

**Automobile Injury Appeal Commission
Province of Saskatchewan**

Citation: *A.S. v. Saskatchewan Government Insurance,*
2008 SKAIA 055
Date: 20081208
File: 043 of 2008

BETWEEN

A.S., Appellant

and

Saskatchewan Government Insurance, Respondent

Appearances:
A.S., Appellant
Dale Brown, for the Respondent

Before: **Jeff Scott, Chair**
Conrad Hnatiuk, Commission Member
Beverly Cleveland, 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
October 30, 2008

DECISION

[1] The Appellant, A.S., appeals five decisions by Saskatchewan Government Insurance (SGI) dated between March 19 and October 6, 2008 dealing with his entitlement to an income replacement benefit (IRB). Decisions numbered 1, 3 and 4 were replaced by decision 5 so that only decisions 2 and 5 are current. The decisions are summarized below.

The 5 Decision Letters

1. March 19, 2008 - initially calculating the IRB at \$549.16 bi-weekly based on the assumption that the Appellant's pay rate in March would have been \$9/hour;
2. June 12, 2008 – retroactively terminating the IRB as of March 31 because Workers' Compensation Board (WCB) resumed paying a wage loss benefit for his work-related injury;
3. July 9, 2008 – retroactively increasing the IRB to \$662.24 bi-weekly to reflect overtime that was missed in the March calculation;
4. September 17, 2008 – retroactively increasing the IRB to \$726.02 bi-weekly based on the assumption that the Appellant's pay rate in March would have been \$10/hour;
5. October 6, 2008 – retroactively increasing the IRB to \$811.02 to reflect additional overtime that was missed before; a slight over-payment from April 1-14 calculated at \$25.08.

The Position of the Parties

[2] The Appellant says he has suffered financial, emotional and physical losses that have not been compensated. Briefly his position can be summarized as (a) the IRB does not reflect what he earned and it is not enough to support his family which he was able to do before the accident and (b) that SGI – not WCB - should be responsible for his income loss until he was able to return to work in July 2008.

[3] SGI relies on section 113(2)(b) of *The Automobile Accident Insurance Act* (the Act) and Reg. 14 of *The Personal Injury Benefit Regulations* (the Regulations) for calculation of the IRB and section 202(7) of the Act for terminating the IRB.

Use of an Interpreter

[4] The Appellant notified the Commission office before the hearing that he would require an interpreter for the appeal proceeding. He speaks English but Persian (Farsi) is his first language. Saboor Saisang volunteers as an interpreter in the Persian language with the Open Door Society in Regina and had been helping the Appellant in preparing for the appeal. Mr. Saisang has no other relationship with the Appellant.

[5] At the beginning of the hearing, the Chairperson asked counsel for SGI what her position was respecting the Appellant's request for an interpreter and whether she had any objection to using Mr. Saisang's services. Ms. Eremko stated she first needed to hear evidence on why the Appellant required the use of an interpreter. Given Ms. Eremko's request, the Chairperson had a conversation with the Appellant to assess his ability to understand English, verbally respond in English and for the panel to ultimately decide if he needed an interpreter. The Appellant was asked where he was born (Afghanistan); what education did he have (he went to university in Afghanistan and obtained an education in teaching); whether he was married and the name of his wife; whether he had children and the ages of his children.

[6] After having that conversation, the Appellant was asked if he knew what it means to tell the truth. He appeared not to understand the question and turned to the interpreter to assist him with the question. The interpreter then asked the Appellant, we assume, in Persian whether he knew what it means to tell the truth. Through the interpreter the Chairperson continued to discuss with the Appellant about the need to be truthful at the hearing.

[7] The Chairperson also asked the interpreter about his background. He is a family medical doctor, educated and trained in Afghanistan but not currently practicing as a physician in Canada. His wife is also a medical doctor who will be writing the Canadian physician exams this coming spring. The interpreter was asked whether he believed he had the ability to understand the English language, then translate for the Appellant what was being stated in English into Persian and then translate from Persian into English the Appellant's evidence for the hearing. He replied that he did have such knowledge.

[8] Based on this conversation, we were satisfied the interpreter had more than an adequate ability to understand the English language and express himself in English. Whether he had the ability to translate from English to Persian and then Persian to English, we had no independent means to assess that other than to rely on the interpreter's word that he did have such ability.

[9] After having both conversations, Ms. Eremko was asked for her position with respect to the Appellant's request for an interpreter and the use of this particular interpreter who was present for the hearing. Ms. Eremko replied that she agreed to the Appellant's request for an interpreter and the use of Mr. Saisang's services.

The Background

[10] The Appellant was injured in a car accident on February 18, 2008. At the time he was off work due to work-related injury (hernia) that happened in August 2007 and was receiving a wage loss benefit from the WCB of \$715 bi-weekly. The hernia injury was surgically repaired and the Appellant was expected to return to work on March 4, 2008. As a result of the car accident however the Appellant suffered soft-tissue injuries to his spine (neck, arm and low back), right groin pain, especially near the surgical scar site, and an exaggeration of the healing process following the hernia repair. His expected return to work was also delayed.

[11] The WCB paid him a wage loss benefit to March 3 and SGI then paid him an IRB from March 4 – March 31 of \$811.02 bi-weekly.¹ On April 1, the WCB again picked up his claim and paid the Appellant a wage loss benefit until he returned to work on July 14, 2008. (*Note: SGI was not aware that WCB had picked up the Appellant's claim again and resulted in the small overpayment of \$25.08.*)

[12] The Appellant received treatment for his spinal injuries (chiropractic, physical therapy and massage therapy) following the accident and continues to experience some mild

¹ See paragraph [1] above - initial IRB calculations of \$549.16, \$662.24 and \$726.02 bi-weekly were replaced by the final calculation of \$811.02 bi-weekly.

discomfort in his low back. He thinks his chiropractic treatment plan includes 5 or 6 more sessions.

[13] The Appellant initially reported significant pain and discomfort in the groin area especially near the surgical site following the car accident and although he was able to return to work in mid-July with weight restrictions for lifting, he says that he continues to have pain in that area. The surgeon who performed the hernia repair conducted a follow-up examination on the Appellant and commented in a letter to his family doctor dated June 23, 2008 that it “certainly seems that he was making an improvement and I had given him the green light to go back to work prior to that accident...I don’t get the sense of any recurrence here at all and the groin feels in tact. (*sic*) He seems to get pain right along that incision area and just superior and medial to it. All in all, it would appear that his car accident has certainly resulted in some right groin pain. I think this perhaps is (*sic*) exacerbated the normal healing process...”. Following this examination, the Appellant underwent a cystoscopy and ultrasound both of which were normal.

[14] The Appellant had blood in his urine after the cystoscopy and was treated with a course of antibiotics. Throughout the surgery and post-accident, he was prescribed medication for pain but reported at the hearing that he no longer uses any medication because it gives him a headache.

[15] The Appellant says his life dramatically changed after the car accident. In addition to his physical suffering, he states that he couldn’t go back to work and the IRB was not enough to support his family – which he was able to do before the accident. As a result, he borrowed money on a line of credit to make ends meet and is now worried about the accumulated debt and increasing cost of items such as gas and food.

[16] The Appellant returned to work as an auto care technician (\$10/hr) on July 14 but moved to a wash bay attendant (\$13/hr) with a different employer on July 23. Both jobs required overtime work although the auto care technician had a larger and guaranteed number of overtime hours attached to it. At the hearing, the Appellant told us that very recently he was let go from the wash bay attendant job for reasons he couldn’t explain. Also, for reasons we don’t understand, he is fearful of approaching this employer for an

explanation or, seemingly, even for his separation certificate. The SGI injury representative attending the hearing said he will try to help the Appellant and would call the employer. We applaud his offer to help the Appellant in this matter.

April 1 – 14, 2008

[17] On April 14 the Appellant contacted SGI and reported that he had received a cheque from both SGI and the WCB for the period April 1 – 14. The SGI injury representative then contacted the WCB representative who said that the Appellant “had a set back and WCB picked up his claim again on April 1”. The SGI injury representative says that by then the Appellant was not having problems with his arm and low back any more and felt that he was off work now because of the work (hernia) injury only. This duplication in paying of an income benefit resulted in a small overpayment of \$25.08 by SGI. We observe the Appellant promptly notified both SGI and the WCB about the duplication.

[18] The Appellant strongly disagrees and says he was getting better after his last hernia surgery and was expected to go back to work on March 1 but then the car accident happened. That, he says, is when he started having significant pain and discomfort at the hernia repair site again. He firmly believes it was the car accident that caused the problems and was why he couldn't return to work until July and thus SGI should have been responsible for paying him an IRB until he did go back.

[19] The SGI injury representative called the WCB worker on April 14 and 24 to ask what was going on but no discussion or joint decision was made about whether the car accident or the work injury was responsible for the Appellant's continued problems at the hernia site and the cause of his being unable to return to work.

Calculation of the IRB

[20] The Appellant's yearly employment income was calculated² based on the most recent information that SGI received from his employer. The revised IRB was based on the average of the Appellant's regular pay for October and November 2007 (357 hrs/2 months =

² See decision letter 5

178.5 hrs/month x \$10/hr x 12 months = \$21,420) plus the guaranteed monthly overtime hours (49 hrs x \$15 x 12 = \$8,820) and resulting in a gross yearly income of \$30,240 (\$21,420 + \$8,820).

[21] The Appellant says he earned more than \$811.02 bi-weekly and feels it should be about \$2,100 to \$2,200 per month instead. He provided copies of payroll vouchers from his most recent job as a wash bay attendant showing total gross earnings of \$2,945.15 and \$2,783.95 for August and September 2008 and included regular and overtime hours and holiday pay.

Discussion and Analysis

[22] The Appellant sustained an at-work injury in 2007 for which he underwent two surgical repairs. He was scheduled to go back to work on March 1, 2008 but was injured in a car accident on February 18. He was unable to work and received WCB benefits from 2007 until he returned to work on July 14, 2008 except for the period March 4 – 31, 2008. During that period in March 2008, SGI paid the Appellant an IRB.

[23] SGI's position is the Appellant was no longer entitled to receive an IRB once the WCB resumed paying benefits to him on April 1, 2008. The Appellant's position is the car accident was the reason for the delay in his return to work and SGI should be responsible for the IRB.

Calculation of the IRB

[24] The Appellant's entitlement to an IRB is section 113(2)(b) of the Act, which states:

113(2) an insured is entitled to an income benefit if, as a result of an accident, the insured:

(b) is unable to hold an employment he or she would have held in the first 180-day period following the accident if the accident had not occurred.

Regulation 14 says:

14. For the purpose of the Act, an insured is unable to hold employment if a bodily injury that was caused by the accident renders the insured entirely or substantially unable to perform the essential duties of the employment of the insured:

(b) would have performed but for the accident.

[25] There is usually a one week waiting period before payment of an IRB starts but in this case the Appellant was considered unable to work for reasons unrelated to the accident (hernia repair) until March 4. SGI says the Appellant was thus not entitled to start receiving an IRB until March 4. We agree.

[26] We are also satisfied the IRB was (eventually) calculated correctly at \$811.02 (net) bi-weekly and includes the \$1 per hour pay increase from \$9 to \$10 as well as his overtime hours that had initially been missed. Shortly after the Appellant returned to work in July 2008, he was successful in transferring to a different position that paid him \$13 per hour. The Appellant provided copies of his monthly pay vouchers for August and September 2008 confirming his rate of pay and it did include some overtime hours although significantly less than he had been guaranteed in his previous job.

[27] The law is clear that the Appellant must have held the employment before the accident or “would have held” the employment after the accident. We understand what he is saying is that he was earning more than what the IRB paid – it was based on \$10 per hour plus overtime hours - but there is nothing we saw that suggested or confirmed the Appellant had been promised the wash bay attendant job at \$13 per hour before the car accident when he was originally scheduled to return to work on March 1.

[28] The revised IRB of \$811.02 (version 5) does not however show any deduction for dependants. The Appellant says that he claims his spouse as a dependent and they also receive a child tax credit. The Manager of the SGI Calculator Unit says that the spouse with the lower income would claim the children as dependents – which in this case would be the Appellant’s wife. The Manager also says it would make a difference in the amount of the IRB if the Appellant claims dependant(s) and if this is reflected in his tax records then SGI will certainly review the calculation. We encourage the Appellant to bring his income tax returns so that SGI can review whether the IRB should be revised to reflect dependent(s).

SGI or WCB?

[29] SGI's position is also that on April 1, 2008 the Appellant was no longer entitled to an IRB because of s. 202(7) of *The Automobile Accident Insurance Act* which says:

202(7) If a person is receiving a benefit and because of another bodily injury became entitled to compensation pursuant to *The Workers' Compensation Act, 1979* or is receiving compensation pursuant to *The Workers' Compensation Act, 1979* and, because of another bodily injury, the person becomes entitled to a benefit:

- (a) the insurer and the Workers' Compensation Board shall:
 - (i) make a joint decision distinguishing between the bodily injury attributable to the accident with respect to which a benefit is payable and the bodily injury for which a wage loss benefit is payable pursuant to *The Workers' Compensation Act, 1979*; and
 - (ii) pay compensation in proportion to the attribution of the person's bodily injuries; and
- (b) the insurer or the Workers' Compensation Board, as the case may be, shall continue to pay the benefit or the compensation until the joint decision is made.

[30] Once the SGI personal injury representative knew that that WCB had once again picked up the WCB claim, it ceased paying the IRB. It is clear that the Appellant is not entitled to receive benefits from SGI and WCB for the same injury at the same time however when that situation arises, as it did in this case, the legislation requires that SGI and WCB must make a joint decision about which agency is responsible and, where needed, apportion the benefits payable with respect to that injury. That didn't happen in this case.

[31] We see nothing in the SGI injury notes or in the WCB notes that suggest or convince us there was any meaningful discussion between the representatives about the hernia injury and/or the injuries the Appellant received in the car accident. The SGI injury representative candidly acknowledged that other than his initial and follow up phone call to the WCB representative asking what was happening that there were no discussions about the Appellant's injuries and the benefits payable. The legislation imposes a positive duty that a

joint decision must be made between SGI and WCB in these circumstances and we find that SGI stopped paying simply because the WCB had started paying a wage loss benefit.

[32] We find the Appellant received soft tissue injuries in the car accident to his spine and at the surgical repair site which delayed his expected return to work following his surgery. We accept the Appellant's testimony in this regard and together with the letter from the general surgeon respecting the hernia repair and find that SGI is responsible for all benefits to July 14 when the Appellant returned to work.

Conclusion

[33] SGI's decision respecting the calculation of the IRB at \$811.02 is correct based on the information available to it at the date of the appeal. The Appellant is encouraged to bring in his tax records for SGI to review respecting the question of dependents being claimed.

[34] SGI's decision retroactively terminating the IRB as of March 31, 2008 because WCB resumed paying a wage loss benefit is set aside. SGI cannot avoid its statutory mandate simply because the WCB recommenced paying the wage loss benefit and we find that, in fact, SGI was responsible for all benefits until the Appellant returned to work on July 14. SGI is ordered to recalculate the Appellant's entitlement to the IRB and make the necessary adjustments between itself and WCB. For clarity, the Appellant is not entitled to receive both the wage loss benefit from the WCB and an income replacement benefit from SGI and any amounts he has already received from WCB will be deducted and reflected in whatever amount is owing to him from SGI.

Expenses

[35] The Appellant has been partially successful in his appeal and he is entitled to a refund of his appeal fee and any reasonable expenses (eg. lunch, travel).

Other

[36] During the appeal hearing the Appellant raised the financial losses he suffered respecting the replacement of his car which was apparently written off in the accident. This Commission however has no power or authority to deal with that issue.

Dated at Regina, Saskatchewan, on December 8, 2008. .

Jeffrey Scott, Chair

Conrad Hnatiuk, Commission Member

Beverly Cleveland, Commission Member