Automobile Injury Appeal Commission

Province of Saskatchewan

Citation: *B.N. v. Saskatchewan Government Insurance*, 2008 SKAIA 032

Date: 20080617

File: 126 of 2006

BETWEEN

B.N., Appellant

and

Saskatchewan Government Insurance, Respondent

Appearances:
David Rusnak, for the Appellant
Elizabeth Flynn, for the Respondent

Before: **Peter Bergbusch, 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.

Heard at Regina, Saskatchewan
April 25 and May 16, 2008

DECISION

[1] The Appellant, B.N., appeals a decision of Saskatchewan Government Insurance ("SGI") dated October 3, 2006, determining employment for her as a Retail Sales/Kiosk Lottery Clerk NOC #6421.

FACTS AND FINDINGS:

[2] The Appellant was involved in a motor vehicle accident which occurred on July 20, 1996.

[3] She suffered a number of injuries as a result of this accident and participated fully in rehabilitation programs as requested by SGI. Although most of her injuries resolved, the Appellant suffers a permanent and serious injury to her right hand. This injury limits her activities and continues to be painful and debilitating. The parties agree about the severity of the Appellant's injury, and that she suffers pain and is permanently impaired from it.

[4] The Appellant and her husband testified at the hearing about the impact of her hand injury and this testimony was confirmed by the April 16, 2003 Independent Medical Examination and the several medical and physiotherapy reports filed by the parties in this appeal.

[5] Prior to the motor vehicle accident, the Appellant was employed as a clerk in a convenience store. She attempted to return to work after the accident but was unable to perform this job due to her hand injury. She then attended Wascana Rehabilitation Centre but, although rehabilitation assisted her in reaching medical maximum improvement, the functional use of her right hand (she is right hand dominant) is still limited both in the work place and in activities of daily living.

[6] At the conclusion of her rehabilitation, the Appellant found work in a call centre which provides services to companies and individuals throughout North America. She is responsible for customer service, placing orders and resolving complaints. Keyboarding, a significant component of her job, puts stress on her injured hand and causes pain, swelling, and loss of function.

[7] SGI retained a vocational counsellor to assist with work accommodations and implemented a graduated return to work program in the hope of enabling the Appellant to work 8 hours a day. However, in March 2005 it was evident that the Appellant was only capable of working part-time as a result of her injury (3 hours per day, 5 days per week). Even with this abbreviated work time, the Appellant testified that she needs to take breaks during each shift to stretch out her hand and relieve pain. Upon returning home, she engages in “contrasting” – a technique she learned at rehabilitation consisting of alternating hot and cold water baths to deal with swelling and pain.

[8] When it became apparent that the Appellant would not be able to work full-time at the call centre, SGI made arrangements for a Functional Capacity Evaluation (“FCE”) to determine the Appellant’s capacity for full-time employment.

[9] The FCE took place with an occupational therapist on October 24 and 25, 2005. The occupational therapist concluded that the Appellant would only be capable of working 4 hours per day maximum at her current job, but she would be able to work 8 hours a day at a job where the physical demands on her right hand were less.

[10] The FCE report indicates that the Appellant’s physical abilities fall within the sedentary category for bilateral or right handed activities and light category of work for the left upper extremity based on 8 hours per day, 5 days per week. Practically speaking, the Appellant’s tolerance for typing was occasional with modified technique; for writing, at the low end of occasional; and for “larger pinch” and simple tool use, occasional with below average productivity. “Occasional” is defined as work that is performed on average 6-33% of the time over an 8 hour day.

[11] Following the FCE, the Appellant underwent a Physical Demands Analysis and a Transferable Skills/Occupational Compatibility Analysis on May 16, 2006. The vocational consultant who was involved with these assessments concluded that the job demands of a lottery kiosk sales clerk were within the Appellant’s restrictions as identified in the FCE. Relying on this advice, SGI provided the decision letter dated October 3, 2006, to the Appellant, setting forth the determined employment of Retail Sales/Kiosk Lottery Clerk NOC (National Occupational Classification) #6421.

[12] The Appellant has appealed this letter.

[13] The parties are in agreement that the Appellant has reached maximum medical improvement and they also agree that the Appellant has residual capacity to perform employment. It is the Appellant's view that the determined employment is not within her physical capabilities and that she would be unable to perform this job 8 hours a day, 5 days a week.

[14] The parties agree that the Appellant's current job at the call centre is beyond her physical capabilities to work on a full-time basis and that her maximum ability to work at this job is approximately half time (3 hours per day).

JURISDICTION

[15] The Automobile Injury Appeals Commission derives its jurisdiction from section 191(1) of *The Automobile Accident Insurance Act*, R.S.S. 1978, c. A-35 (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:
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> (a) 90 days after the date of the insurer's written decision; and
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> (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.

[16] The Appellant faxed her application form to the Commission on December 23, 2006, and the original was received by the Commission on January 8, 2007.

[17] As a written appeal (the faxed copy) was received within the 90 days of the October 3, 2006 decision letter, the Commission has jurisdiction over this appeal.

ISSUE:

[18] Has SGI proven on a balance of probabilities that the Appellant has the capacity to perform the determined employment?

Determination of Employment:

[19] The Appellant's claim to benefits is subject to the statutory provisions in force at the time of her accident: *An Act to Amend The Automobile Accident Insurance Act*, S.S. 1994, c. 34, s. 18 (the "*Old Act*"). The relevant sections are:

> 132 Following the second anniversary date of the accident, the insurer may determine an employment for a victim of an accident who is able to work but who is unable because of the accident to hold the employment mentioned in section 112 or 113 or determined pursuant to section 131.
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> 134 In determining an employment pursuant to section 132 or 133, the insurer shall consider the following factors:
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> (a) the education, training, work experience and physical and intellectual abilities of the victim at the time of the determination;
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> (b) any knowledge or skill acquired by the victim in a rehabilitation program approved pursuant to this Part;
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> (c) whether the employment is available in the region of Saskatchewan in which the victim resides;
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> (d) the employment that the victim is able to hold:
>
> (i) on a regular and full-time basis; or
>
> (ii) if it would not be possible for the victim to hold employment on a regular and full-time basis, on a part-time basis;
>
> (e) any other prescribed factors.

[20] The scheme provided in these sections is deceptively simple. If a person who is injured in a vehicle accident is unable, by reason of the injuries, to return to his or her pre-injury employment two years after the accident, SGI may consider what the person is then able to do and determine whether there is other employment that the person could undertake. This consideration must take into account, among other things, any restrictions, limitations or disabilities that the person suffers from, and his or her education, training, work experience and intellectual abilities. SGI then determines, to use the terms of the legislation, a new employment for the injured person.

[21] The *Act* requires SGI to consider whether the proposed determined employment is available in the region of the province where the individual resides. The *Act* does not require that SGI actually find a job for the individual who is determined into employment, nor does it provide that the income replacement benefit will continue until the individual actually obtains employment.

[22] The parties agreed that the determined employment, Retail Sales/Kiosk Lottery Clerk NOC (National Occupational Classification) #6421, is "available" in the region of Saskatchewan where the Appellant resides. A job is considered available for the purposes of the statutory scheme if it exists within 100 km of the Appellant's residence. It does not mean a job opening exists or that the Appellant has an offer of employment.

FACTS AND FINDINGS

[23] The Appellant testified as to her current employment and the physical limitations she experiences due to the hand injury. It was clear to the Commission that she takes justifiable pride in her accomplishments in her job and is seen as a valued employee.

[24] She also testified that, although she has tried to work a full shift, the pain and swelling she experiences in her right hand make this impossible. Therefore, she has been working 3 hours per day, periodically taking breaks to stretch her hand and changing her work from keyboarding to something less physically strenuous. Even with this, when she returns home after work, she must "contrast" her hand for 20-30 minutes to deal with swelling and pain. She also follows this routine after housework, such as vacuuming, and before retiring for the night. She indicated that she limits activities after 7 p.m. because of the pain and swelling in her hand.

[25] She testified that she has learned to accommodate the reduced function of her right hand by using her left hand more extensively. She can use her right hand, but only in a significantly decreased capacity.

[26] She expressed concerns that she would not be physically able to do the job as a lottery kiosk retail worker and went through each of the required tasks of that position. She thought she would have particular difficulty working the cash register, making change, and tearing lottery tickets from the large rolls on which they are supplied.

[27] Under cross examination, she indicated that she has learned to make accommodations since her accident whereby she limits the use of her right hand by using

primarily her left hand for a number of tasks. She acknowledges that she can use her right hand to a limited extent.

[28] The Appellant is very good at and clearly enjoys her job at the call centre and finds it fulfilling. In her view, she should not have to leave a job that she is good at and likes to take a job that she is not sure that she could do.

[29] The Appellant's husband testified as to his observations of his wife's disability and how this has affected their home life. He indicated that when she had tried to work 8 hours a day at her current employment her hand was so sore and swollen afterwards that she was not able to do anything at home. He indicated that he must communicate with her frequently as, for example, she cannot lift heavy cooking pots and has to know when he is coming for supper so that he can help take the pots out of the oven or off the burners.

[30] Counsel for SGI called the occupational therapist ("OT") who conducted the FCE. She stated the assessment used in this case took place over a 2-day period and is a widely accepted and recognized protocol based on biometrics. In her view the FCE provides the best evidence to determine how much functional capacity an individual has.

[31] In this case, the Appellant participated in a standardized Upper Extremity Isernhagen Work Systems Functional Capacity Evaluation for 3.5 hours on the first day and 3.75 hours on the second day.

[32] During the assessment, the OT testified that it was very important to identify the physical changes that took place between the first and second days with regard to pain, range of motion, strength and swelling as the evaluation is designed to test the maximum capacity that the Appellant has in her upper extremities.

[33] The OT testified that the FCE is a useful tool but it is not meant to guarantee that a person can do a specific job. The FCE assists in predicting whether or not it is worthwhile to consider certain occupations that are consistent with the patient's capacities.

[34] In her view, the results of the tests and the physical changes and aggravation of the Appellant's hand observed in the FCE were consistent with the Appellant's work history at

the call centre. The Appellant was working at her maximum (3 hours a day) at the call centre because the use of her right in that job was frequent to continuous (34-66% to 67-100%). Her tolerance for typing as identified in the FCE was defined as occasional (6-33%) and so it was consistent that she would not be able to meet the job demands of her current employment.

[35] SGI hired a vocational consultant to conduct a Physical Demands Analysis and a Transferable Skills/Occupational Compatibility Analysis. The Transferable Skills/Occupational Compatibility Analysis, dated March 16, 2006, reviewed the Appellant's education and work history and her functional abilities and restrictions, and then identified several occupations consistent with the Appellant's skills and capabilities. The report concluded that the occupation of "Lottery Ticket Kiosk Clerk (NOC# 6421) presents as the most closely transferable occupation given the client's vocational background. It is also within the client's restrictions thereby enabling her to perform this job for 8 hours per day/5 days per week (as per FCE recommendations)." The Physical Demands Analysis, also dated May 16, 2006, reviewed in detail the physical demands associated with employment as a lottery kiosk clerk. To summarize, this employment is a sedentary position requiring frequent (34-66% of the time) hand movements, primarily to handle cash and provide change and lottery tickets to customers.

[36] The vocational consultant testified that the Appellant might be capable of performing other jobs within the broad NOC# 6421 classification of Retail Salesperson/Sales Clerk, but he selected the lottery kiosk position because it seemed to be the least physically demanding and most tasks could be performed using one hand only. He added that another likely suitable position would be a sales clerk in a jewellery store. The consultant made it clear that he believes the Appellant's qualifications, especially her customer service skills, exceed the requirements of the lottery kiosk position, but that he believed that this job met her physical abilities.

[37] On July 5, 2006, SGI requested the OT to review the Physical Demands Analysis plus the occupational job descriptions of a Lottery Ticket Kiosk Clerk NOC #6421 and

asked if the Appellant "is capable of performing the … job including hours per day and any restrictions if applicable."

[38] On July 27, 2006, the OT wrote to SGI and advised that, in her opinion, the Appellant would be capable of performing the Lottery Ticket Kiosk Clerk job as it fell within "the sedentary category for bilateral or right handed activities and in the light category of work characteristics using the left upper extremity only" based on 8 hours per day, 5 days per week. The OT indicated that the Appellant should use a common sense approach while performing tasks requiring manual dexterity in order to avoid aggravating her right hand.

[39] At the hearing the OT confirmed her view that this occupation was within the physical capabilities of the Appellant and that the functional capacity testing had demonstrated that she would be able to perform this occupation on a full-time basis.

[40] On September 21, 2006, the personal injury representative for SGI, the vocational consultant and the Appellant and her husband met to discuss the various reports and the determination process pursuant to the Act. SGI's representative indicated that SGI would fund vocational assistance to help the Appellant in her job search.

[41] SGI then sent the decision letter on October 3, 2006, setting out the determined employment and offering the services of a vocational consultant for a period of one year to assist the Appellant with vocational options.

ANALYSIS

[42] SGI's position is that it is entitled to rely on the opinions of the occupational therapist and the vocational consultant that the Appellant can do the job of a Lottery Ticket Kiosk Clerk. Both of these consultants were fully aware of the limitations of the Appellant.

[43] SGI relies on *Job v. Saskatchewan Government Insurance* 2002 SKQB 479, affirmed 2004 SKCA 164, wherein Mr. Justice Matheson approved SGI's reliance on

assessment reports of experts in the determination process, in the absence of a very convincing reason to reject their advice.

[44] Counsel for SGI further submits that the evidence of the Appellant as to how she has learned to accommodate her right hand disability shows that she would be able to perform the duties of the determined employment relying mainly on her left hand and using her right hand occasionally to assist.

[45] It was clear from the evidence that the Appellant has had to accommodate her disability and has done so by changing some of the ways in which she performs certain tasks. With regard to the kiosk worker employment, the Appellant agreed that she could take cash from customers using her left hand only or with her right hand on an infrequent basis, as long as she does not use her right hand for more than an aggregate of 3 hours per day.

[46] SGI argues that it has proven on a balance of probabilities that the Appellant has the physical capacity to hold the determined employment on a regular and full-time basis pursuant to s. 134(d) of the *Old Act*. There was no dispute that the Appellant met the other factors set out in s. 134(a) such as education, training, work experience and intellectual ability to do the determined occupation. In fact, it was acknowledged by all the parties that the Appellant had exceptional customer service skills and far exceeded the non-physical qualifications that would be required for the job of a lottery kiosk clerk. The Appellant also accepts that the determined employment is available in the region of Saskatchewan in which she resides, in accordance with s. 134(c).

[47] Appellant's counsel argued that the Commission should not rely on the FCE report as the 2-day test did not provide an adequate examination of the Appellant's disability. In support of this, he relied upon the OT's response that it was her expectation that if the FCE had continued for a third or fourth day, the Appellant would have experienced increased pain symptoms and reduced functionality. He also argued that the Appellant should have been assessed for longer than 3.5 to 3.75 hours per day in order to see if she could endure a full-time position.

[48] The Appellant's argument assumes that the FCE is intended to replicate the demands of the determined employment situation. If that were so, then the Appellant's significant physical reaction to the first day of assessment would suggest that she could not possibly perform this level of work full-time.

[49] However, the FCE, as explained by the OT, is not meant to guarantee that a person can perform any particular employment but rather is a tool to determine the outer limits of the Appellant's physical capabilities. It is not expected that a typical workday in the determined employment would be as demanding as the FCE testing. The changes in function between the first and second day of the FCE confirmed that she could perform only occasional functions with her right hand and that she had lifting and reach restrictions as well. The 2-day test, which is based on an established protocol, allows the OT to observe any changes in function resulting from the first day's activity.

[50] The Appellant's counsel also argued that it was unfair of SGI to ask the Appellant to give up an employment that she loved and to which she had earned seniority for a job that she was unsure that she could perform on a full-time basis. He argued that SGI had a responsibility to determine if in fact the Appellant was capable of performing the determined employment by arranging a work placement for the Appellant in the position.

[51] The Appellant is currently working in a job which is beyond her physical capabilities. Even with the implementation of numerous adaptations, such as the use of a special left hand numeric keyboard, she can only tolerate working 3 hours per day. She is reluctant to leave the position, however, because she is consistently a "top performer" and because she has accumulated seniority in the position. She would like to maintain this employment and continue to have SGI "top up" her salary to a full-time equivalent. She told her vocational consultant that it was unfair for her to be forced to leave this employment because of a motor vehicle accident that was not her fault.

[52] The applicable provisions of the *Old Act* do not require that the Appellant in fact obtain employment in the determined category. SGI may determine for the Appellant any employment that is consistent with the factors listed in s. 134. However, the statutory provisions do not require SGI to place an insured in the determined employment in order to

conduct a work trial. As the Court of Appeal held in *Job v. SGI, supra*, the *Act* does not guarantee employment nor does it require that the determined employment be actually made available to the insured. Further, the legislation does not require the Appellant to obtain employment as a lottery kiosk clerk. It simply grants her a one-year grace period from the date of the determined employment decision before her income replacement benefit is reduced by the net income that she earns or could earn from the determined employment: s. 139 of the *Old Act*.

[53] We are satisfied on a balance of probabilities that SGI has met the requirements of s. 132 and s. 134 of the *Old Act*. We have sympathy for the Appellant's desire to remain in her current employment at the current hours, but SGI is not obliged to compensate her for her decision to do so. We agree with SGI that the Appellant has the physical capability to work full-time in less physically demanding work, such as the determined employment.

CONCLUSION:

[54] SGI's decision of October 3, 2006, is upheld and the appeal is dismissed. There is no order as to costs.

Dated at Regina , Saskatchewan, on June 17, 2008.

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Peter Bergbusch, Chair

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Beverly Cleveland, Commission Member

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Jane Lancaster, Q.C., Commission Member