, Chair**
Carol Olson, Commission Member
Stan Loewen, 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 6, 2004

DECISION

[1] The Appellant, V.L., appeals three decisions of Saskatchewan Government Insurance (SGI): April 2, 2003 terminating his income replacement benefit following a graduated return to work; March 4, 2004 terminating any further funding for passive treatment and May 17, 2004 denying the right rotator cuff tear was caused by the motor vehicle accident.

FACTS

[2] The Appellant was injured in an accident on January 23, 2003 when the car he was driving “t-boned” another vehicle that ran a red light. The vehicles had managed to nearly stop before the impact and there was minor damage to both vehicles. The Appellant was [age] at the date of the accident and employed by [the company] for 26 years. He has worked in the claims department since 1989 and his most recent position was a [customer service representative].

[3] In addition to the decisions by SGI dated April 2, 2003, March 4 and May 17, 2004, the Appellant says there is what he refers to as an “unwritten” decision - a refusal to send him for a secondary assessment despite recommendations by his caregivers.

[4] The Appellant was diagnosed with a whiplash associated disorder (WAD) 2 of the cervical, thoracic and lumbar spines as well as an injury to his right shoulder and for which he received treatment including chiropractic, massage, physical and exercise therapy. The Appellant eventually recovered from his injuries but for the right shoulder that continued to cause pain and decreased range of motion. After referral to an orthopedic surgeon, an arthrogram in December 2003 confirmed a full thickness tear of the right rotator cuff.

[5] A 4-week graduated return to work commencing March 3, 2003 was planned with 2 hour weekly increments but was interrupted due to family reasons resulting in an amended plan. During the return to work, the Appellant reported headache, pain and lack of sleep due mostly to his right shoulder, family leave and earned days off (EDO's), all giving rise to missed days of work throughout.

[6] Because of this according to the Appellant, stage 4 should not have started until April 2 and that SGI had been informed of all the dates and hours he missed from the plan. However,

April 1 was when SGI considered he was substantially able to perform the duties of his job and his return to work had been completed. Practically, this resulted in his income benefits ending and his being put back on the company payroll effective April 1 (as per the April 2, 2003 decision letter).

[7] On March 31, 2003 an email was sent from the Appellant to SGI, reporting he is scheduled to see his family physician, Dr. Popick, that morning for a referral to Dr. McKerrell regarding his shoulder and a possible rotator cuff tear. On the same day, Dr. Nykoliation, chiropractor, recorded a clinic note that was also sent to SGI, recommending a secondary level assessment because of (in part) quite severe right shoulder pain that had not been responsive to conservative treatment.

[8] The Appellant stated he was supposed to be referred to Dr. McKerrell (who he had seen previously for his right shoulder) but because he was so busy, Dr. Popick referred him to Dr. Taillon instead. After waiting several months to see Dr. Taillon, Dr. Nykoliation said he could probably get into see Dr. Ernst much quicker. It was of course, Dr. Ernst that eventually made the diagnosis of the full rotator cuff tear in December 2003.

[9] The Appellant says the above is relevant because SGI has a legal duty to assist claimants and he believes that he was treated differently. He stated that SGI ignored 3 requests from his caregivers for a secondary assessment and that his graduated return to work should have been completed on April 8 and not April 1. The relationship between the Appellant and the company was apparently not good for some time before the accident but deteriorated even further shortly after his return to work resulting in his taking disability (stress) leave April 16, 2003 to October 17, 2004 when following an 8 week graduated return to work he returned to full-time hours..

[10] During this period, the Appellant received his income from the disability insurer and funding for continuing (passive) chiropractic and massage therapy. On December 16, 2003, Dr. Nykoliation reported that all treatments after May 12, 2003 were unrelated to the car accident but for the right shoulder.

[11] In February 2004 Dr. Kitchen, chiropractic consultant for SGI, reviewed file and felt there was insufficient clinical evidence to further warrant passive treatment. He specifically

stated that repair of the shoulder injury was outside of the scope of chiropractic treatment (and presumably his opinion). As a result on March 4, 2004 the Appellant was advised that SGI would no longer fund chiropractic and massage treatments.

[12] On April 8, 2004, the Appellant had surgery to repair the rotator cuff tear to his right shoulder. Dr. Ernst advised Dr. Popick on April 21 that:

“...he is doing quite well with is passive range of motion. He is working at Daniels Kimer on some passive range of motion with his physiotherapist.

I explained to (him) the nature of his repair and the importance of leaving his arm in the sling between bouts of physiotherapy and trying to work on his passive mobility over the next four weeks. At that stage, the tendon should be healed to the point that we can begin a strengthening program....”

[13] Following a review of the medical file by Dr. John Alport, medical director for SGI, on April 12, 2004, he provided his opinion that the Appellant’s rotator cuff tear injury in all likelihood occurred prior to the accident. Dr. Alport’s opinion gives rise to the last decision letter on May 17, 2004 advising that SGI did not accept responsibility for the rotator cuff injury or tear and will not provide funding or treatment.

LAW AND ANALYSIS

[14] Section 193(7) of *The Automobile Accident Insurance Act* (the Act) provides the Commission may set aside, confirm or vary a decision of SGI or make any decision that SGI is authorized to make pursuant to Part VIII. The basis upon which we would do this may differ depending on the nature of the issue before us.

[15] When the claimant places the facts in issue and challenges a decision of SGI in respect of a benefit that it is obligated to pay, the standard for our review will be correctness. That is, after considering the record and any new evidence, the Commission will decide the matter on the basis of what it thinks is the correct decision in the circumstances.

[16] If the claimant places the facts in issue and challenges a decision of SGI in respect of a benefit that SGI has discretion to pay or not, the Commission will consider whether the decision was reasonable. In this regard, we will consider whether the decision was wrong in law, based on erroneous assumptions or whether it was unreasonable.

April 2, 2003 decision letter

[17] The standard of review regarding income benefits is correctness and in the situation where SGI terminates the benefit, it bears the burden of proof.

[18] One of the Appellant's complaints was that his caregivers did not have input into the return to work plan but yet we note the original and amended plan was set up by Dr. Karen Fenrich, one of his primary caregivers at the time. As well, Dr. Fenrich was a colleague at the Lenore Chiropractic Clinic along with two of his other primary caregivers, Drs. Nykoliation and Kristmanson.

[19] The original return to work plan was signed by Dr. Fenrich, Phil Fincati (SGI supervisor), Dave Prociuk (external adjuster) and the Appellant. The copy in our document book was unsigned by Dr. Popick although it was clearly indicated that he was to be included as a signatory thereby agreeing to the schedule. We don't know why he didn't sign it but we have no document or other evidence to suggest he disagreed with the return to work plan either.

[20] The Appellant also says that SGI went by the "week" rather than the "stage" in his return to work plan. For example, he refers to Stage 2 that started March 11, 2003: He was away on family leave from March 12-19 and the schedule should have resumed:

<u>Stage 2:</u>	Day 3	March 20 (Thurs.)	4 hours
	Day 4	March 21	4 hours
	Day 5	March 24 (Mon.)	4 hours

[21] An injury note from the Appellant's supervisor on March 24 states "today he'll work...for the full 6 hours". As indicated, according to the Appellant, he should have only been required to work for 4 hours and not 6 hours according to the plan.

<u>Stage 3:</u>	Day 1	March 25	6 hours
	Day 2	March 26	6 hours

[22] The Appellant called in sick on March 27 and 28 and this angered some of his co-workers.

[23] On March 31 the Appellant advises Lynn Henderson at SGI that he:

...missed March 27 & 28 = Day 3 & 4 of Week 3 @ 6 hours per day. I had a chrio trt @ 7:45 AM on the 27th and because of lack of sleep on March 25 & 26 was not able to continue my GRTW as I had stated I would....I also have another PRN appointment April 2, at 9:00 A.M. I apologize for this & will do my utmost to not disturb my GRTW, again, all other things being equal...

[24] The Appellant also reports to Phil Fincati on March 31 that:

I left the office at 9:00 and was back @ my desk @ 10:20 AM...My appt was for 9:15 but I did not get in on time & left that office @ 10:04, coming right back to work, I did not get my 15 minute rest break but will take it now @ 10:23 AM...[the Appellant]

[25] Mr. Fincati replies:

I just re-read your GRTW. You are not entitled to take stretch breaks every 15 to 30 minutes. It outlines full, unrestricted return to work activities. You are of course, entitled to your regular coffee break.

[26] The order of the continuing emails is a bit confusing but it appears the Appellant continues the dialogue the next morning (April 1):

OK, I don't have my copy with me but you are probably right. No more breaks....Just to avoid any confusion, I will take down my reminder sign:

'REMEMBER: Pace, Stretch, Mini-breaks'

1 question – I believe this is Day 4, Week 3, 6 hours/day. Can you confirm if that is your interpretation, thanks.

PS: My IRB was 5 days late, further to your assertion that I would be treated like any other customer.

And I seemed to have been denied my Home Assistance. Oops, sorry, you aren't involved in the Injury Claim, are you? TTFN

[27] Mr. Fincati responds:

I believe we are on Week 4, 8 hours per day, no restrictions, full duties....

Also, as far as I know you ARE NOT back on [the company] payroll yet. I have not received confirmation of this. As soon as I do I will let you know....

[28] Later on that day (April 1) Mr. Fincati advises John Schmidt, Head of Injury Claims and copied to the Appellant:

...I'll ask...to put [the Appellant] back on payroll. I just need to know as of when.

If I might make a suggestion:

[The Appellant's] GRTW ends this week. We could keep him on IRB to April 4, then put him back on payroll starting Apr 7. Although, [the Appellant] is working 8 hours per day, no restrictions, this week so could also put him back on payroll March 31.

[29] The exchange of emails continues and the Appellant was becoming increasingly frustrated and stressed and concludes his last email on April 1 (after debating sick leave) with “(B)ut go ahead [text deleted]...It just doesn't matter, anymore.” In saying so we are not casting any aspersions on SGI personnel and in fact, find they acted professionally, fairly and respectfully towards the Appellant in what seemingly had the potential of becoming a very serious situation.¹

[30] The Appellant left work at noon on April 1 and went home following a discussion with two union representatives without any reasons being given to the company. At the appeal hearing, the Appellant describes this as his being “banished” until September 3, 2004 for human resource issues and that he was forced to go onto disability due to stress.

[31] On April 4, 2003 the building access codes and locks were changed in the company offices. The Appellant testified he was told that co-workers were concerned for their personal safety and well-being but it wasn't fully explained to him and the union representatives couldn't explain it either.

[32] The Appellant was advised by the company human resources that he could use sick leave or annual leave credits during the 2 week waiting period before his short-term disability kicked in. However, despite the April 2 decision letter advising that he was being placed back on

¹In October 2002 the Appellant lost his temper at work and punched a hole in the wall causing \$400 damage.

payroll effective April 1, it was later decided he would be paid an income benefit and no vacation leave credits would be deducted.

[33] The Appellant alleges SGI took away Day 5, Stage 2 (see above) and also suggests he was being penalized for March 27 and 28. He says that Stage 4 should not have started until April 2, 2003:

<u>Stage 4</u>	Day 1 April 2 (Wed.)	8 hours
	Day 2 April 3	8 hours
	Day 3	8 hours
	Day 4	8 hours
	Day 5 April 8 (Tues.)	8 hours

[34] The Appellant testified that out of the 18 day GRTW plan, he only worked 11.5 days and out of the total 92 hours, he only worked 48 hours – representing just 51% completion. He disagrees that he was substantially able to perform the essential duties of his employment and that his income replacement benefit should not have been concluded on March 31, 2003.

[35] The narrow issue is whether SGI correctly terminated the Appellant’s income replacement benefit following completion of his GRTW and his ability to successfully perform the essential duties of his employment. In our minds the entire issue was made moot after April 1 when the Appellant was “placed” (or forced or banished as he says) on disability until September 2004 when he commenced a GRTW that successfully concluded in October 2004. He testified that he had no income loss during this period. The disability insurer accepted the Appellant’s claim and as far as we are concerned that is the end of the matter.

[36] The Appellant testified in a sincere and frank manner and we found him to be a credible witness. He was respectful of the parties and for the process of the appeal but remained firm in his belief there was bad faith by SGI in administering his claim. We do not agree with him and are satisfied there is no basis for us to conclude the disability (stress) leave was related to the motor vehicle accident. Accordingly the appeal is dismissed.

March 4, 2004 decision letter

[37] The standard of review regarding rehabilitation benefits, in this case, we find to be reasonableness and as before, SGI bears the burden of proof.

[38] SGI relies on Dr. Kitchen's report, which reviews two recent reports from Drs. Kristmanson and Nykolation and he concludes there is insufficient clinical evidence to justify further passive care (massage, chiropractic) and that, in his opinion, the Appellant's present back complaints are consistent with those pre-accident and repair of the shoulder injury is outside the scope of chiropractic treatment.

[39] On December 3, 2003 Dr. Kristmanson reported his recent examination revealed a decreased range of motion with pain that was consistent with a WAD 2 mechanical low back pain and possible internal derangement of the right shoulder. He strongly recommended the Appellant continue with chiropractic treatments and that he be seen for a secondary evaluation.

[40] On December 16, 2003 Dr. Nykolation recounted his previous report and stated that by March 31, 2003, he had enough concern about his right shoulder and mild lingering neck and back pain that he recommended a secondary assessment. Nonetheless, in his opinion the accident related symptoms had settled down by May 12, 2003 and the only problem that remained was with the right shoulder.

[41] Dr. Kristmanson testified he became the Appellant's primary chiropractic caregiver in December 2003 and previous to that Drs. Fenrich and Nykolation were his primary caregivers although he also treated him while he was at Lenore Chiropractic Clinic. He stated that pain management was the primary focus for treating the right shoulder after the accident.

[42] He explained by derangement of the shoulder he meant that the internal structures are not fully functional and that it would be a labial tear in the boney surface, capsular or in the joint structure itself. He stated there was no one test for confirming a rotator cuff tear.

[43] With respect to Dr. Kristmanson, we prefer Dr. Nykolation's opinion that, but for the right shoulder, the accident related complaints and injuries to his neck and back had settled down and that he was at least at his pre-accident status by May 2003. Dr. Nykolation was one

of his primary care-givers during the relevant of time and had known and treated the Appellant for some time preceding the accident.

[44] Dr. Fenrich reported on February 25, 2003 that progress has improved significantly from the last report.

[45] We also note that on May 27, 2003, Dave Prociuk, external adjuster, reported to SGI that the Appellant felt his neck, upper back and lower back had returned to their pre-accident condition and that:

Overall, [the Appellant] advised the writer that he has lost approximately 20-25 pounds since he has been off work and involved in this vigorous exercise program. He feels he is in the best condition that he has been in in quite some time physically and further confirms that the only outstanding problem that he has at the present time with respect to the MVA, is his shoulder.

[46] The Appellant testified the disability insurer paid for passive therapy at 80% before and after the surgery to his right shoulder and the full cost of a gym pass. We have no evidence the Appellant did not receive any passive treatment that he required or that he was out of pocket any money. We don't know what the arrangement was between the disability insurer and SGI regarding payment of rehabilitation benefits but we nonetheless find SGI's decision to terminate benefits for passive treatment in March 2004 was reasonable. The appeal is dismissed.

May 17, 2004 decision letter

[47] The standard of review for causation is correctness and the Appellant bears the burden of proof the injury to his right shoulder was caused by the motor vehicle accident.

[48] The Appellant was candid about his pre-existing problems with is right shoulder in 1968 (dislocation), 1995 (impingement) and 1999 but says prior to the accident it was not too bad. After the accident he refers to his shoulder as being very painful and notably less stable than it used to be. We note that a few months before the accident, the Appellant became angry at work and punched a hole in the wall (gyproc) using his right arm/shoulder. We don't know what effect this force may have had on an already "bad" shoulder.

[49] The Appellant also provided photographs taken recently but demonstrating how his arms were braced and extended during the accident. While these photographs were not taken at the time of the accident, common and personal experience is they reasonably reflect what one might do when braking suddenly and sliding on ice as he reported his car did briefly before stopping.

[50] In June 2003, Dr. Alport recommends holding off on the secondary assessment pending a review by Dr. Taillon and a determination on causation. On April 12, 2004 he again reviews the file and notes the chronic right shoulder problems from age 20, the 1995 “pop” sound when the Appellant jumped off a fence and Dr. McKerrell’s diagnosis of an impingement syndrome. He opines the rotator cuff tear is not related to the accident and moreover, he is confident the work of a customer service representative could be done with a full tear with minimal accommodation.

[51] In preparation for the hearing before this Commission, counsel for SGI, Mr. Rath, sought Dr. Ernst opinion about the causation of the tear. He writes in part:

.....If these symptoms had completely resolved following the 1995 consultation completely, then I think this injury did cause a re-aggravation of his symptoms and possibly a rotator cuff tear. If however as could be correlated with his medical records, he did indeed have ongoing symptoms up until the MVA even after the 1995 consultation, then it is most probably that this has been a long standing rotator cuff tear.

[52] The Appellant’s symptoms had not completely resolved since 1995. We note the Physician’s Initial Statement for the Lenore Chiropractic Clinic in 1999 that records chronic right shoulder injury of many years duration and possible chronic right rotator cuff strain and subjective symptoms of right shoulder girdle and AC joint pain. In addition, there is a clinic note by Dr. Popick in October 2002 of an irritable shoulder. Dr. Fenrich’s report the day after the accident indicates a diagnosis of acute exacerbation of pre-existing injuries.

[53] SGI also relies on a report by Carl Shiels, an accident reconstruction expert. Mr. Shiels did not examine the vehicle or attend the accident scene and his opinion was based on information and photographs provided to him by SGI. He was asked to consider whether the collision forces experienced by the driver of the Pontiac (the Appellant) would be likely to cause injury, and in particular a tear of his right rotator cuff.

[54] Mr. Shiels concludes the forces acting on the two vehicle involved were very small and probably not great enough to have caused either vehicle to be accelerated to any extent in any direction. Even if there was some very small amount of movement experienced by the Pontiac, it wouldn't have been enough to present any risk of injury to the driver. We accept Mr. Shiels report as evidence the forces applied to the Appellant's vehicle were small and that movement, if at all, was minimal.

[55] Overall, we are satisfied that the Appellant has not discharged the onus to show the rotator cuff tear was caused by the January 23, 2002 accident. We find that he had on-going symptoms after 1995 and until the accident in 2003. The appeal is dismissed.

[56] The Appellant raised the issue of an unwritten decision concerning a secondary assessment. As indicated in June 2003, Dr. Alport advised SGI should wait for the orthopedic consult before a decision on causation or responsibility was made. This is not an issue pursuant to a written decision upon which our jurisdiction arises but we think the Appellant and his caregivers were entitled to a timely response as to why their request or recommendation for a secondary assessment was not being pursued. We say this with the benefit of hindsight and acknowledge the relationship between the Appellant and SGI was problematic – for a variety of reasons – and feel it was most likely an oversight.

CONCLUSION

[57] The decisions of SGI dated April 2, 2003, March 4, 2004 and May 17, 2004 are upheld and the appeal is dismissed.

Dated at Regina, Saskatchewan, on January 31, 2007.

Beverly Cleveland, Chair

Carol Olson, Commission Member

Stan Loewen, Commission Member