

Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *E.A. v. Saskatchewan Government Insurance,*
2008 SKAIA 022

Date: 20080409

File: 024 of 2005

BETWEEN

E.A., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:

Grant Schmidt, for the Applicant

Elizabeth Flynn, for the Respondent

Before: **Beverly Cleveland, Chair**
Jeffrey Scott, 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
January 12 March 6, 2006 and December 12, 2007

DECISION

[1] The Appellant, E.A., appeals a decision of Saskatchewan Government Insurance (SGI) dated December 2, 2004 in which causation of his present disability was attributed at least 85% to a pre-existing condition and, as a result, it considered that he was substantially able to complete his work duties and no longer entitled to an income replacement benefit effective May 29, 2004. The Appellant was further advised that SGI would consider a permanent impairment for the right shoulder and requested that he have a physical therapist complete the enclosed forms.

[2] He appealed¹ the December 2 decision by SGI and noted he disagreed with the 15% disability attributed to his right shoulder and 0% disability being attributed to his neck and left wrist. The December 2 decision by SGI did not deal with permanent impairment although it seemed the Appellant interpreted the assessment of a percentage of disability as being an assessment of permanent impairment. Subsequently on November 14, 2005, SGI assessed the appellant's entitlement to permanent impairment for the cervical spine fracture (0.5%), scarring (0.75%) and loss or range of motion for the right shoulder (6.26%) for a total benefit of 7.51% whole body impairment.

[3] The Appellant's appeal of the November 14 decision was received by the Commission on January 23, 2006 after the commencement of the appeal hearing but within the statutory time periods. As a result, both decisions were properly before the Commission and the issues we were required to decide were: (a) entitlement to an ongoing income replacement benefit, (b) causation (left wrist), and (c) calculation of permanent impairment benefits (neck, right shoulder and wrist).

[4] At the conclusion of the evidentiary portion of the appeal, the hearing was adjourned for the Appellant to obtain additional x-rays. After reviewing these and previous x-rays, CT scan and MRI by Dr. Rice (radiologist) and Dr. Alport (SGI's medical director), SGI withdrew its decision to terminate the Appellant's income replacement benefits and recalculated the permanent impairment benefit respecting the

¹ February 16, 2005

C7 fracture² that resulted in an increase of 3.5% and an overall benefit of 11.01% whole body impairment.³ As a result, it was (eventually) agreed that the only live issue for the Commission to decide was the calculation of permanent impairment for the right shoulder and left wrist.

FACTS AND FINDINGS

[5] The Appellant was injured in a motor vehicle accident on March 22, 2002 when the car in which he was riding was struck head-on by a vehicle that had crossed the center line on the highway between [location] and [location]. The Appellant was diagnosed and treated for a fracture in his cervical spine at C7 and a rotator cuff tear in his right shoulder. The Appellant further says that he suffered a left wrist injury in the accident and is entitled to a permanent impairment. SGI does not acknowledge there was an injury to the left wrist which it is responsible for or alternatively, if the left wrist was injured in the motor vehicle accident that it was minor and no permanent impairment benefit is payable. The Appellant completed an Application for Benefits on April 10, 2002 and received benefits under Part VIII of *The Automobile Accident Insurance Act*.⁴

[6] The Appellant has a chronic degenerative condition of the spine known as ankylosing spondylitis which was diagnosed many years before the accident.

[7] As noted above, by agreement of the parties, the only remaining issues for the Commission to decide are permanent impairment for the right shoulder and left wrist.

Permanent Impairment

1. Right Shoulder

[8] The range of motion in the Appellant's shoulders was restricted prior to the accident because of the progressive and degenerative nature of the ankylosing spondylitis.⁵ In order to determine what loss was caused by the motor vehicle accident,

² SGI letter dated May 1, 2007

³ SGI letter dated September 27, 2007

⁴ c. A-35, R.S.S. 1978 as amended S.S. 1979 (as amended)

⁵ October 2001; December 2003

Dr. Alport compared the (injured) right shoulder against the left shoulder to determine the percentage loss and calculate the permanent impairment benefit. We accept the approach used by Dr. Alport in this case was reasonable and fair and accurately identified the loss of range of motion caused by the motor vehicle accident.

[9] Appendix B: Part 1, Division 1, Subdivision 1, section 4(c) of the *Personal Injury Benefits Regulations*⁶ was used to do the determination and provides:

4. **Shoulder**

(c) Restriction of movement of the shoulder joint:

- (i) partial to complete loss of abduction: 0.5 to 6%
- (ii) partial to complete loss of front elevation: 0.5 to 3%
- (iii) partial to complete loss of external rotation: 0.5 to 2%
- (iv) partial to complete loss of internal rotation: 1%
- (v) partial to complete loss of adduction or extension: 0.5%

[10] Dr. Alport calculated the restricted range of motion loss as follows:

Direction	Right Shoulder	Left Shoulder	Percent Loss	Permanent Impairment
Flexion	60 degrees	100 degrees	40%	1.2%
Abduction	60 degrees	100 degrees	40%	2.4%
Adduction	25 degrees	35 degrees	29%	0.5%
Extension	25 degrees	50 degrees	50%	see note below
External Rotation	15 degrees	35 degrees	58%	1.16%
Internal Rotation	55 degrees	80 degrees	32%	1%

(Note that “loss of adduction and/or extension” received 0.5% in total as per 4(c)(v) of the regulations)

[11] The total loss for restricted range of motion was 6.26% whole body impairment and was included in the permanent impairment award previously paid.⁷ We accept the

⁶ c. A-35, Reg 3 (effective January 1, 1995 as amended)

⁷ See SGI letter Sep 27 07: 11.01% permanent impairment (6.26% loss of ROM R shoulder, 0.75% scarring, 4% C7 fracture)

range of motion loss for the right shoulder was accurately calculated as shown in the above table.

[12] It was well documented that the Appellant also suffered a right full thickness rotator cuff tear in the motor vehicle accident for which he underwent surgery and in fact, SGI paid a permanent impairment for scarring as a result. A careful review of the regulations shows there is an entry at section 4(a) for “Rupture of the rotator cuff including reduction of muscular strength and atrophy, if applicable: depending on the degree of restriction or movement”. The column next to that listing, that otherwise shows the percentage award, is blank. It may be that because no percentage is prescribed that SGI did not ascribe a percentage payable for the rotator cuff tear. We don’t know.

[13] We are unable to find any other impairment that was listed in the regulations – old Act or new – for which no percentage was listed. If there was no permanent impairment benefit intended, it is likely that the injury would simply have been omitted from the regulations, or at least, that zero percent would have been listed.

[14] In addition, it is listed as item (a) of the section heading “Shoulder” and the wording of the provision appears to anticipate an award of a permanent impairment for rotator cuff rupture as it clearly contemplates a range of awards in its very wording: *Depending on the degree of restriction of movement*. That wording is inconsistent with an intention to provide no award of zero percentage.

[15] In these circumstances, we turn to section 156(2) of the Act. It states:

156 (a) 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.

[16] While not directly applicable to these circumstances – in the Appellant’s case, the impairment is listed but no percentage given – it would appear that the premise could nonetheless guide us. That is, the section directs SGI, in effect, to consider comparable impairments and their corresponding awards.

[17] In our case, permanent impairment for the rotator cuff rupture is provided in the “new” Regulations that came into effect after the appellant’s accident. These provide a suitable comparison or guide in our view. Appendix B: Division 1, Subdivision 1, section 1.3(c)(i) provides:

Diagnosis	Impairment Rating
(c) Rotator cuff tear:	
(i) Imaging positive, full thickness	
With no known prior rotator cuff pathology	5%
With known prior rotator cuff pathology	2%

[18] Although there was supraspinatous (muscle) wasting and atrophy of the right shoulder reported after the accident we note Dr. Milne also reported the Appellant appeared to have some wasting and discomfort with stressing of the rotator cuff tendons in both shoulders before the accident. Thus, in our view, SGI is responsible and is ordered to pay a permanent impairment for the rotator cuff tear to the right shoulder in accordance with section 1(c)(i) above – with known prior rotator cuff pathology - at 2%.

2. Left Wrist

[19] Before we are able to decide whether SGI is responsible to pay a permanent impair for the left wrist, we must first determine if there was an injury to the left wrist caused by the motor vehicle accident.

[20] The Appellant circled his left wrist as being injured in the motor vehicle accident in his Application for Benefits. He testified that he braced himself with his left wrist on the dashboard just prior to collision with the other vehicle. The Appellant is left handed and commented that he had no problems with his left wrist prior to the accident but that it is now very painful and stiffens up requiring him to wear a supportive brace so that he can drive the tractor and do certain of his farm duties particularly those having gripping, holding or carrying tasks.

[21] On March 18, 2005, Dr. Bachynski, orthopedic surgeon reported in part:

...There is very definitely a post-traumatic feature as his left wrist which has been sore since his injury. He was checked for carpal

tunnel syndrome which was mild. Dr. Nair also felt that he may have had a carpal tunnel syndrome from his EMG from trauma because he held onto the (dash).⁸ This has settled down to where he has residual pain in his left wrist and now his left wrist shows some arthritic changes in the proximal carpal row in the area where one would expect post-traumatic features to occur. He braced himself against the dash and his wrist soreness persisted. I think this is all post-traumatic. I think eventually he is going to require some stabilization of his left wrist or even excision of the proximal carpal row to give him a moving wrist...

[22] Under cross-examination, Dr. Bachynski acknowledged he may have relied on the Appellant's subjective reporting that he did not have any previous disability in his left wrist but went on to say that "...some of that could have been there before, but the thing is the proximal carpal the way it changed it looks like – it looks like a thing we see in an injury when they hold onto a steering wheel it hits the first row first ...his history is consistent with that of the way he told me his injury occurred."

[23] Dr. Bachynski also testified that ankylosing spondylitis generally only seen very latent in the joints and not much in the wrists. He felt since the changes in the left wrist were predominately more advanced (compared to the left arm and/or right wrist) this was also consistent with post-traumatic injury compared to progression or degeneration caused by the a. spondylitis.

[24] In April 7, 2004, Dr. Nair reported that he had conducted an EMG and wrote in part:

Assessment

Nerve conduction studies continue to show bilateral carpal tunnel lesions, worse on the left side...I first said when I saw him in 2002 that his carpal tunnel lesions may not be related to the injury. But I noticed he was involved in a motor vehicle accident. I have seen several people with carpal tunnel lesions associated with a whiplash type of injury. My deduction in these cases is that the person may try to brace themselves against the steering or dashboard from moving forward. This impact results in the development of carpal tunnel symptoms because he had paresthesia in both hands ever since his injury. Therefore the carpal tunnel lesions which are

⁸ Correction in another document

still symptomatic may be related to the injury also....He has bilateral changes but slightly more marked on the left side...

[25] Dr. Alport also testified respecting the left wrist and subsequently reviewed the medical file to be sure that nothing had been over looked.⁹ He noted the Appellant did not have any treatment for the left wrist until about 18 months after the accident despite seeing several clinicians respecting his injuries. He referred to a report by Dr. Milne in October 2003 in which he stated “(the Appellant) did not complain of other swollen joints aside from his left wrist. When we were discussing things he told me that he didn’t think that his was because of his car accident”. (We note the Appellant disagreed with the doctor’s recollection of their conversation).

[26] Dr. Alport also commented that recent articles that he’s reviewed suggested that “with time, diffuse articular disease occurs with involvement of the hands, wrists and feet” and suggests that in deference to Dr. Bachynski’s opinion, a. spondylitis may be related to his present left wrist problems. He further pointed to a clinic note made by Dr. Rotoski dated October 24, 2001 that, while the writing was less than desirable, appeared to partly read “left ulnar aspect wrist painful”.

[27] Dr. Alport concluded that overall, he thinks the left wrist wasn’t badly injured, if it was injured at all, and that no permanent impairment would be indicated.

[28] The Appellant has the onus of proof that on a balance of probabilities that an injury to his left wrist was caused by the motor vehicle accident. We accept that while the Appellant may have injured his wrist in the collision – which he reported to SGI shortly after the accident – we are not convinced that his current problems were caused by the accident. He didn’t receive treatment for an injury to the left wrist until many months later – which itself is not fatal – but it raises a concern about how badly injured the wrist may have been. We agree with Dr. Bachynski that the best evidence of a traumatic injury was the mild arthritic changes to the proximal carpal bones but we cannot discount the chronic, progressive and degenerative nature of ankylosing spondylitis.

⁹ SGI letter dated August 22, 2007

[29] Similarly, although Dr. Nair explained the basis for his (changed) opinion was that he has seen this in other individuals who have sustained a (braced) WAD type injury - what we don't know what role his underlying chronic disease may have played as carpal tunnel lesions were reported in both wrists, left greater than right, post accident.

[30] Having regard to all of the evidence, we are not satisfied on a balance of probabilities that the present problems the Appellant has with his left wrist were caused by the motor vehicle accident. Accordingly, there is no award for permanent impairment.

CONCLUSION

[31] SGI is directed to pay a further permanent impairment benefit of 2% for the rotator cuff tear as set out in paragraph [18]. The appeal respecting a permanent impairment benefit for an injury to the left wrist is dismissed.

[32] As the Appellant has been partly successful in his appeal he is entitled to his reasonable costs and expenses subject to the \$2,500 cap set out in the regulations excluding the cost of any practitioner's reports under s. 169(1) of the Act and 76 thereof. He is also entitled to be reimbursed for his appeal fee(s).

Dated at Regina, Saskatchewan, on April 9, 2008.

Beverly Cleveland, Chair

Jeffrey Scott, Commission Member