

Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *L.R. v. Saskatchewan Government Insurance,*
2007 SKAIA 078

Date: 20070621

File: 038 of 2006

BETWEEN

L.R., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:

Peter V. Abrametz, for the Applicant

Dale Brown, for the Respondent

Before: **Stephanie Pfefferle, Chair**
Jane Lancaster, Q.C., Commission Member
Darleen Topp, 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 Prince Albert, Saskatchewan
February 22 and May 25, 2007

DECISION

[1] The Appellant, L.R., appeals the October 3, 2005 decision of Saskatchewan Government Insurance (SGI) which denied her benefits pursuant to Part VIII of the *Automobile Accident Insurance Act*, Chapter A-35.

[2] SGI advised the Appellant that the reason that they were denying her benefits was that she was unable to prove that her injuries were a direct result of an accident with a motor vehicle as defined under the *Automobile Accident Insurance Act*.

[3] The *Automobile Accident Insurance Act*, Part VIII s.101(1.1)“....applies to any person who sustained bodily injury caused by a motor vehicle arising out of an accident on or after the date that this Part comes into force...”

[4] The Commission must determine if the Appellant “sustained bodily injury caused by a motor vehicle”, and whether there was an “accident”. “Accident” is defined in section 2(1) of the Act as “any event in which property damage or bodily injury is caused by a motor vehicle.”

[5] In coming to our decision, the Commission reviewed the oral testimony of the witnesses called on behalf of the Appellant, her testimony, as well as the documents filed in the appeal book by SGI and the Appellant.

[6] In this case, the most important issue facing the Commission is the determination of credibility of the Appellant regarding the circumstances of the reported accident as well as the injuries that she alleges were a result of the accident in question.

[7] Counsel for the Appellant argues that, although there may be discrepancies in the evidence before the Commission, the Appellant was consistent in relating that a motor vehicle accident occurred on January 27, 2005 and therefore has met the onus under section 101(1.1). In his view, once the Appellant proves an accident took place, then the onus shifts to SGI to prove that the injuries were not the result of the accident.

[8] Counsel for SGI submits there is no independent evidence that an accident did or did not take place. All of the evidence concerning the accident comes from the Appellant. Therefore, counsel for SGI argues the issue of the credibility of the Appellant is crucial in this decision.

[9] In relating circumstances of the incident that arose on January 27, 2005, the Appellant has consistently contended that a motor vehicle was involved and whatever occurred between her and the motor vehicle took place in the [supermarket] parking lot on January 27, 2005.

[10] A review of the Appellant's testimony, filed documents, and the testimony of witnesses shows a remarkable variance in what occurred that January morning. The various recollections of the event can be summed as follows: *[emphasis added]*

- February 10, 2005: She stated she was hit by a car. She explained the MVA occurred in the parking lot of the supermarket. **She stated an older lady in a white vehicle was backing out and did not see her. She was hit and knocked to the ground. She explained that she was not run over, but hit.** She was unable to obtain a license plate number and there were no witnesses except for her mother. She stated that she sustained damage to her right knee. She feels her knee pain is increasing with time rather than improving. She stated now she is unable to bend her leg as her leg is overly swollen and incredibly painful. She stated she met with Dr. Rabuka on February 1, 2005 and February 10, 2005. Dr. Rabuka is concerned and has since obtained x-rays. He advised her that her knee was partially out of joint and her knee socket is filled with blood. She has her knee wrapped with a tensor bandage to reduce the swelling. Dr. Rabuka advised her that he may have to drain the blood from her knee and a follow-up appointment was scheduled for two weeks. Dr. Rabuka referred her to a new orthopedic surgeon. On two occasions, the Appellant indicated that both her knees and hips need to be replaced.
- In her Application for Benefits completed March 2, 2005, the Appellant stated "I was a pedestrian in a parking lot. The driver was an older woman who, **without**

looking she backed up and ran into my right knee, then she left without stopping. The car was a newer white Dynasty.”

- Dr. Loots’ medical note of February 9, 2005 states “**pt came in complaining of sore rt knee, after falling in parking lot about 2 wks ago.** Pt chronic knee pain. No ligament disability. Scars from previous cosmetic surgery. No effusion seen, no soft tissue swelling, very tender around the knee, limited flexion, advised physiotherapy, but pt doesn’t want therapy. P: T#4 1-2, tid 30 tabs, advised to f/u w/ regular physician if not getting better.”
- Dr. Rabush’s medical report of February 10, 2005 states “letter to dr gsrach re knee injury. Swollen, tender, painful difficult to move. **Was pinned by car bumper jan 28 th** report to sgi.” *[errors in original]*
- Report of Sherry Pelletier from Innovative Rehabilitation Consultants regarding two meetings with Dr. Loots on April 19, 2005 and April 20, 2005: “You met with the Appellant on February 9, 2005 at the Prince Albert Medical Walk-in Clinic. The Appellant **complained of chronic right knee pain after falling. She reported she fell two weeks prior in a parking lot and there was no mention of her being struck by a vehicle.** You observed the Appellant to have a tender right knee, reduced knee flexion, no ligament disability, no effusion (no blood in the joint) and no soft tissue swelling.”
- Dr. Loots’ letter dated December 15, 2006 states: “To clarify mechanism of injury, I did see the patient on February 9, 2005 at the walk-clinic where she came in complaining about a sore knee and gave a history of falling in the parking lot two weeks prior. **The patient did mention that she was hit by a car at that stage although I did not mention it in my notes at the given date although clinical examination wasn’t very convincing of the given mechanism of injury, this was the patient’s subjective history and complaint and not my objective medical finding.**”
- In her undated statement to the Prince Albert City Police, the Appellant stated: “I was meeting my mom for coffee at [the supermarket]. A lady in a newer white

Dynasty **backed up without looking and hit my right knee hard.** She drove away without looking and I never had the chance to get her plate number. My mom was with me and heard me scream and looked right away.¹ She is not sure if she saw me get hit or just noticed my scream. I have been seeing my doctor on an ongoing basis. I'm waiting to see the orthopedic surgeon as the socket is full of blood and the tendons are all torn.²

- SGI also made arrangements for the Appellant to be interviewed by a member of their investigation department, Ken Webb, on August 31, 2005. This interview was recorded and the transcript is part of the appeal documents submitted by SGI. The Appellant advised Mr. Webb of the following:
 - an older lady backed up without looking at her rear view mirror and hit her right in the knee.
 - The Appellant screamed and uttered a few “choice words” at her. She indicated that her mother heard her scream.
 - the woman was driving a white newer Dynasty.
 - she and her mother went in the supermarket for coffee and her mother gave her a ride home as she did not want her to walk home.
 - within 2 days, her leg and knee were huge and she was in pain so she went to the walk in clinic at Cornerstone and the doctor told her to have physio.
 - the next day, she stopped in to see her family doctor (Rabuka) and he ordered an x-ray.
 - on this date, her knee socket was full of blood and half out of joint. Her knee was so swollen that it was bigger than her thigh.

¹ Her mother testified that she did not hear screams nor profanities, but that her daughter had advised her that she had sworn at the driver prompting her to tell the Appellant that she hoped that “she had been kind.”

² Date of statement is likely between the Rabuka referral to a specialist on February 10, 2005 and the Appellant seeing Dr. Kukkadi on April 9, 2005 and April 19, 2005. The Appellant advised on a number of occasions that her tendons had been torn in this incident and that she needed knee replacement surgery, but this is contradicted in numerous medical reports of her doctors.

- as a result, Dr. Rabuka phoned the emergency ward and she attended to an orthopedic surgeon who drained 2 and a half cups of fluid from the knee.
- two weeks later, she went again to the walk in clinic and her knee was drained again.
- in another 2 weeks, her leg was so swollen it was the same size – like a straight post.
- on June 17, 2005, she went to emergency and saw Dr. Visson who drained 3 cups of pus and one cup of blood
- the driver of the car ran over the Appellant's knee and she lay on the ground for 5 minutes.
- as she was angry and swearing at the driver, her mother said "Watch your language." The Appellant advised her mother that the car had hit her.
- Ms. Cholodnuik explained further that the tire did not go right over her leg, but just "sat there" and you could see the bruising and the tire treads on her knee.
- she made no attempt to report the incident to the store or to see if there were witnesses or surveillance cameras of the parking lot of the shopping centre.
- it took the Appellant two days to calm down from her anger and to realize how much pain she was in.
- she felt that she had reported the accident to the police within 3 weeks of the date of the accident. She had not reported it sooner as she felt that without a license plate, she could not make a police report.
- She never complained to her mother of her injuries while they were sitting having coffee in the supermarket.
- The Appellant is sure that she went to see a doctor named Lutz (*phonetic*) on February 2, 2005 and saw Dr. Rabuka on February 3, 2005

- The Appellant testified at the hearing and provided more details surrounding the January 27, 2005 incident:
 - She stated that the woman driver of the car was around 70-75 years of age with poorly dyed black hair. She had been a hairdresser so felt confident in expressing her views about the hair colouring.
 - Her mother wanted to look at her leg and she pulled up her sweat pant leg to show her knee to her mother.
 - She asked her mother to give her a ride home and it had not been prearranged that her mother would give her a ride after having coffee at the supermarket.³
 - She said that she had seen a Dr. Lotz who worked at the Cornerstone Medicentre on February 2, 2005 and Dr. Loots on February 9, 2005. It was Dr. Lotz who told her to have physio and it was Dr. Loots who prescribed 30 Tylenol 4s with codeine.
 - In cross examination, she advised the day was a mild winter day and in her view that would be minus 40 below.⁴
 - She had been mistaken in thinking the car had gone over her leg and the tires never touched her. It was the back carriage of the car that was over her body. She changed her mind when doctors advised there would be significantly more damage to her leg if a car tire had run over it.
 - Upon impact, she fell backwards landing on her seat and breaking her fall with her hands.
 - She took no steps to alert the driver that she had been hit, either by striking the car; however, she had started yelling profanities loudly.
 - She explained that Dr. Loots did not see the bruising on her knee when he examined her because she was darkly tanned.⁵

³ Her mother testified that it had been prearranged to drive the Appellant to her home.

⁴ 40 degrees Fahrenheit and Celsius are the same number of degrees at that temperature

⁵ The Appellant had also stated that she had not returned to her tanning salon after January 27, 2005, 2 weeks prior to seeing Dr. Loots.

- She confirmed that she had advised Dr. Kukkadi that she felt a pop in her knee upon impact with the car.
- She disputes that she told Dr. Rabuka that she had been pinned by a car bumper.

[11] As the Appellant was so certain that she had seen medical personnel (Dr. Lotz) prior to seeing Dr. Loots on February 9, 2005 and that she had had her leg drained and x-rays taken before the medical reports we have from Dr. Loots, Dr. Rabuka and a specialist, we asked the Appellant's counsel to locate this additional medical information. He advised that there was no additional information confirming the Appellant's contention that she had seen the doctors at this time. In fact, Dr. Lotz had not joined the medical clinic until later that year and so was not employed at the Medicentre at the time the Appellant states she saw him.

[12] It is not unusual for witnesses to be uncertain about events that occurred in the past. What is surprising in this case is that the Appellant was rarely uncertain about events, and went to considerable lengths to justify what she had said when the records of medical professionals or even her mother conflicted with her ever changing story.

[13] Her counsel suggested that this was embellishment only and did not strike to the crux as to whether she had been involved in a motor vehicle accident and entitled to benefits.

[14] We disagree. The Appellant's evidence is so riddled with inconsistencies, exaggerations, and implausibility that it would be unreliable to rely on her evidence as to whether a motor vehicle accident occurred on January 27, 2005 at all. The fact that the Appellant has a medical condition with her knee that is long standing and chronic is well-documented. Her counsel indicated that he was not arguing that the fact that she had a sore knee was in any way determinative of the fact that a motor vehicle accident had occurred.

CONCLUSION

[15] SGI's October 3, 2005 decision letter advising the Appellant that she was not entitled to benefits under the *Automobile Accident Insurance Act* is upheld.

Dated at Saskatoon, Saskatchewan, on June 21, 2007.

Stephanie Pfefferle, Chair

Jane Lancaster, Q.C., Commission Member

Darleen Topp, Commission Member