

**Automobile Injury Appeal Commission  
Province of Saskatchewan**

**Citation:** *H.H. v. Saskatchewan Government Insurance,*  
2008 SKAIA 024  
**Date:** 20070430  
**File:** 055 of 2007

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**BETWEEN**

**H.H., Appellant**

**and**

**Saskatchewan Government Insurance, Respondent**

**Appearances:**  
**H.H., Appellant**  
**Elizabeth Flynn, for the Respondent**

**Before:** **Beverly Cleveland, Chair**  
**Jeff Scott, 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.**

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Heard at Regina, Saskatchewan  
April 15, 2008

## DECISION

[1] The Appellant has been involved in four motor vehicle accidents dated January 9, 1997, December 25, 2002, December 12, 2005 and January 23, 2007. He had been in receipt of benefits pursuant to *The Automobile Accident Insurance Act* c.A – 35.

[2] In this decision we will consider the appeal that the Appellant filed against decisions made by Saskatchewan Government Insurance (SGI) dated February 2, 2007, March 22, 2007, and April 26, 2007 regarding his benefits.

[3] As background to this decision, it is important to note that SGI confirmed at the hearing that the decision letter dated February 2, 2007 did not cover the motor vehicle accident dated January 23, 2007. Counsel for SGI confirmed that the Appellant's concerns with regard to his entitlement to benefits as a result of this motor vehicle accident would have to be considered by SGI and the Appellant was entitled to receive a decision letter. As a result, we did not consider any evidence regarding this motor vehicle accident.

### PRELIMINARY ISSUE:

[4] As a preliminary matter, counsel for SGI raised the issue of the jurisdiction of the Commission to consider the decision letter dated February 2, 2007.

[5] Counsel for SGI argued that the Appellant has not filed his appeal within the time frame of 90 days pursuant to section 191(1)(a) 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 with the later of:

- (a) 90 days after the date of the 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) that the mediation is completed.

[6] It is common ground that the Appellant did not file his appeal within the 90 days of February 2, 2007 decision letter which indicated that "no further funding of treatment or benefits will be provided to you."

[7] In his appeal to the Commission dated May 30, 2007, the Appellant specifically mentions the April 26, 2007 SGI decision letter dealing with the calculation and payment of substitute worker benefits, although he also mentions the denial of physiotherapy treatments. It is unclear whether those were for his January 23, 2007 motor vehicle accident or the December 12, 2005 motor vehicle accident or both.

[8] Counsel for SGI takes the position that the AIAC does not have the power to expand the time frame and there is no jurisdiction for AIAC to hear any appeal which does not comply with the time limitation.

[9] The Appellant argued that he thought that when SGI had continued to communicate with him regarding the substitute worker payments of his income replacement benefits, that this meant that the February 2, 2007 decision was not final. In his testimony, he suggested that his personal injury representative had influenced him in this belief. He could not provide the members of the Commission with any evidence that any one at SGI had ever induced him to adopt this view and counsel for SGI indicated that this had not been their position.

[10] We have some sympathy for the Appellant's position especially as there appeared to be some confusion by both parties initially as to whether the January 23, 2007 motor vehicle accident was before the Commission on this appeal.

[11] However, the Saskatchewan Court of Appeal and the Court of Queen's Bench for Saskatchewan in *Mintzler v SGI* (2001 SKCA 54 and 2000 SKQB 104 ) as well as decisions by this Commission govern our interpretation of s. 191 of the *Act* that late filing of an appeal is fatal to our jurisdiction to hear the appeal of the decision.

[12] Therefore, we find that we do not have jurisdiction to hear the Appellant's appeal regarding SGI's February 2, 2007 decision letter dealing with further benefits and treatment.

[13] The Appellant's appeal of the March 22, 2007 decision letter and April 26, 2007 decision letter are within the jurisdiction of the Commission.

**ISSUES:**

[14] The Appellant takes the position that he is not yet recovered from his December 12, 2005 motor vehicle accident and takes issue with SGI's decision to terminate his benefits especially the substitute worker entitlement as of September 25, 2006 which was the date of his discharge from CBI secondary treatment. His position is that his entitlement for income replacement benefits (IRB) continues up to and including the present.

[15] Counsel for SGI takes the position that as of September 25, 2006, the Appellant was at the same position regarding his capacity to do his employment as he was prior to the 2005 motor vehicle accident. SGI's position is that the Appellant suffered from a pre-existing injuries and medical conditions at the time of the 2005 motor vehicle accident for which they have compensated him or are not responsible. SGI claims its responsibility is to provide the Appellant benefits for the injuries he sustained in the 2005 motor vehicle accident and they were not required to put him in any better position than he would have been in if the motor vehicle accident had not occurred. He is what is referred to in law as a "crumbling skull" claimant and SGI's contention is that the Appellant would have suffered from the problems he currently is experiencing irrespective of the 2005 motor vehicle accident. In other words, SGI says the Appellant's capacity to do his landlord duties or lack thereof were not caused by the 2005 motor vehicle accident but rather by his pre-existing conditions.

**FACTS AND FINDINGS:**

[16] The Commission was provided with extensive medical documentation which spanned the Appellant's medical condition beginning when the Appellant suffered a workplace accident to his left hand in 1985.

[17] As a result of this accident, the Appellant had injured his left hand and as he was left-hand dominant this had serious repercussions to his work which required precision hand co-ordination. He had extensive medical intervention, including operations and therapy and retraining, but eventually Workers Compensation (WCB) determined he had a permanent

disability to his left hand and on June 7, 1994, he was provided with a salary top up to the minimum wage job that he was determined to be functionally capable of performing.

[18] At this hearing, the Appellant testified that he chose to have the minimum wage salary deducted so that he could concentrate on his land lord duties which included administration, repairs and maintenance.

[19] On December 13, 2003, he received a permanent impairment award of 7.5% indicating that he had permanent restrictions to avoid heavy grip and hand movement with the left dominant hand. He was unable to return to his pre-accident employment as it required a lot of hand gripping with both right and left hands.

[20] At age 65, WCB provide him with a retirement allowance of approximately \$100,000.

[21] The Appellant was involved in a motor vehicle accident in 1997 and in addition to receiving rehabilitation benefits for the injuries that he received, he also received income replacement benefits under *The Automobile Accident Insurance Act* (old Act)

[22] His injuries in the 1997 motor vehicle accident were whiplash, headaches, and problems with left ear, jaw, and neck.<sup>1</sup> As a result of these injuries, the Appellant underwent a series of rehabilitative treatments and secondary and tertiary assessments including surgery on his C6-7 joint.

[23] The Appellant at the time was owner/landlord to 11 revenue properties and was unable to perform all the caretaking duties and provided receipts for labour done on his revenue properties to SGI for which he was reimbursed.

[24] From the dates of his 1997 and 2002 motor vehicle accidents to March 16, 2005 when he settled a dispute with SGI concerning his income replacement benefits, the Appellant indicated that he continued to suffer the disability to his left hand from his WCB claim which SGI accepts. In addition, he suffered significant disability to his neck and shoulder which although allowing him to do the administrative duties of being a landlord,

did not allow him to do the labour component of maintenances required as well as the more intensive labour required when tenants left and there was need for cleanup and more major maintenance. It is noted the Appellant received permanent impairment benefits arising from the 1997 motor vehicle accident from SGI for scarring and the loss of function of his shoulder and neck in 2001.

[25] From March 2005 until a further accident on December 12, 2005, the Appellant indicated that he was feeling considerably much better and able to perform all the duties required of him as a landlord. However, he did concede in his testimony during the hearing that his recollection was during that period of time, he did not have to perform any of the more intensive labour required as he did not think any tenants left during this timeframe nor did he sell or purchase property.

[26] Prior to the December 2005 motor vehicle accident, the Appellant was diagnosed with non-insulin dependent diabetes, had surgery on his C6/7 disk in 1998 with residual C6/7 disc bulge, osteophyte formation and left C7 radiculopathy post surgery, he underwent a 5-vessel coronary by-pass in January 2003, and there was radiographic evidence osteoarthritis change of the AC joint and degenerative changes of the lumbar spine identified in January 2003.

[27] The motor vehicle accident on December 25, 2002 further aggravated the injuries the Appellant received in the 1997 motor vehicle accident.

[28] The December 12, 2005 accident was another rear end collision which appeared to again injure the same areas as his 1997 and 2002 motor vehicle accidents. The tertiary report prepared by Wascana Rehab in February 22, 2006 diagnosed him with aggravation of pre-existing neck pathology with signs of neural tension on the left as well as aggravation of pre-existing left shoulder pathology. The Appellant's assessment was limited by the uncertainty of his cardiac status, but according to the occupational therapy report, the Appellant was able to meet most of his job demands except for repetitive forward reaching and sustained shoulder level reaching. In addition, functional strength testing was limited

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<sup>1</sup> CBI Secondary Assessment Primary Report

due to the fact that it was essential for therapists to obtain cardiac clearance before embarking on a rehabilitation program.

[29] When that cardiac release was provided, the Appellant commenced a secondary rehabilitative treatment at CBI Physical Rehabilitation Centre in August 2006. Upon completion in September 2006, the analysis states the following:

- Movement dysfunction in the cervical spine and left shoulder girdle due to exacerbation of pre-existing injuries and symptoms
- Marginal physical or functional improvement noted with eight weeks of treatment
- There has been little improvement in left shoulder range of motion (flexion and abduction). Neck mobility is essentially unchanged with the exception of a slight improvement of flexion (10 degrees).
- [The Appellant] is currently working at the light DOT level for below shoulder work and at the sedentary level for work at /above shoulder level.

[30] The Appellant's discharge recommendations were:

- Continue with home exercise program as instructed
- Gradual progressions in both work activities and activities of daily living as able to tolerate
- [The Appellant] may require an FCE if no further functional progress is obtained on his GRTW. ( Graduated Return to Work)
- [The Appellant] may benefit from a follow-up to review stability of cervical fusion since his symptoms have not improved since this MVA.
- If SGI wishes to pursue further treatment for [the Appellant], it is recommended he be reviewed for treatment at tertiary level.

[31] CBI Rehab made arrangements for the Appellant to participate in a GRTW for a four week basis and **reassessed in the clinic in one month at the end of his GRTW to see if there are any changes in his physical or functional status.** (emphasis added)

[32] The Appellant commenced his GRTW under the monitoring of an occupational therapist (OT). This OT accompanied the Appellant as he went about his work. As the Appellant's work schedule is sporadic due to the unknown demands of his work, his GRTW commenced September 19 and was expanded from four weeks to ten weeks ending on November 10, 2006. SGI advised the OT to initially place the Appellant's file on hold on

November 3, 2006 and then close the Appellant's file on February 22, 2007.<sup>2</sup> The reasons for this were not explained in the filed material nor did counsel for SGI provide any further information as to why the GRTW was terminated early. More importantly from the Commission's perspective, there was never a concluding assessment by the OT or the further reassessment by CBI after the GRTW as recommended whether the Appellant was at and/or able to resume his pre-accident level of work and activities. (it is noted that the Appellant did attend at CBI on October 23, 2006 for a Secondary Assessment Follow-up.

[33] On February 2, 2007, SGI provided the Appellant with a decision letter which terminated further funding on the basis that the Appellant was at pre-accident status and therefore, SGI's obligation to provide further funding was at an end and that the date of termination was the discharge from CBI which was September 24, 2006. It would appear from the February 2, 2007 decision letter, that SGI relied on an opinion from their consultant received January 10, 2007 (the letter is dated 2006, but it is accepted by the parties that this was a typographical error as it discusses events which took place in the fall of 2006).

[34] Notwithstanding the February 2, 2007 letter, SGI continued to review the Appellant's entitlement to and calculation of his income benefit resulting in further adjustments to the payment of the benefit although SGI remained firm that the termination date was the Appellant's discharge from CBI.

[35] At the hearing, counsel for SGI advised that it was not relying on the consultant's January 10, 2007 letter as the basis for their February 2, 2007 decision and conceded that the consultant appeared to rely on a report from an accident reconstructionist on causation which SGI was not relying on and which report had not been file with the Commission. Instead, SGI argued that although the GRTW was terminated before a concluding report was provided, that the Commission could consider the medical evidence of the Appellant's prior medical condition from the vast array of reports, draw the conclusion that his injuries from his 1997 and 2002 accidents along with non-medical conditions, advancing age and numerous mentions in the reports that the Appellant may have more function than he

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<sup>2</sup> IRC Closure Report

demonstrated, were sufficient to show that Appellant's injuries from the 2005 motor vehicle accident did not result in the loss of capacity that he claims in performing his job as a revenue property owner.

[36] The Appellant's view is that he was feeling much improved during the time frame between the settlement of his claim with SGI (respecting the 1997 and 2002 motor vehicle accidents) in March 2005 and the December 2005 accident and that he was able to perform all the necessary duties required for his employment but that after the 2005 motor vehicle accident, he was unable to do so. The Appellant does not dispute the calculation of the income benefit (substitute worker) that he received as per the March 22 and April 26, 2007 decision letters but only that the benefit should have continued past September 2006 and ongoing because the 2005 motor vehicle accident exacerbated his the injuries he received in 1997 and 2002 especially to his neck and shoulder from which he has not yet recovered.

[37] As an added complication, the Appellant was involved in a fourth rear end collision in January 23, 2007. He indicates that this has yet again aggravated his neck and shoulder injuries. He has not received any benefits from SGI and issues concerning this motor vehicle accident are not before this panel.

[38] This appeal is complicated by a number of factors. The Appellant was considered permanently disabled by WCB as a result of his left hand injury in 1985 but was capable of minimum wage work. He received an award of permanent impairment from WCB and never returned to work as a steelworker/fabricator. At age 65, WCB paid him an annuity pension of about \$100,000. The Appellant, who was left hand dominant at the time of the WCB injury, testified the disability to his left hand continues to the present day and that although he compensates to some extent by having learned to use his right hand to do certain tasks, it affects his ability to perform physical work due to loss of grip, manual dexterity and strength.

[39] The Appellant's series of motor vehicle accidents aggravated the injuries that he experienced in the 1997 motor vehicle accident especially concerning his neck, left shoulder and jaw and SGI paid permanent impairment for his loss of function to the neck and shoulder.

[40] In addition, it is clear that the Appellant had health conditions unrelated to any of his motor vehicle accidents such as diabetes and his coronary by-pass as well as evidence in x-rays and CT scans showing degenerative conditions in the lumbar spine.

[41] Assessing the Appellant's capacity has proven to be problematic as the nature of his work is unpredictable. He stated in his testimony that he is able to pace his work which allows him to do tasks that he would not be able to do if he had to work an 8 hour day. The Appellant testified that the work is more intensive when tenants leave as he then is required to get the property ready either for sale or rental. Other than that, he is called upon to do maintenance when required. He indicates that he is able to pace himself in doing these tasks, relying on family on occasion or casual labour from the Salvation Army Labour service to assist in jobs that he cannot undertake on his own. He also hires trades people for such projects as electrical work or other specialized trades.

[42] In his view, since the 2005 accident, the difference has been that where before he would hire one person to assist, he now has to hire two because of his lack of capacity. He did not point to any of the numerous receipts that he had provided SGI and which were filed in the appeal to confirm this assertion nor did he indicate what work he had done, only what bills he had submitted for payment. We accept the Appellant's evidence that he is not totally disabled and while we have copies of those bills he submitted, we have no evidence as to what percentage this represented of the maintenance/repair work undertaken.

[43] The Appellant was compensated for loss of function (permanent impairment) and underwent rehabilitation treatment for his neck and shoulder injuries arising from the 1997 motor vehicle accident and it is common ground the 2002 and 2005 accidents aggravated his previous injuries. While a number of the assessments note discrepancies between testing results and observations of the Appellant's capacity<sup>3</sup>, what is missing in our view is the assessment by CBI that was to take place at the conclusion of the GRTW respecting the Appellant's ability to safely return to his former duties. The GRTW was abruptly terminated by SGI about one week before it was set to conclude for reasons we don't know.

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<sup>3</sup> Counsel for SGI referred the Commission to a number of the many reports indicating that these show a pattern of that the Appellant views himself more disabled than he is.

[44] The Commission is being asked by SGI to speculate that CBI would have determined that the Appellant had returned to pre-accident status. We are not prepared to do so.

[45] SGI relies on the expertise of their various consultants, medical and rehabilitative experts to provide them with opinions which guide the decisions on funding of benefits or rehabilitation that a claimant requires. The Appellant in this case has been through multiple assessments, medical procedures, rehabilitation, therapies since his initial 1985 WCB injury and thereafter, through non-injury medical diagnosis, and four motor vehicle accidents with long standing and permanent injuries.

[46] Throughout the entire 20 years, both WCB and SGI have followed the recommendations of the assessment professionals and rehabilitation programming which the Appellant has attended. In this case, one week before the GRTW program was to be concluded and before, the occupational therapist provided a final report, SGI inexplicably put the process on hold.

[47] We are left without this crucial concluding piece of information from the occupational therapist as to the Appellant's capacity to do the maintenance on his rental property and if he was at pre-accident status.

[48] Therefore, we find that the decision letter of April 26, 2007 terminating the Appellant's income (substitute worker) benefit effective September 25, 2006 is set aside and that benefit is reinstated from that date to January 23, 2007 being the date of his fourth motor vehicle accident. If the Appellant has claims for substitute worker benefits from September 26, 2006 to January 23, 2007, he should provide those to SGI for their consideration.

## **COSTS**

[49] As the Appellant has been partially successful in his appeal he is entitled to his reasonable costs capped at \$2500 as governed by the legislation. He is also entitled to be reimbursed for his appeal fee.

**Dated** at Regina, Saskatchewan, on April 30, 2008.

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Beverly Cleveland, Chair

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Jeff Scott, Commission Member

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Jane Lancaster, Q.C., Commission Member