

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *E.R. v. Saskatchewan Government Insurance,*
2007 SKAIA 091
Date: 20070914
File: 109 of 2006

BETWEEN

E.R., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
E.R., Applicant
Elizabeth Flynn, for the Respondent

Before: **Ann Phillips, Q.C., Chair**
Beverly Cleveland, 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
August 16, 2007

DECISION

[1] The Appellant, E.R., was injured in a vehicle accident on August 13, 2003. He applied for and received benefits from Saskatchewan Government Insurance (“SGI”) pursuant to Part VIII of *The Automobile Accident Insurance Act* (“the Act”). Eventually, by letter dated August 14, 2006, SGI advised the Appellant that further chiropractic, massage and physiotherapy were not indicated and would not be further funded by the insurer.

[2] SGI provided a number of reasons for this decision. The Appellant disagreed with those reasons and appealed to the Automobile Injury Appeal Commission.

JURISDICTION

[3] 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 [of] the mediator’s written statement pursuant to subsection 190(8) declaring that the mediation is completed.

[4] SGI’s decision letter is dated August 14, 2006 and the Appellant’s application for appeal was received on November 9, 2006. Thus, his appeal was received within 90 days after SGI’s decision, in accordance with section 191(1)(a). The appeal is properly before us.

FACTS AND FINDINGS

The Documents:

[5] On August 13, 2003, the vehicle the Appellant was driving was “T-boned” by another vehicle that failed to yield on a Saskatchewan highway. The impact was such that the Appellant’s vehicle was propelled some distance and ended up resting below a nearby bridge.

[6] The Appellant was certainly shaken by the incident but did not immediately notice significant injuries. However, later that evening, he was not feeling well at all. In the

morning, he attending a meeting and he said that afterward, another participant told him he had acted and spoken oddly. The Appellant then attended to his chiropractor.

[7] Dr. Waddell diagnosed Whiplash Associated Disorder (WAD) III with cervical and lumbar pain and limitation and cervical and lumbar spine palpatory tenderness. X-rays taken that day showed no bone, joint or disc space abnormality in either the cervical or thoracic spine. Dr. Waddell, however, was more concerned by signs of concussion and recommended that the Appellant attend to hospital for further examination.

[8] At the hospital in [town], medical staff observed that the Appellant was very confused and referred him to Dr. Buwembo, a neurologist in Regina. The Appellant was transported to Regina General Hospital by ambulance and was admitted there shortly after his arrival. He was not discharged until August 20, 2007.

[9] At hospital, the Appellant was found to be confused, somnolent, sometimes combative and somewhat slow to respond to commands. He was diagnosed with post-vehicle accident concussion and underwent numerous tests, including CT scans, MRI, x-rays and ultrasound examinations. The tests did not disclose significant or any injury to the head or brain. Nonetheless, the diagnosis of concussion was retained and confirmed upon his discharge on August 20, 2007.

[10] The Appellant's family doctor, Dr. Oberholzer, proved his report of his August 27 examination of the Appellant. He diagnosed concussion with WAD II to III to the Appellant's neck and found pain and limitation on all movements of the cervical spine and palpatory tenderness in all planes of the cervical spine. Dr. Oberholzer recommended analgesics, physiotherapy and heat. He further recommended that the Appellant refrain from work and limit his daily activities for a period of six to twelve weeks.

[11] On September 4, 2003, the Appellant completed his application for benefits under Part VIII of the Act. On the diagram, the Appellant indicated that he suffered pain to all of his head except his face and to all of this neck, back and upper chest. He also showed an injury to his right thumb and left knee. He noted that the injuries to his neck and brain were the most severe.

[12] Angela MacCleary, a physiotherapist at Sun Country Health region, assessed the Appellant's condition on September 12, 2003. She found WAD III that was acute and severe and proposed a treatment plan including education, exercise, pain-relieving techniques, manual therapy and laser treatment over a period of at least 12 weeks. She recommended further investigation of the symptoms of concussion, including dizziness and memory loss.

[13] Ms. MacCleary's next report is not dated but appears to have been prepared some time in about mid-October and relates to the last time she saw the Appellant on September 25, 2003. In this report, Ms. MacCleary continued her diagnosis of WAD III and recommended further specialized testing regarding the Appellant's concussion signs and symptoms.

[14] Dr. Oberholzer examined the Appellant again on October 1 and his report is essentially unchanged from those provided previously. He diagnosed concussion and a whiplash injury to the neck that he described as WAD II to III. In regard to the concussion symptoms, he referred the Appellant to a neurologist. He noted, "Patient is displaying problems [with] memory loss, headaches and generally not doing well" and recommended that he refrain from work for six to 12 weeks.

[15] The Appellant returned to Dr. Waddell for examination on October 15, 2003. Dr. Waddell diagnosed WAD III to the cervical spine and noted, "[Patient's] objective musculoskeletal signs and symptoms improve. Symptoms relating to concussion are not changing esp[ecially] inability to concentrate, do mental tasks and remember detail." Dr. Waddell's prognosis regarding the Appellant's recovery from the symptoms of concussion was guarded and he anticipated that the Appellant would be unable to work for over 12 weeks.

[16] Dr. Waddell's report of his November 14 examination of the Appellant shows some improvement. In particular, Dr. Waddell indicated that most physical symptoms had resolved but that the Appellant continued to experience significant cognitive problems. His diagnosis on this visit was WAD III with connected post-concussive symptoms.

[17] Cheryl Mahoney of Weyburn Physical Therapy Services provided a treatment plan dated December 19, 2003. Like Dr. Waddell's report, Ms. Mahoney's shows some improvement in the Appellant's condition by this date. She rated his condition by then as sub-acute and an injury of moderate severity. The proposed treatment included education, exercise and conditioning two to three times weekly for an indefinite period.

[18] By the time of his January 20, 2004 report, Dr. Oberholzer showed only WAD I but a "working diagnosis" of post-concussion syndrome (PCS). Based on the PCS symptoms, he remained of the view that the Appellant should remain off work for an uncertain time exceeding 12 weeks. Dr. Oberholzer was hesitant to actually make a diagnosis of PCS, hence his reference to a "working diagnosis". Instead, he referred the Appellant to Dr. Terry Levitt for a neuropsychological assessment.

[19] Dr. Levitt examined the Appellant on April 7 and 8, 2004. His report deals exclusively with the neuropsychological aspects of the Appellant's injuries and is not directly relevant to the matters at issue in this appeal. For purposes of context, however, we note his conclusion that the evidence suggesting the Appellant suffered a brain injury was equivocal at best and, if such injury occurred, it was "at most mild". He found nothing neurological that would indicate a need for the Appellant to limit work or home activities.

[20] An electroencephalogram and CT scan of the brain showed no abnormality and no change from tests done a year earlier.

[21] With the consent of his care providers, the Appellant attended a multi-disciplinary assessment at the Saskatoon Balance and Dizziness Centre on May 31, 2004. Following examination, the Centre diagnosed injury-related post-concussion syndrome that it thought was resolving. The Centre concurrently found that the Appellant had "a significant past history of headache and dizziness-related problems, likely largely related to stress." It is not clear whether the Centre saw these as separate and distinct conditions.

[22] The Centre concluded that the Appellant's post-concussive symptoms prevented him from resuming his pre-injury work duties. The Centre recommended eight weeks of augmented secondary level multidisciplinary treatment to condition him for his normal work

activities and to accommodate his symptoms, thereby enabling him to return to normal duties at work. Separate recommendations for treatment were given relating to his non-accident-related condition.

[23] The Appellant attended Maximum Potential Rehab Inc. (“Maximum”) for the recommended secondary treatment. In addition to the post-concussive complaints, Maximum noted, among its objective findings at the Appellant’s initial assessment on August 11, 2004, orthopaedic joint hypomobility and reduced cervical range of motion.

[24] A progress report from Maximum show that all cervical ranges of motion were full by September 2 and that the Appellant himself reported a decreased need for chiropractic manipulation. Treatment at that time focused on matters involving balance.

[25] On September 29, 2004, the Appellant was discharged from Maximum. In its Discharge Report, Maximum recorded that the Appellant still complained of neck stiffness and headaches at work, dizziness and clumsiness. Testing showed that he had a severe perception of disability due to neck pain and a moderate to severe perception of his disability due to back pain. This suggested that his disability was not as severe as he perceived it to be.

[26] Objective testing showed range of motion to be full in all but left rotation, where it was only at 2/3 normal range. Spinal flexion, trunk rotation, side bending and spinal extension were full, although with some reported tightness mid-thoracically and in the lower back.

[27] Despite his discharge, the Appellant still was unable to meet his job demands. However, he was by then on a graduated return to work (GRTW) over a further four weeks and would be monitored in this regard. Other than the monitored GRTW and a caution about self-pacing, the Appellant was discharged without restrictions.

[28] In the meantime, the Appellant continued to receive chiropractic care. By report dated March 11, 2005, Dr. Waddell reported that the Appellant was at maximum medical recovery (MMI). While he still showed intermittent stiffness and dysfunction and would

receive symptomatic treatment for this, Dr. Waddell stated that he didn't expect the condition to improve.

[29] Dr. Waddell's July 13, 2005 report was similar. He wrote, "Patient has reached MMI which is not at pre-injury status. He is receiving episodic treatment . . ." and "This patient is not anticipated to recover further."

[30] By letter dated April 28, 2006, Dr. Waddell provided a summary of his care for the Appellant and of his observations. He stated that he had treated the Appellant for unrelated problems commencing in January 1999. His letter continued:

[The Appellant] presented in November 2001 and was seen three times for a lower/mid back problem and again discharged. He had a single treatment for a similar condition in January 2002 again involving his lower mid-back. This problem was also seen in August 2002 as well as the end of November and end of December 2002. [The Appellant] was seen five times in January 2003 preceding his accident for a mid to lower upper back problem as well.

As you are aware, in August 2003 [the Appellant] suffered the motor vehicle accident in question and continues to have ongoing treatment. This time frame represents the first time his cervico-thoracic spine was the problem and as you are aware he has ongoing problems as a result of that motor vehicle accident.

In performing this file review, there had been no treatment for [the Appellant] in the region that he is now having problem with in any of the brief visits that he had in my office since 1999 until the time of the accident in question.

[31] SGI thereafter referred the file to its chiropractic consultant, Dr. Kitchen, who provided his report by letter dated August 4, 2006. Dr. Kitchen disagreed with Dr. Waddell's review of his treatment of the Appellant. Dr. Kitchen, upon reviewing Dr. Waddell's clinic notes, identified a number of notes showing a treatment code of C04 and a number of entries regarding C6-7. Dr. Kitchen also saw significant overlap in the pain drawings that the Appellant had done for Dr. Waddell and the drawing completed for SGI after the accident. (See paragraph [11] above.)

[32] Dr. Kitchen briefly reviewed the evidence regarding the Appellant's cognitive/concussive symptoms.

[33] He then concluded:

I am in agreement with Dr. Waddell this client has reached MMI. Clinically, the aches and pains the client presents with are consistent with those expected with activities of daily living. It is evident the client had these pre-MVA and I am unable to see where they are related to the MVA. There is no evidence of structural or other permanent disability to warrant supportive care.

[34] Based on this report, SGI provided its decision to the Appellant. In a letter dated August 14, 2006, SGI advised that it would no longer fund chiropractic, physiotherapy and massage therapy treatment. In support of its decision, SGI wrote:

Upon review, we have determined that your current symptoms and need for further Chiropractic/Physiotherapy Treatment is not related to the above noted motor vehicle accident. We are in agreement with Dr. Waddell that you have reached maximum medical improvement. Clinically, the aches and pains that you present with are consistent with those expected with activities of daily living. It is evident that you had these pre-MVA and we are unable to see where they are related to the MVA. There is no evidence of structural or other permanent disability to warrant supportive care.

[35] It appears that Dr. Kitchen had not been provided a copy of the report from the Saskatoon Balance and Dizziness Centre at the time he prepared his August 2006 opinion. Therefore, the file was resubmitted to him for further consideration. He provided a subsequent opinion on June 27, 2007. After reviewing specific findings in the Centre's report, he said:

This report does not provide any new information to indicate there is a structural or functional problem with the back that would require chiropractic treatments. It indicates the client's complaints are related to a post concussion syndrome which is outside the scope of practice for chiropractic care. Therefore it does not change my opinion on the need for further treatment.

Oral Evidence:

[36] In addition to providing his reports, Dr. Kitchen gave oral evidence at the hearing. He clarified that he does not disagree that the Appellant continues to experience neck and shoulder pain but he said that the multiple diagnostic tests carried out showed that there is nothing structural in the Appellant's spine that requires continued treatment. Whatever its cause, Dr. Kitchen believes that further treatment will not result in improvement of the condition and that Dr. Waddell's opinion that the Appellant is at MMI is correct. While the Appellant continues to receive chiropractic treatment occasionally, this treatment is for the

temporary alleviation of residual symptoms and will not result in improvement to the Appellant's physical condition.

[37] Dr. Kitchen also spoke to Dr. Waddell's comment that the Appellant was not at pre-injury status and said that, in his view, Dr. Waddell was referring to the Appellant's post-concussive symptoms when he made this statement. He said he reached this conclusion based upon the fact that later in the report Dr. Waddell did not show loss of range of motion or pain in the Appellant's cervical spine.

[38] Next, Dr. Kitchen identified particular instances where he believes that Dr. Waddell's notes show that he provided treatment before the accident to the very areas injured in the accident. Specifically, he noted references to treatment of the mid-thoracic spine and left flank in November 2001, treatment to the mid-back and shoulder above and below the shoulder blade in August 2000 and treatment into the neck and top shoulder in January 1999.

[39] Dr. Kitchen examined the report from the Balance and Dizziness Centre and concluded that they had found PCS but full range of motion in the Appellant's cervical, thoracic and lumbar spines, although with some palpatory tenderness. He said that the remaining "aches and pains" were what he would expect from a person the Appellant's age doing usual activities of daily living.

[40] The Appellant testified on his own behalf. He said he is not either physically or mentally as well as he was before his accident and that his understanding is that SGI has concluded, in effect, that he is fine. He said that this is simply not correct and that he is still unable to resume his pre-injury employment as a result of both physical and mental disability. Fundamentally, the Appellant is hoping that SGI will have recommendations for and fund further treatment.

ANALYSIS

[41] The salient portion of SGI's decision letter reads as follows:

We have now had the opportunity to review your entitlement to chiropractic, physiotherapy and massage treatments. Upon review, we have determined that your current symptoms and need for further Chiropractic/Physiotherapy Treatment is not related to the above noted motor vehicle accident. We are in agreement with Dr. Waddell that you have reached maximum medical improvement. Clinically, the aches and pains that you present with are consistent with those expected with activities of daily living. It is evident that you had these pre-MVA and we are unable to see where they are related to the MVA. There is no evidence of structural or other permanent disability to warrant supportive care.

[42] It is clear from this paragraph that this decision is related only to the Appellant's neck and upper back injury and not to PCS. We anticipate that SGI will issue a decision relating to PCS, rehabilitation for PCS, permanent impairment benefits for all injuries and any other benefits to which the Appellant might be entitled in due course.¹ It is therefore unnecessary that we decide whether the Appellant suffered PCS and, if so, whether he has recovered therefrom or what treatment might be appropriate. Our decision relates only to his physical injuries.²

[43] The paragraph quoted from SGI's decision letter sets out four conclusions as follows:

1. That the Appellant's current symptoms and need for further chiropractic and physiotherapy treatment are not related to the August 13, 2003 vehicle accident;
2. That the Appellant, in respect of his physical injuries, has reached maximum medical improvement;
3. That the Appellant's current aches and pains are consistent with what might be expected from ordinary activities of daily living and that the Appellant had these symptoms prior to the vehicle accident; and
4. That there is no evidence of structural or permanent injury that would warrant supportive care.

¹ In accordance with SGI's duty pursuant to section 171 of the Act, we believe that the Appellant is likely entitled to further communication or a decision regarding PCS, rehabilitation for PCS and any permanent impairment benefits for all injuries fairly urgently as the matter has been outstanding for some time.

² If the parties contemplate bringing a further appeal before the Commission regarding post-concussive syndrome, they might be wise to consider that the evidence before us – admittedly likely incomplete – and, in particular, the report of the Balance and Dizziness Centre, is ambiguous in some respects.

Causation:

[44] In essence, conclusions 1 and 3 above set out one conclusion – that the Appellant’s current symptoms were not caused in the vehicle accident in that they existed prior to the accident and are, or might be, the consequence of ordinary activities of daily living.

[45] These conclusions are not supported by the evidence. The Appellant’s oral evidence was that he was in “really good shape” at the time of the accident as he had been working out a lot. He said that he had suffered a separated shoulder some nine years prior to the vehicle accident and that he later received chiropractic treatment because of problems with his ribs and stiffness in his lower back. He said that he does not have either of these problems now; the problems now are in his neck and upper back.

[46] Dr. Waddell’s April 26, 2006 report confirms this. In that report, Dr. Waddell described his treatment of the Appellant from January 1999 to the time of the accident. He referred to a shoulder injury, a lower rib cage injury and a lower back problem that was referred for medical, rather than chiropractic, care. Later, he treated the Appellant occasionally from November 2001 until December 2002 for a lower and mid-back problem. Finally, he said, he treated the Appellant in January 2003 for a mid to lower upper back problem. He stated specifically that it was only after the accident in August 2003 that he treated the Appellant’s cervico-thoracic spine.

[47] Dr. Kitchen, who also reviewed Dr. Waddell’s clinic records, disagreed. He identified three occasions when Dr. Waddell’s records show that he treated the Appellant’s cervical spine. Specifically, notations from July 18, 2002 until August 20, 2002 show that the Appellant complained of stiffness in his back and at the base of his neck and that Dr. Waddell diagnosed cervical thoracic stiffness. On each of the recorded occasions, treatment involved either a cervical thoracic lateral break or a cervico-thoracic adjustment. Almost all entries thereafter relate to the Appellant’s mid-thoracic and lumbar spines.

[48] We agree with Dr. Kitchen that these recordings appear to indicate treatment to the Appellant’s cervical spine at C6/7 prior to the vehicle accident. However, the evidence does not establish that the condition treated persisted after the last date of treatment in August

2002, nor is there evidence suggesting that the condition treated was or was not consistent with the Appellant's current neck and upper back complaints. In fact, there is no notation of treatment of any nature to the cervical spine after August 2002, a year prior to the vehicle accident.

[49] As to the Appellant's upper spine injury, the situation is similar. While there are occasional indications of treatment to the upper thoracic spine, these are not numerous and do not suggest an on-going condition. Again, there is no evidence suggesting that the condition treated was or was not consistent with the Appellant's current upper back complaints.

[50] On the other hand, the Appellant's current complaints have been consistent since the vehicle accident. He complained of and was treated for neck and upper back complaints – among others – from the time of the accident until at least April 2006. The evidence shows the injuries improving to the point where range of motion was occasionally restored (and occasionally lost). No care provider has suggested that the injuries did not appear to flow from the accident or that they might have pre-existed the accident.

[51] Dr. Kitchen also testified that he understood Dr. Waddell's progress reports of March 8, 2005 and June 22, 2005 to confirm his view that the Appellant's injuries pre-existed the vehicle accident. In this regard, Dr. Kitchen noted that Dr. Waddell in both reports indicated that the Appellant had reached MMI but did not record pain or limitation to the cervical or thoracic spines. He said that this would indicate that Dr. Waddell considered both to have recovered.

[52] We think this interpretation is not available when one considers the reports as a whole. In the first report, Dr. Waddell wrote, "P[atient] is at MMI so [treatment] is symptomatic for neck dysfunction. I don't expect it to change much." In the second, Dr. Waddell wrote, "P[atient] had reached MMI which is not a preinjury status. He is receiving episodic [treatment]; myofascial [*illegible*] delivered to injured areas."

[53] It is clear from these statements that Dr. Waddell was referring to the Appellant's neck and back injuries in terms of his conclusion that he had reached MMI, in regard to on-going treatment and, therefore, in regard to his not having reached pre-injury status.

[54] In these circumstances and while conceding the possibility that the injuries pre-existed the accident, the weight of the evidence is significantly to the contrary.

[55] Having concluded that the injuries were caused in the accident, it is unnecessary that we specifically consider Dr. Kitchen's opinion and SGI's position that the injuries were consistent with ordinary activities of daily living.

Maximum Medical Improvement:

[56] We are satisfied that the Appellant has achieved maximum medical improvement in respect of his neck and upper back injuries. Dr. Waddell, as his treating chiropractor, has so concluded and Dr. Kitchen thought this conclusion was sound. There is no evidence to the contrary.

[57] In so concluding, it must be understood that we are not suggesting – nor is Dr. Waddell or Dr. Kitchen – that the Appellant does not continue to suffer pain and stiffness in his neck and upper back. Instead, MMI means simply that the Appellant's current condition is not expected to improve by further treatment.

On-Going Chiropractic Care:

[58] Dr. Waddell continues to provide occasional chiropractic treatment when the Appellant finds his symptoms difficult to manage. We accept the Appellant's evidence that this treatment provides him a period of relief.

[59] However, SGI is not obligated to provide benefits in respect of any treatment that provides relief; it is required to provide benefits only when treatment is rehabilitative. Section 112 of the Act sets this out as follows:

112(1) In this section, “**rehabilitation**” includes any or all of the following measures, programs and treatments that the insurer considers necessary or advisable

to contribute to the rehabilitation of an insured, to lessen the insured's disability caused by the accident and to facilitate the insured's recovery from the accident . . .

[60] Given that the Appellant has reached MMI, it is unlikely that further treatment will facilitate his recovery from the accident; he has, in all likelihood, recovered as much now as he ever will. For similar reasons, it is unlikely that further treatment might contribute to his rehabilitation. Dr. Waddell continues to provide occasional chiropractic treatment when the Appellant finds his symptoms difficult to manage. We accept the Appellant's evidence that this treatment provides him a period of relief.

[61] The question is whether on-going episodic chiropractic care might lessen his disability. The conclusion that the Appellant has reached MMI leads to the consequent conclusion that his physical condition will not likely be improved by treatment. It could be argued, however, that his current condition disables him occasionally and/or episodically from managing activities of daily living, including work, and that on-going chiropractic treatment lessens *this* disability.

[62] In this regard, Dr. Kitchen has opined that on-going chiropractic care for the Appellant is for treatment of symptoms only and does not improve his condition or change his disability. Dr. Waddell's reports lead to the same conclusion. We are therefore satisfied that the care the Appellant seeks and occasionally receives is not rehabilitative for purposes of section 112(1) and benefits are therefore not payable in this regard.

Physiotherapy and Massage Therapy:

[63] There is no current recommendation for either physiotherapy or massage therapy and no evidence whether it might be beneficial or the nature of the benefit it might provide. There is, therefore, no evidence that physiotherapy or massage therapy would be rehabilitative for the Appellant.

CONCLUSION

[64] The Appellant's neck and upper back injuries were caused in his August 2003 vehicle accident and were not pre-existing or expected with the activities of daily living.

Nonetheless, he is at maximum medical recovery and further chiropractic, physiotherapy or massage therapy treatment are not likely, in the circumstances, be rehabilitative within the terms of section 112 of the Act.

[65] As such, SGI's decision letter dated August 14, 2006 is set aside in so far as it concluded that the Appellant's neck and upper back injuries and symptoms were not caused in his August 13, 2003 vehicle accident.

[66] SGI's decision letter dated August 14, 2006 is confirmed only to the extent that it declined benefits for chiropractic, physiotherapy and massage treatment at that time and by reason only that same were not shown to be rehabilitative for purposes of section 112 of the Act.

COSTS

[67] As this decision does not result in substantive benefit to the Appellant, no costs will be awarded and the Appellant shall forfeit his appeal fee.

Dated at Regina, Saskatchewan, on September 14, 2007.

Ann Phillips, Q.C., Chair

Beverly Cleveland, Commission Member

Barbara Tomkins, Commission Member