

Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *E.R. v. Saskatchewan Government Insurance,*
2007 SKAIA 068

Date: 20070517

File: 113 of 2006

BETWEEN

E.R., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:

E.R., Applicant

Elizabeth Flynn, for the Respondent

Before: **Beverly Cleveland, Chair**
Carol Olson, Commission Member
Barbara Tomkins, 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
May 3, 2007

DECISION

[1] E.R., the Appellant, was injured in a vehicle accident on May 6, 2006. He applied for and received benefits under Part VIII of *The Automobile Accident Insurance Act* (the *Act*).

[2] By letter dated September 12, 2006, Saskatchewan Government Insurance advised the Appellant that, since he had demonstrated that he could complete eight-hour work days on September 5 and 6,¹ SGI had discontinued his income replacement benefits effective September 7, 2006.

[3] The Appellant did not agree with this decision and appealed.

FACTS AND FINDINGS

[4] On May 6, 2006, the Appellant was placing items in the back of his vehicle in a parking lot when the vehicle behind and across the aisle from him commenced backing up. Apparently that vehicle did not see the Appellant, as it continued moving until he was pinned between it and his vehicle. Even then, the vehicle did not move forward until a number of by-standers yelled and the Appellant pounded on the vehicle's trunk.

[5] The Appellant went to hospital to have his injured knees examined. Fortunately, no bones were broken but he had a severe contusion and crush injury to his left knee.

[6] The Appellant attended physiotherapy, where he was assessed on May 15, 2006. In her report, Ms. Apshkrum concluded that the Appellant was unable to work as a result of his injury and that he would require physiotherapy three times each week for six to eight weeks. Treatment goals were pain reduction and, eventually, a return to work and normal activities.

[7] On July 14, 2006, Ms. Apshkrum provided a report regarding the Appellant's progress. She stated that the muscular endurance and strength in the Appellant's left leg was improving. While he was still unable to work and while his leg was not yet at full function, Ms. Apshkrum was able to add increased range of motion and increased strength

to her previous treatment goals. She recommended that the Appellant attend treatment three times per week for about three further weeks and then begin a graduated return to work (GRTW) program.

[8] The Appellant was also optimistic about his recovery. He said that when he visited Dr. Bhatt, his general practitioner, he asked him to approve a GRTW starting August 10, 2006.

[9] Dr. Bhatt did just that. In his Practitioner's Report on July 19, 2006, Dr. Bhatt reported that the Appellant suffered pain in both knees secondary to a crush injury. He opined that, while the Appellant could participate in activities of daily living and while his condition had improved significantly, he should refrain from work for another three to six weeks. He indicated that the Appellant could start a GRTW on August 10 and that he would review and monitor the Appellant's progress.

[10] Based on Ms. Apshkrum's and Dr. Bibeau's reports, SGI referred the Appellant's case to a rehabilitation consultant who would arrange the GRTW. His claim was referred to Innovative Rehabilitation Consultants (IRC) where it was assigned to Leslie McIntrye.

[11] The Appellant is employed at a large seniors' residence where he does maintenance work. The facility includes three buildings, all of which have stairs. The work requires climbing, walking, kneeling, carrying and other activities that were or might be compromised by the Appellant's injury. That being the case, it was agreed that the Appellant's return to work would be on a supernumerary basis; that is, the Appellant's employer would employ and pay another worker to do the Appellant's duties, while SGI would pay the Appellant's salary. In this way, the Appellant's restrictions could be accommodated without inconvenience to his employer or the residents of the facility.

[12] The GRTW plan required the Appellant to work four hours per day for three days in the first week, then six hours per day for four days in the following two weeks, and finally, five full time days in the fourth week.

¹ The letter states September 6 and 7 but it is evident from other parts of the letter and a review of the Appellant's file that this was in error and ought to have read September 5 and 6.

[13] The Appellant expressed apprehension about returning to work. It appears that his physiotherapist became concerned that he would fail because he was mentally resistant to returning to work. Ms. Apshkrum was convinced that there was no physical reason the Appellant could not work and told SGI she thought that the Appellant was resistant simply because he wanted to be home with his daughter for the summer. Primarily as a result of these concerns, SGI decided that the GRTW would be monitored. This meant that an occupational therapist would observe the Appellant at work, probably one day each week.

[14] The occupational therapist, Jennifer Meyers, provided her report regarding her observations of the Appellant's first day back at work on the GRTW on August 14, 2006. On this first day, the Appellant was completing light maintenance tasks only and, according to Ms. Meyers, was "unable to report specific difficulties he is having."

[15] The Appellant raised concerns regarding his return to work – specific duties that he thought would be difficult to manage but more important, he was concerned that attending work and physiotherapy would leave him too tired to attend to his home activities. Ms. Meyers found no medical reason why the Appellant would not be able to progress in his GRTW as planned but suggested that close contact be maintained with his physiotherapist to assess his progress. Ms. Meyers did not expressly comment on the possible impact the plan might have on the Appellant's ability to manage his obligations at home but did suggest that his hours in physiotherapy might need to be reduced in order for him to participate more fully in his work.

[16] Ms. Meyers monitored the Appellant's work again on August 22 and provided a report of her observations. She saw that he was able to manage his tasks of that day and in the process, observed him to walk for 20 minutes without a break and without limping and to stand in one position for five minutes. He did tasks that involved heavy lifting and did not report difficulty in doing so.

[17] However, the Appellant stated that he experienced burning and tiredness in his legs after standing for two hours. Ms. Meyers did not find any "objective medical reason" for this increase in symptoms and suggested he elevate his feet during his coffee break to relieve them. She recommended that he increase his participation in work duties.

[18] On August 30, Ms. Meyers again observed the Appellant at his employment. While the Appellant expressed concern about his ability to do certain tasks, the therapist was satisfied that he could manage them with proper body mechanics. The Appellant also expressed concern about returning to work full-time as, during the GRTW, another worker was assisting him whereas after the GRTW was completed, he would be on his own. He was concerned that whereas he was now able to take breaks and, in effect, pace himself, he would not be able to do so when he was working alone. The therapist again encouraged him to take his coffee breaks and use that time to elevate his legs to rest them.

[19] Ms. Meyers again concluded that there was no “objective medical information” suggesting that the Appellant was unable to complete his job duties on a full time basis.

[20] Also on August 30, perhaps as a result of his discussion with the occupational therapist, the Appellant advised SGI that he expected to be back at work and on his employer’s payroll the following week. However, he advised that he was scheduled for laser eye surgery on September 7 and would likely be off work for a couple of days for recovery.

[21] The Appellant’s optimism of August 30 was apparently misplaced. On August 31, he advised SGI that he had thought that his employer was willing to accommodate his restrictions and the fact that he might be slower than usual in completing some of his tasks. However, when he told the employer on August 31 that he would occasionally have to stop work and rest his leg, the employer thought this could not be accommodated. The employer’s concern related to the Appellant’s unavailability or restricted ability in the event of a serious incident such as a fire or flood.

[22] Given on-going problems with pain – particularly in his right knee – the Appellant attended his physician on August 31. Dr. Bhatt apparently recommended that the Appellant’s hours of work be reduced to four per day and that he see an orthopaedic specialist and have an MRI.

[23] SGI thought the new restrictions were inconsistent with the Appellant’s prior report that he was managing his job duties and expected to resume his employment the week

following. SGI asked the rehabilitation consultant to coordinate discussions among the Appellant, his physician, his employer and the physiotherapist.

[24] It appears that the intended consultation did not take place and the Appellant and his employer were wholly excluded from the discussions which followed. Instead, Ms. Apshkrum spoke to Dr. Bhatt. Dr. Bhatt advised that the Appellant had requested drugs for pain.

[25] She advised SGI of this and that the Appellant had not told her of problems with work and that she had not advised him “he needs to lay down with his legs up when his knee hurts”.² She noted that the Appellant had told her he was having laser eye surgery but was not going to tell SGI so that he would be paid while off work. At the conclusion of the conversation, the physiotherapist is recorded to have stated that “[The Appellant] is lying to everyone”.

[26] SGI also called Dr. Bhatt in regard to the restrictions that had been placed on the Appellant’s GRTW. Dr. Bhatt said that the Appellant had told him there were duties he could not do at work and that he had increasing pain while on the GRTW; it appears this was the basis for Dr. Bhatt’s recommendation to reduce his hours of work. Dr. Bhatt had recommended an orthopaedic consult and an MRI, in addition to reduced hours of work pending those investigations.

[27] SGI advised that the Appellant had reported no problems and few symptoms at work just a day or two prior to his visit to Dr. Bhatt. SGI explained that the Appellant was supernumerary at his job and would not be required to work alone and therefore, any restrictions Dr. Bhatt might wish to impose could be accommodated.

[28] As a consequence of this conversation, on September 1, 2006, Dr. Bhatt agreed that the Appellant could commence working eight hour days the following week but that he would work on a supernumerary basis. Dr. Bhatt would reconsider the matter after the Appellant’s appointment on September 6.

² Note, however, that Ms. Meyers had recommended this at paragraphs [17] and [18].

[29] This agreement was confirmed in a note made by SGI and also a report by Ms. Meyers for SGI. This note recorded only that the Appellant could work four full days that week; the reference to his supernumerary status was omitted.

[30] Ms. Apshkrum's report, also dated September 1, 2006, indicated that the Appellant then complained of pain in his right knee on making certain movements such as pivoting. She ticked the space for "Work modified duties" and beside that noted as follows:

Sept. 11-15/06 – 8 hrs (supernumerary)
*Decision made by Dr. Bhatt

[31] The occupational therapist observed the Appellant at work again on September 6, 2006. She concluded, and the Appellant apparently agreed, that he could continue his GRTW with eight hour days on September 5, 2006. He noted, though, that he had an appointment with Dr. Bhatt on September 6 and the therapist noted that she had agreed to consult with Dr. Bhatt regarding further recommendations after that appointment.

[32] On September 6, while again being observed by the occupational therapist, the Appellant reported that he had worked eight hours on September 5. While he had complained that he experienced shooting pain in his right knee after one six-hour day the previous week, he reported that he'd had a "good day" on September 5. Ms. Meyers concluded that the Appellant was able to work full time hours and perform all job duties.

[33] The Appellant had his eye surgery on September 7 as had been scheduled. He suffered complications in his recovery and advised SGI on September 11 that he thought he would likely be off work all of that week. He said that he was next scheduled to work on September 20 and assumed he'd be capable of full time work by then and that he would no longer need the GTRW.

[34] SGI responded that, in fact, he had worked eight hours on September 6 before his eye surgery so no income replacement benefits would be paid after that date. If he found difficulty when he did report for work, the PIR advised, the Appellant should contact her and SGI would consider whether he should resume the GRTW.

[35] The Appellant asked whether SGI would pay for the time he was away from work for his surgery. He said he had used sick leave credits during the one-week waiting period at the beginning of his claim and that he wanted SGI to cover his later period of leave. The PIR asked if he had sick leave credit at work and said if not, she would “look into it further.”

[36] In a conversation with Ms. Meyers on September 11, 2006, Dr. Bhatt agreed that the Appellant could resume full-time duties for eight hours daily, in accordance with the return to work plan. Based on her observations and the discussion with Dr. Bhatt, Ms. Meyers recommended that the Appellant “continue with his previously prescribed return to work plan.”

[37] While the Appellant had advised, and his employer confirmed, that he was not scheduled for work until September 20, he in fact returned on September 14, 2006. At that time, he began working full-time hours and was fully returned to his pre-injury employment.

[38] The Appellant challenged SGI’s decision that he was capable of resuming his employment after September 6, 2006. He said that his GRTW was scheduled until September 20 and that, in effect, he was or should have been considered on GRTW until that date. As such, he submitted that SGI should have paid income replacement benefits until September 20. SGI did not agree.

JURISDICTION

[39] The Commission derives its jurisdiction from section 191(1) of the *Act* which provides as follows:

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.

[40] The decision letter stating that the Appellant's income replacement benefits would be terminated from and after September 6, 2006 is dated September 12, 2006. The Appellant's application to appeal was received on November 22, 2006. This is within the 90 day period prescribed by section 191(1)(a). Thus the Commission has jurisdiction to hear and decide the Appellant's appeal.

LAW AND ANALYSIS

[41] SGI has taken the position that the Appellant worked full-time hours by himself on September 5 and 6. In this regard, SGI noted section 131 of the *Act* which reads, in part:

131(1) [A]n insured ceases to be entitled to a benefit pursuant to this Division when any of the following occurs:

(a) the insured is able to hold the last employment that he or she held before receiving a benefit.

By working full-time hours on September 5 and 6, SGI submitted that the Appellant established that he was, by those dates, able to hold his pre-injury employment for purposes of section 131(1)(a).

[42] SGI's position in this regard, however, is flawed.

[43] The Appellant worked a full day on September 5 but not on September 6, 2006. In this regard, we note the occupational therapist's report of her observations on September 6, 2006. She recorded that the Appellant had an appointment with Dr. Bhatt that afternoon at 2:50 and as a result, would have to leave work an hour early. While only one hour short, this is not a full day of work. Therefore, the Appellant was shown able to manage one day of work at full time hours and that was on September 5, 2006.

[44] Further, the Appellant did not work alone on those days. He remained on supernumerary status but his replacement worked in a separate building. As such, the Appellant was not assisted in the course of his work on September 5 and 6 but his duties were necessarily different as he was able to remain in only one of the three buildings for which he had responsibility.

[45] Finally, we note SGI's commitment to the Appellant's physician. Dr. Bhatt recommended that the Appellant's hours be reduced to only four effective on September 1, 2006. His recommendation was changed after SGI confirmed to Dr. Bhatt that the Appellant would work supernumerary so that any restrictions or difficulties could be accommodated and that this regime would be maintained for two weeks. After that, SGI would discuss the Appellant's progress with Dr. Bhatt and obtain his further recommendations.

[46] In fact, Ms. Meyers next consulted Dr. Bhatt on September 11. During that conversation Dr. Bhatt agreed that the Appellant could continue at full time hours in accordance with the return to work plan. Ms. Meyers recommended that the GRTW be continued.

[47] No evidence was put before us indicating the reason SGI terminated the Appellant's GRTW effective September 6 and contrary to his physician's recommendation. Instead, it appears that SGI's decision to terminate the Appellant's GRTW was based primarily on the observations of its occupational therapist and those of the Appellant's physiotherapist. Ms. Meyers, the occupational therapist, repeatedly stated that there were no medical reasons preventing the Appellant from working. Eventually, Ms. Apskrum gave a similar opinion.

[48] For example, Ms. Meyer reported "no objective medical reason" for the Appellant's reported increase in symptoms on August 22. We are uncertain as to the basis for this opinion; we have not been provided any evidence suggesting that the Appellant was examined in respect of those symptoms or even that he was referred for examination. The opinion appears to be based on Ms. Meyer's observation – skilled and professional but certainly not itself constituting objective medical information.

[49] The decision that the Appellant should resume full duties and full-time hours was contrary to SGI's commitment to the Appellant's physician and preceded Dr. Bhatt's instruction or recommendation that the Appellant could undertake full time duties. Therefore, SGI's decision was not based on objective medical information. It was directly contrary to the instructions – which SGI accepted – of the Appellant's treating physician.

[50] For these reasons, SGI has not established that the Appellant was able to resume full time hours and full time duties on September 7, 2006. It had observed the Appellant to have worked only one day at full-time hours, apparently without problems; this does not establish an ability to manage such hours on an on-going basis. Further, during that day, he had not been responsible for all work duties, as a shadow employee worked in another building. Indeed, he was not scheduled to complete his GRTW until some days later and the change to completion on September 6 is explained, if at all, only by reason of the Appellant's September 7, 2006 surgery.

[51] Given our conclusion that SGI has not established that the Appellant was able to resume full duties and full time hours on September 7, 2006, we turn to the question of when he might have been expected to do so.

[52] The evidence as to the intended completion of the Appellant's GRTW is unclear. In the initial notation regarding the GRTW schedule, a period of four weeks concluding on September 8 is proposed. Ms. Apshkrum's report on September 1, 2006, shows that the GRTW would conclude on September 15, in accordance with Dr. Bhatt's recommendation. The Appellant, however, said in conversations with SGI that his first scheduled shift following GRTW was on September 20 and that benefits ought to have continued to that date.

[53] We are satisfied that the GRTW was, at the time of SGI's decision, scheduled to conclude on September 15 as that date corresponds to Dr. Bhatt's recommendation, Ms. Apshkrum's notation and Ms. Meyer's report. We also note that we have not been provided evidence suggesting any other date.

[54] We also accept that the Appellant's first scheduled shift after the GRTW was on September 20 as this information was confirmed by his employer. However, that fact has become irrelevant since the Appellant resumed his pre-accident position on a full-time, full duties basis on September 14, 2006.

[55] The remaining question is whether SGI should be required to pay the Appellant income replacement benefits for September 7, 8, 11, 12 and 13 given that he was away from work on those days due to his laser eye surgery and recovery.

[56] We are satisfied that were it not for his surgery, the Appellant would have or should have remained on GRTW to and including September 15, 2006. We are also satisfied that the reason for his absence was not caused by or consequent on the vehicle accident.

[57] In argument, SGI submitted that when a claimant misses time from a GRTW in such circumstances, SGI has and exercises discretion as to whether income replacement benefits would be paid during the absence. However, we have not been able to find a foundation for this position in the Act or in the regulations.

[58] Section 131, quoted above, provides that income replacement benefits will be discontinued when a claimant is able to resume his pre-injury employment. We have concluded that the Appellant was not shown to have been able to resume his employment on any of September 7, 8, 11, 12 or 13.

[59] The simple fact that a person was not available for treatment or rehabilitation does not, by operation of the legislation, necessarily lead to the termination of benefits. Instead, it leads to section 183 which sets out the circumstances in which SGI may suspend, reduce or terminate benefits. Most applicable in this case, we note are subsections (e) and (g) which read as follows:

183 The insurer may refuse to pay a benefit to a beneficiary or may reduce the amount of a benefit or suspend or terminate the benefit if the beneficiary:

(e) without valid reason, refuses, does not follow or is not available for treatment recommended by a practitioner and the insurer; [or]

(g) without valid reason, refuses, does not follow or participate in a rehabilitation program.

[60] Certainly, the Appellant was, on the salient dates, unavailable to participate in his GRTW. The question is whether he had a valid reason for that unavailability.

[61] The Appellant testified, and we accept, that the surgery had been under consideration for some months. His specialist advised him that surgery would proceed and had been

scheduled about a week prior to the surgery. It was projected that, barring complications, he would miss only two days in the course of his recovery – the day of the surgery and one day following.

[62] There has been no evidence given suggesting that the surgery was unnecessary or that it might reasonably have been deferred; it may be that in either event our decision would have been different. But without that, we are satisfied that the Appellant had a valid reason for his absence. The fact that he experienced complications in his recovery that necessitated his absence for four or five additional days does not and cannot affect that conclusion.

[63] SGI therefore could not terminate the Appellant's benefits under either section 131 or section 183. No other basis for the termination has been advanced. We are therefore satisfied that the Appellant is entitled to IRB for the days he was absent for and recovering from surgery.

MISCELLANEOUS

[64] A review of the documents SGI filed in this matter suggests that Ms. Apshkrum came to the view – clearly speculative - that the Appellant wanted to stay home with his daughter that summer and didn't want to attend to his rehabilitation. Nonetheless and despite the Appellant's belief that the physiotherapy was not assisting in his recovery, he attended every scheduled appointment and there is no suggestion that he did not give full effort. Similarly, even when he expressed reservations, he participated fully in his GRTW.

[65] Notwithstanding this, we note the physiotherapist's advice that the Appellant was "lying to everyone". It appears that this comment may have been based on the Appellant's statement that he was to put his legs up to rest them when they were sore, something Ms. Apshkrum had not advised. The problem is, of course, that Ms. Meyers did recommend this on at least two occasions.

[66] Or, the statement might have been based on Ms. Apshkrum's stated belief that the Appellant intended to conceal his eye surgery from SGI and receive income replacement

benefits during his recovery. The problem with this is that the Appellant had told his PIR about the eye surgery on August 30, before the physiotherapist claimed to have had the conversation where he supposedly stated his intention to conceal it.

[67] Our concern lies in the fact that the Appellant, who perhaps voiced reservations or even objections in the course of the administration of his claim but was certainly not aggressive about them, was nonetheless fully co-operative throughout. There is certainly no evidence that he lied or misled anyone, let alone “everyone”.

[68] In so stating, we are aware that the Appellant believed (and continues to believe) that as he was required to use his employment sick leave for the first week of his claim, it would be fair for SGI to pay benefits in respect of the time he had and recovered from his surgery. Whether he is right or wrong in his reasoning, he has been consistently open in requesting these benefits and in providing the reasons he thinks they should be paid. It cannot be suggested that he is trying to trick or take advantage of SGI.

[69] The file discloses a degree of skepticism about the Appellant and his injuries and illustrates the negative impact that inaccurate perceptions can have in the administration of a claim.

CONCLUSION

[70] SGI’s decision letter dated September 12, 2006 is varied to show September 13, 2006 as the date after which the payment of income replacement benefits will be terminated and the additional income replacement benefits will be paid to the Appellant. Accordingly, the Appellant is entitled to income replacement benefits for the period September 7, 8, 11, 12 and 13 together with pre-judgment interest thereon.

COSTS

[71] As the Appellant has been successful in his appeal, he shall have his costs, including reasonable expenses, in accordance with section 193(11) of the *Act* and section 96 of the regulations. In addition, he shall be refunded his appeal fee.

Dated at Regina, Saskatchewan, on May 17, 2007.

Beverly Cleveland, Chair

Carol Olson, Commission Member

Barbara Tomkins, Commission Member