

**Automobile Injury Appeal Commission  
Province of Saskatchewan**

**Citation:** *A.N. v. Saskatchewan Government Insurance,*  
2008 SKAIA 029

**Date:** 20080611

**File:** 129 of 2007

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**BETWEEN**

**A.N., Appellant**

**and**

**Saskatchewan Government Insurance, Respondent**

**Appearances:**  
**A.N., Appellant**  
**Dale Brown, for the Respondent**

**Before:** **Joy Dobko, Chair**  
**Beverly Cleveland, 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 Saskatoon, Saskatchewan  
May 13, 2008

## DECISION

[1] The Appellant was injured in a motor vehicle accident October 22, 2007. As a result of this motor vehicle accident (mva), he has been in receipt of benefits pursuant to Part VIII of the *Automobile Accident Insurance Act* c.A-35.

[2] Saskatchewan Government Insurance (SGI) had issued four decision letters to the Appellant. The January 3, 2007 decision letter dealt with the calculations of the Appellant's permanent impairment as set out in the Personal Injury Benefits Regulations (PIBR) and provided the Appellant with 7.34%. This was calculated in the following manner:

- Closed head injury without loss of consciousness: subdural and intercerebral hematoma Appendix B, Division 2, Subdivision 1, Part 1.2 (a and c) – 2% for each part for a total of 4%
- Intra-articular fracture of left knee – Appendix B, Division 1, Subdivision 2, Part 3(f) – 2%
- Scarring involving left eyebrow – measuring 4.9cm by 0.2 cm and 1.8 cm by 0.2 cum for a total surface area of 1.34 cm squared. – Table 12.1 of the Regulations – total 1.34%
- Total for this permanent impairment assessment – 7.34%

[3] The second decision letter was dated May 4, 2007 and dealt with the Appellant's entitlement to permanent impairment. He was provided 2% additional permanent impairment calculated in the following manner:

- SGI's medical consultant reviewed the range of motion of the Appellant's left knee and found that there was no impairment rating for this in light of the Appellant's measured range of motion pursuant to the PIB regulations at Appendix B, Division 1, Subdivision 2, Part 3.5 (b and c).
- The Appellant had atrophy of the calf muscle of his left leg and was entitled to permanent impairment pursuant to Division 1, Subdivision 2, Part 3.3 in the amount of 2%

- The consultant indicated that based on the medical information he had which he felt was incomplete, the Appellant would be entitled to a further permanent impairment benefit for the instability of the left knee pursuant to Division 1, Subdivision 2, Part 3.4(a) (ii) which stipulated that the Appellant has regular episodes of instability which interferes with occupational or recreational activities. This provided an additional 7% permanent impairment rating.
- The consultant indicated that in his view the information on the issue of instability was incomplete with regard to its severity and suggests further medical reports.
- As a result, the Appellant received 2% further permanent impairment and SGI asked for further medical information in order to properly assess the instability of the left knee.

[4] On June 7, 2007, SGI provided a third decision letter after receiving further information from the Appellant's family doctor which indicated that the Appellant suffered from frequent rather than regular episodes of instability. He was provided with a permanent impairment of 10% pursuant to Division 1, Subdivision 2, Part 3.4 (a)(iii).

[5] On October 22, 2007, SGI provided the fourth decision letter which dealt with permanent impairment ratings for cognitive dysfunction as a result of the mva. The medical consultant for SGI relied on the neuropsychological assessment dated June 26 and 27, 2007. The consultant determined that the Appellant had very slight residual cognitive deficit and would be entitled pursuant to Appendix B, Division 2, Subdivision 1, Part 4.8 (e) to 5% whole body impairment rating.

[6] On December 11, 2007, the Appellant filed an appeal to the Automobile Accident Appeal Commission (AIAC) stating dissatisfaction with the assessment of his left leg, and also indicating a memory and learning problem as well as a sensory deficit.

## **JURISDICTION**

[7] As a preliminary matter, counsel for SGI raised the issue of the jurisdiction of the Commission to consider the decision letters dated January 3, 2007, May 4, 2007, and June 7, 2007. Counsel's view was that it is only the October 22, 2007 decision letter in which the Commission has jurisdiction.

[8] Counsel for SGI argued that the Appellant has not filed his appeals on these decision letters 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.

[9] It is common ground that the Appellant did not file his appeal within the 90 days of January 3, 2007, May 4, 2007 and June 7, 2007 and that these decision letters were provided personally to the Appellant who signed acknowledgement of receiving them.

[10] In his appeal to the Commission dated December 11, 2007, the Appellant specifically mentions issues relating to his left leg which was the subject of the January 3, 2007, May 4, 2007 and June 7, 2007 decision letters. In his opening statement at the hearing, the Appellant expanded that he felt that he had limited motion, a knee brace, and needed a cane. He felt that the permanent impairment assessment did not adequately compensate him for his disability.

[11] 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.

[12] The Appellant argued that his family doctor had lead him to believe that he could bring all of his concerns together once SGI had concluded the determination of his

permanent impairment benefits although it does not appear that he had ever raised this with SGI.

[13] 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.

[14] Therefore, we find that we do not have jurisdiction to hear the Appellant's appeal regarding SGI's January 3, 2007, May 4, 2007 and June 7, 2007 decision letters. In particular, we do not have jurisdiction to review the Appellant's concerns regarding the permanent impairment of his left leg.

[15] The Appellant's appeal of the October 22, 2007 decision letter is within the jurisdiction of the Commission.

**ISSUES:**

[16] The Appellant's position is his cognitive dysfunction is significantly more severe than the SGI assessment. He states that his condition is such that he cannot return to his employment in the oil fields and in addition it has significantly affected his daily life, his relationships with friends and family such that he is no longer the person he was prior to the motor vehicle accident. In his view, SGI has an obligation to recognize and compensate him and he disputed the decision that he was very slightly impaired in the performance of tasks necessary for daily living.

[17] In addition, the Appellant takes the position that he should be compensated for his loss of smell which he attributes to the mva.

[18] Counsel for SGI has filed additional information from the neuropsychologist who had previously assessed the Appellant. At the time of this assessment, the Appellant had not mentioned even when asked specifically that he had any loss of smell. In an updated report the neuropsychologist met with the Appellant on May 8, 2008 (just before the hearing) and was tested for loss of sensory acuity.

[19] The Smell Identification Test administered to the Appellant on May 8, 2008 put him in the severe smell acuity loss range and the neuropsychologist's report indicated that this loss was as a result of the head injury received in the mva.

[20] Counsel for SGI indicated that in light of this new information which they accepted, they were prepared to concede that the Appellant was entitled to receive permanent impairment benefits for this loss of smell.

[21] With regard to permanent impairment entitlement for cognitive dysfunction, Counsel for SGI argued that they were relying on the reports of the medical consultant dated September 17, 2007 and May 10, 2008 who reviewed the neuropsychologist's report. The medical consultant took the view that the Appellant's cognitive function was consistent with the regulations Appendix B, Division 2, Subdivision 1, Part 4.8(e) and assessed his impairment rating as "very slightly impaired his tasks of daily living".

## **FACTS AND FINDINGS**

[22] At the hearing, the Appellant called his mother, a former employer and his family doctor to testify as to his current condition. He also testified on his own behalf.

[23] The Appellant's mother testified that she went to the hospital when her son had been injured and had an opportunity to see the severity of his injuries. She advised that after the motor vehicle accident she noted a change in her son. In particular, she said he is different in that he forgets, will tell the same story several times, gets frustrated and his temper flares up. She testified that this was not how her son behaved prior to the accident.

[24] She lives outside the province so does not see her son on a regular basis, but the Commission accepts her evidence as to her observations of his change of personality.

[25] A former employer of the Appellant also testified. He has 23 years of experience in the oil patch and currently works as a pump operator. He had worked with the Appellant in the past (1991-92) and between October 2007 and February 2008, he hired the Appellant as a trainee to cover for him when he had days off. His assessment was that the Appellant was a good worker but was a hazard as a worker as he would forget things, and would get

frustrated and lose his temper. He gave examples of forgetfulness such as locking himself out of his car sometimes as many as 5 times a day, that he would forget basic safety procedures and once put a heated line in his mouth in error. He used varsol to make coffee as he could not smell the difference.

[26] By February 2008, he had made the decision that he could not recommend to his employer the continued employment of the Appellant. He felt badly about making that decision but he felt that no matter how much time he spent training the Appellant, the Appellant could not retain the information. In his view, this made the Appellant very dangerous to be around as the job had a great many hazards wherein he could seriously hurt himself or others.

[27] He did testify that he had left the Appellant in charge while he took some time off, but was apprehensive and made sure that he was available by telephone if needed. He testified that he did not have confidence that he could go away and leave the Appellant in charge and it is this job that he was training a replacement to do.

[28] The Appellant's family doctor testified that because of his leg brace and instability the Appellant could no longer do physical labour. He had been the Appellant's family doctor before the motor vehicle accident and has noted cognitive changes in the Appellant since the then. In particular, he stated that the Appellant could not be employed in occupations which require good memory, judgment and processing. He stated that in his interviews with the Appellant he has noted that it takes longer for the Appellant to process what he is saying to him and he has to repeat instructions to the Appellant to ensure he remembers them.

[29] The Appellant testified at the hearing and he took some issue with the report of the neuropsychologist in particular that the doctor had not spoken to his family about his situation. In his view, as expressed at the hearing "everyone looks after me." This appears to be looking in on him, reminding him of tasks, and having him share some meals with them. He has a driver's license and lives in an apartment by himself. Family members live in the same apartment complex and he has contact with them on a daily basis.

[30] He says that he has anxiety attacks as he is afraid that he is going to do something wrong. He experiences temper flare ups as he gets frustrated and has been told by family members they find his moods unpredictable. This has had a detrimental effect on his family relationships.

[31] During the hearing, the Appellant appeared to get frustrated especially when there was a discussion of the jurisdiction of the commission regarding the permanent impairment rating of his left leg. He appeared to recognize his anger and quickly got his flare-up under control with apologies to the commission and counsel for SGI.

[32] At the hearing, the Appellant was able to put forward his situation, ask relevant questions of his witnesses, and had prepared a document outlining his record of employment. He had prepared and written a document which he filed with the commission setting out his concerns about his condition.

#### **PERMANENT IMPAIRMENT BENEFIT**

[33] As an understanding of permanent impairment benefit and its purposes are necessary to understanding this decision, we will provide a brief explanation.

[34] 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.

[35] 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.

[36] 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.

[37] Other benefits are based on the Appellant'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.

[38] 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. Permanent Impairment Benefits are a third kind of benefit; for these, individual circumstances or expenditures are not relevant.

[39] 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 Permanent Impairment Benefit 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.

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

[41] 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.

[42] 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 September 28, 2005 motor vehicle accident.

**ANALYSIS**

[43] SGI has conceded that the Appellant is entitled to receive Permanent Impairment Benefit for his loss of sensory (smell) function at the maximum rating and an increased benefit for alteration of cognitive function. Accordingly, the only issue is the appropriate rating or level of compensation for the loss of cognitive function that the Appellant suffered as a result of the motor vehicle accident.

[44] The Personal Injury Benefit Regulations dealing with cognitive function are found at Division 2, Subdivision 1, Part 4.8 as follows:

- **4.8 Cognitive Function**

Organic cerebral syndrome, dementia and neurologic deficiencies:

(a) Alteration of the higher cognitive or integrative mental functions which markedly impairs the tasks necessary for everyday life or that require continuous supervision for performing such activities or confinement, including the side effects of medication .....100%

(b) Alteration of the higher cognitive or integrative mental functions which significantly impairs the performance of tasks necessary for everyday life and that require nearly continuous supervision for performing such activities, including the side effects of medication .....80%

(c) Alteration of the higher cognitive or integrative mental functions which moderately impairs the performance of the tasks necessary for everyday life and that require occasional supervision for performing such activities, including the side effects of medication .....45%

(d) Alteration of the higher cognitive or integrative mental functions which slightly impairs the performance of the tasks necessary for everyday life, including any side effects of medication.....15%

(e) Alteration of the higher cognitive or integrative mental functions which very slightly impairs the performance of the tasks necessary for everyday life, including any side effects of medication.....5%

[45] The medical consultant after reviewing the report of the neuropsychologist dated August 31, 2006 and August 25, 2007 was of the view that the Appellant fit into category (e) very slight impairment of the performance of tasks necessary for everyday living and the Appellant was given a Permanent Impairment Benefit of 5%.

[46] The August 25, 2007 neuropsychologist report states that although the Appellant suffered from a moderate traumatic brain injury, it appears that the Appellant has a mild compromise to his verbal intellectual learning and memory as well as his general rate of thinking and motor speed processing. He also stated that the Appellant is independent in daily living situations aside from certain limitations due to physical restrictions.

[47] The neuropsychologist indicated that the Appellant should be able to work in employment situations that emphasize visual problem-solving capabilities and probably routine and not work that requires rapid decision making.

[48] The Appellant takes issue with a number of the statements in the neuropsychologist report mainly about the impact of alcohol abuse. Both he and his mother dispute that he was a heavy drinker and that he suffered serious alcohol withdrawal after his accident and during his hospitalization. This alcohol withdrawal was documented by health providers after his accident and during his transport from his local hospital to an urban hospital for treatment. The medical reports attribute some of his disorientation and confusion to acute alcohol withdrawal as well as the head injury received in the accident. Despite the Appellant's contrary view to what was stated or recorded in the documents, it was unnecessary for us to consider this evidence in reaching our decision.

[49] After reviewing the neuropsychological reports and the evidence especially of his employer, we are satisfied that the Appellant's cognitive function is more severe than to "very slightly impair" the performance of tasks of daily living and a more accurate depiction is that it "slightly impairs the performance of tasks of daily living". In coming to this

conclusion, we reviewed that the Appellant lives independently, drives his own car, comes and goes as he pleases, and functions well in his tasks of daily living.

[50] Although the Appellant receives assistance (ie. cueing or reminding) from family and friends for some tasks (eg. medication), we are satisfied that he does not need occasional supervision. Alteration of cognitive function requiring occasional supervision results in a significantly higher (45%) impairment rating as set at in paragraph [44] above. Unfortunately “occasional” is not defined in the Regulations for this category of impairment. We are assisted in our decision though and rely on the test results in the August 31, 2006 neuropsychological report that showed the Appellant’s “daily living memory” for immediate and delayed recall was average. Having regard to all of the evidence, we find the Appellant is entitled to a Permanent Impairment Benefit for alteration of cognitive function assessed at 15% under subsection (d) above.

## **CONCLUSION**

[51] We find that the Appellant is entitled to, and which SGI concedes, a further Permanent Impairment Benefit for his loss of sense of smell at the maximum rating (total loss) of 4% pursuant to Subdivision 3, Cranial Nerve (1). We are appreciative of SGI’s effort to have the Appellant further assessed with regard to his claim which he had for the first time raised in his appeal dated November 27, 2007.

[52] In addition, we find the Appellant is entitled to, and which SGI also concedes, a further Permanent Impairment Benefit for alteration of higher cognitive function of 15% pursuant to the Appendix B, Division 2, Subdivision 1, Part 4.8 (d).

## **COSTS**

[53] 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 Saskatoon, Saskatchewan, on June 9, 2008.

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**Beverly Cleveland, Chair**

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**Joy Dobko, Commission Member**

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**Jane Lancaster, Q.C., Commission Member**