

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *P.R. v. Saskatchewan Government Insurance,*
2008 SKAIA 001
Date: 20080104
File: 008 of 2007

BETWEEN

P.R., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
P.R., Applicant
Allan McLeod, for the Respondent

Before: **Barbara Tomkins, Chair**
Carol Olson, Commission Member
Jane Lancaster, Q.C., 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 Saskatoon, Saskatchewan
December 13, 2007

DECISION

[1] The Appellant, P.R., appeals the decision of Saskatchewan Government Insurance (SGI) dated November 9, 2007 denying him permanent impairment benefits. The Appellant's appeal was received by the Automobile Injury Appeal Commission on January 25, 2007.

[2] After that date, SGI continued to review the issue under appeal and sent the Appellant an amended decision letter dated July 9, 2007 on the issue of permanent impairment awarding the Appellant 3% permanent impairment for a C5/6 lesion.

[3] The Appellant disputes this assessment. It is common ground between SGI and the Appellant that his original appeal application also will also cover the July 9, 2007 appeal letter which dealt with the same issue of permanent impairment entitlement and it was not necessary for the Appellant to file a further appeal on the July 9, 2007 decision letter.

FACTS

[4] The Appellant was involved in a motor vehicle accident February 27, 1999. He was sitting in a stopped vehicle when he was rear-ended by another vehicle. Unfortunately for the Appellant this was the third motor vehicle accident in which he had been in a stopped vehicle and hit from behind by another vehicle. His first accident was in September 1992 and pre-dated no fault insurance provisions. It is the understanding of the panel that the Appellant dealt with that accident through the tort system.

[5] His injuries in the 1992 accident resulted in mid-back pain and according to independent medical examiner, Dr. O'Callaghan, likely caused compression of the spinal discs T6-7 and T7-8.

[6] The Appellant's second motor vehicle accident occurred on January 14, 1997. In this accident, the Appellant experienced neck pain and a MRI showed a C6-7 disc bulge which required surgery.

[7] The Appellant received permanent impairment benefits for the 1997 accident in the amount of 18.5%. Unfortunately, the documentation is not as specific as we often see concerning what specific areas in the regulations the payments were meant to compensate. At that time, the Appellant asked for a review of the assessment and this review was done in-house by SGI pursuant to *The Automobile Accident Insurance Act* review provisions in place at the time. The review confirmed the Appellant's permanent impairment at 18.5% for the following:

- 7% for the discectomy and fusion
- 5% for **“problems in the mid thoracic area”** (emphasis added)¹
- 3.5% for the muscle dysfunction in the spine
- 3% for the surgical scar.

[8] This information is important for the current appeal as the Appellant's injuries from this third motor vehicle accident overlap some of the same bodily areas as the two previous motor vehicle accidents. Our jurisdiction is limited to reviewing issues arising from the 1999 accident and not matters that may have been adjudicated in the previous accidents and are thus concluded.

[9] In the 1999 motor vehicle accident, the Appellant advised that he received injuries to his neck, and experienced pain in both his shoulders and arms. He was still experiencing low back pain as well as other non-resolved issues from his two previous accidents.

[10] The FIT assessment team had originally done a report on the Appellant in January 1998 prior to his latest accident and did a further re-assessment on July 19 and 20, 1999 after the third accident.

[11] An independent medical examiner, Dr. O'Callaghan, in a report dated May 1, 2003 reviewed the previous medical material and reported on his examination of the Appellant.

¹ Dr. Alexander in his letter to SGI dated December 2, 1998 indicated specific issues with C6/7, T6/7 and T7/8.

He indicated that a 2000 MRI showed a tiny left C4-5 bulge and a small left C5/6 disc protrusion which he attributed to the 1999 accident.

[12] The Appellant has had the benefit of two independent medical assessments, by Dr. O'Callaghan in May 2003 and Dr. Clarke in June 2003. In addition, the Appellant has had MRI's dated August 11, 1997 , September 30, 1997, October 2, 1997, March 8, 1999, March 6, 2000 and March 15, 2004.

[13] For this appeal, both SGI and the Appellant filed numerous medical reports outlining the Appellant's situation beginning at the first accident in 1992. These have been helpful to the panel in determining the issues in this appeal.

ISSUES

[14] The Appellant advises that he is appealing the decision of SGI not to award him permanent impairment benefits for the following injuries which he indicates were caused by his 1999 motor vehicle accident:

- C3/4 – minimal disc bulge
- C4/5 – small herniated disc
- T4/5 – very minimal central disc bulging
- Decrease of range of motion
- Elevated blood pressure during exertion
- C5/6 – that the 3% awarded did not adequately compensate him for the impairment and should be higher in the 3-5% range available for impairments of this sort
- Lumbar issues

POSITION OF THE PARTIES

[15] The Appellant drew the attention of the panel to medical documentation; in particular MRI's which have identified the defects in his spinal cord. In his view, the identification of these defects might entitle him to receive permanent impairment benefits from SGI.

[16] The Appellant also identified medical documents he or SGI have filed which show that his range of motion has been restricted and it is his position that this should be compensated as a separate impairment category.

[17] With regard to his elevated blood pressure, the Appellant cites reports from rehabilitation professionals who noted his elevated blood pressure and ceased his physical testing. When questioned by the panel if he had obtained further testing on the issue of hypertension, he provided a document of dated March 29, 2004 indicating that he had a normal diurnal pattern of blood pressure.

[18] It is the position of SGI that the Appellant has been properly compensated for permanent impairment for his 1999 accident when they provided 3% compensation for the C5/6 disc lesion.

[19] SGI, in particular, relies on the assessment of the two independent medical exams performed on the Appellant by Drs. O'Callaghan and Clarke, as well as the MRI dated March 6, 2000, the MRI dated March 23, 2004, and the consultation note of the neurosurgeon, Dr. Hudoba.

Permanent Impairment under the Old Act

[20] As the Appellant's motor vehicle accident occurred in 1999, it is the 1995 *Automobile Accident Insurance Act* Chapter A-35, (*Old Act*) and regulations which govern his entitlements.

[21] Sections 153, 154 and 156 of the old *Act* provide lump sum benefits as follows:

153 In this Division "permanent impairment" includes a permanent anatomical or physiological deficit, a permanent disfigurement, a permanent acquired brain injury or any other permanent impairment prescribed in the regulations.

154 Subject to this Division and the regulations, a victim who suffers a permanent impairment because of an accident is entitled to a lump sum benefit for the permanent impairment.

156(1) The insurer shall evaluate a victim's permanent impairment as a percentage that is determined on the basis of the prescribed schedule of permanent impairments.

(2) If a victim's permanent impairment is not listed on the prescribed schedule of permanent impairments, the insurer shall determine a percentage for the permanent impairment using the prescribed schedule as a guide.

[22] Section 36 of the *Personal Injury Benefits Regulations (PIBR)* refers one to Appendix B. Appendix B is the Schedule of Permanent Impairments, divided into two parts: Part 1 is "Anatomical and Physiological Deficits" and Part 2 is "Disfigurement". In this case we are looking at Appendix B, Part 1, Division1, Subdivision 3, Part 21, Other spinal impairments (a)(iii).

PERMANENT IMPAIRMENT BENEFITS (PIB)

[23] As an understanding of PIB and its purposes is necessary to understanding this decision, we will provide a brief explanation.

[24] Fundamentally, the Act and its regulations provide that a person who is injured in a motor vehicle accident may be entitled to certain benefits, depending on the nature, duration and impact of their injuries. There are many kinds of benefits appropriate for various circumstances but the most common are benefits for lost income, medical and rehabilitative services, medications, expenses and permanent impairment.

[25] A person who is injured in a vehicle accident may, depending on the nature and impact of the injuries and depending on the person's circumstances, be eligible for a number of different kinds of benefits.

[26] Some of these benefits are based on actual expenses. When an injured person incurs expenses traveling to a medical examination, the actual cost of his taxi fare, for example, will be reimbursed.

[27] Other benefits are based on the claimant's specific circumstances. The most obvious of these is the Income Replacement Benefit which is generally an amount calculated by reference to the injured person's actual earnings and the impact that the injuries have had on his or her ability to earn those monies. Thus, a person who earned \$50,000 per year and who is unable to work will receive a higher weekly sum for income replacement than will a person whose annual income was \$25,000.

[28] These benefits are essentially intended to reimburse actual expenses or losses, such as the loss of income that may occur after a person is injured in an accident. PIB are a third kind of benefits; for these, individual circumstances or expenditures are not relevant.

[29] The Permanent Impairment Benefit is an attempt – admittedly and necessarily imperfect – to quantify a person’s permanent loss of function, impairment or deformity resulting from a motor vehicle accident. The PIB is an objective measure of the percentage of the body that is effectively no longer usable, has lost function or is permanently damaged in other ways.

[30] The amount of the benefit is determined by reference to a schedule in *The Personal Injury Benefit Regulations*.

[31] Permanent impairment is not the same as a disability. Disability is how the reduction or loss affects the person’s ability to work and to live. Permanent impairment is given for a permanent, measurable reduction or loss of physical function.

[32] Determining the permanent, measurable reduction or loss of physical function is not the only factor that needs to be assessed in order that a claimant is entitled to the permanent impairment benefit under the legislation. It is also a requirement that the reduction or loss of physical function must be related to the injuries received in the motor vehicle accident. In this case, it is the Appellant’s 1999 motor vehicle accident.

[33] It is not sufficient that a claimant presents SGI with evidence of the existence of the impairment without medical evidence linking the impairment to the motor vehicle accident as the cause of that impairment. It may well be that this evidence shows a permanent impairment, but not one is that is compensated under this legislation.

[34] In this case, we accept that the medical reports show the Appellant has a bulging disc at C3/4, however, there is evidence that this condition was in existence prior to the 1999 accident and following the 1997 accident. If it was motor vehicle related, it should have been included in the 1997 permanent impairment award. If it was not, we do not have

the jurisdiction to consider it now. We have no evidence that the 1999 accident exacerbated this condition.

[35] Dr. Hudoba, neurologist, identified a tiny herniated disc at C4/5 in March 2000 from the MRI. Dr. O’Callaghan described this in his May 2003 report as “transient disc protrusions”. Dr. O’Callaghan advised that this condition was linked to the 1999 accident. However, the most recent 2004 MRI advises “C4-5 – This level is unremarkable in appearance”.

[36] We do not have expert evidence as to what “transient disc protrusions” means – do they return and then disappear, or just disappear? In any event, the most recent medical evidence is that the Appellant does not have a herniated disc at C4/5 and so there is no permanent impairment payable to him in that regard at this time.

[37] The Appellant also provided medical information regarding a bulge at T4/5. There is no evidence that this is related to the 1999 accident. In fact, Dr. O’Callaghan in his report dated May 1, 2003 specifically states that the September 20, 1992 motor vehicle accident is **“solely responsible for the mid-thoracic disc protrusions and on going activity-related back and left chest wall pain.”**(Emphasis added)

[38] We are satisfied that the T4-5 disc bulge was not considered or compensated previously and was not included in the 1997 compensation for mid-thoracic issues, as it was not mentioned specifically in the award. We are aware that the Appellant suffers from multiple sclerosis and Dr. Clarke in his extensive report reported his doctors have identified “significant degenerative disease in his spine at many levels and this may be sufficient to account for some of his difficulties. It is unrelated to any of the accidents”.

[39] As there is no medical evidence linking it to the 1999 motor vehicle accident, we are unable to conclude that the Appellant would be entitled to permanent impairment for T4/5.

[40] As we have concluded that the Appellant is not entitled to further compensation for C3/4, C4/5, and T4/5, the evidence of loss of range of motion is also not compensable. In

other parts of the regulations, loss of range of motion is particularly set out as a separate classification for compensation. This is not the case for the regulations of the *Old Act*; there, range of motion is included as part of the compensation paid for impairment to the spinal column and not as a separate category.

Pursuant to Appendix B, Division 1, Subdivision 3, Part 21(a)(iii): Other spinal impairments
(a) Alteration following the herniation of an intervertebral disc: (iii) without discectomy or chemonucleolysis, **including any functional limitations**, per space: 3-5%, loss of range of motion is included as part of the award.

[41] We accept the evidence that the Appellant provided that his range of motion is impaired, but some of that impairment would likely have been included in his 1997 award for thoracic impairment and in the July 2007 permanent impairment award which gave 3% for the disc alternation for C5/6. Although it was not specifically argued before us, we agree with the assessment of the medical consultant that the C5/6 award should be at the low end of the 3-5% range as there has been no sensory or motor change to date.² The Appellant did not provide any medical evidence to contradict this assessment.

[42] The Appellant also claimed permanent impairment for the fact that his blood pressure rose precipitately during exertion. However, he also filed a report indicating that he does not suffer from hypertension. In addition, there is no medical evidence linking this condition to his 1999 motor vehicle accident.

[43] The Appellant also mentioned that he suffered from lumbar pain which he attributes to his motor vehicle accident. There is no medical evidence of impairment and no medical evidence linking his symptoms as being caused by the 1999 motor vehicle accident. Specifically, Dr. O'Callaghan makes no mention of lumbar disability as being caused by the 1999 motor vehicle accident.

CONCLUSION

[44] The Appellant has not been successful with regard to his appeal on the permanent impairment benefits. We uphold the decision of SGI as set out in its July 9, 2007 decision letter.

² clinically silent but subject to accelerated degeneration

[45] We acknowledge that the Appellant has, through the medical records, identified impairments but he has not persuaded us that the 1999 motor vehicle accident was responsible for those defects.

[46] In particular, we accept the 3% award for his C5/6 disc provided to the Appellant July 9, 2007 is correct and uphold this decision letter.

[47] We are of the view that the Appellant has not persuaded us that the C3/4 lesion was not a pre-existing condition prior to the 1999 motor vehicle accident.

[48] The C4/5 herniated disc is not apparent in the most recent MRI and so is not compensable at this time.

[49] The T4/5 disc was not compensated in the 1997 vehicle accident claim but has not been shown to be caused by the 1999 motor vehicle accident.

[50] Range of motion is included in any of the awards for disc abnormality and does not have a separate impairment classification.

[51] In our view, the Appellant has not met the onus to persuade us that he has lumbar impairment caused by the 1999 motor vehicle accident and this claim must fail.

[52] In addition, we accept that the Appellant may experience elevated blood pressure during exertion, but there is no evidence that he suffers hypertension. In fact, there is evidence that he does not. Even if he were to suffer hypertension, there is no medical evidence that this was caused by the 1999 motor vehicle accident.

[53] The Appellant is aware that his motor vehicle accident file remains open at SGI and if his medical condition changes and/or if he has medical evidence linking this physical change to his 1999 motor vehicle accident, he is can provide this information to SGI to consider whether he is entitled to further benefits under the legislation.

Dated at Saskatoon, Saskatchewan, on January 4, 2008.

Barbara Tomkins, Chair

Carol Olson, Commission Member

Jane Lancaster, Q.C., Commission Member