

Automobile Injury Appeal Commission
Province of Saskatchewan

Citation: *S.A. v. Saskatchewan Government
Insurance, 2003 SKAIA 003*
Date: 20030723
File: 031 of 2003

BETWEEN

S.A., Applicant

and

Saskatchewan Government Insurance, Respondent

Appearances:
S.A., For the Applicant
John Schmidt and Lynn Henderson, For the Respondent

Before: **Ann Phillips, Q.C., Chair**
Beverley Cleveland, Commission Member
Mukesh Mirchandani, 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
July 4, 2003

DECISION

[1] The Appellant, S.A., appealed four decisions of Saskatchewan Government Insurance (“SGI”) as follows:

- (a) February 17, 2003 – A decision not to pay for further prescriptions for Nexium, to alleviate heartburn, as it was not considered required for accident-related injuries.
- (b) February 19, 2003 – A decision refusing to pay for contact lenses as well as glasses on the grounds that *both* were not medically required.
- (c) April 2, 2003 – A rejection of funding for a Palm Pilot.
- (d) April 4, 2003 – A letter declining to re-examine his income replacement benefit on the basis “that it was not keeping up with his expenses”, on the grounds that he was already receiving annual increases on the income replacement benefit according to the Consumer Price Index.

FACTS:

[2] The Appellant incurred head injuries in a snowmobile accident in February, 1996. We observed that the injuries affect the use of his dominant right hand, his gait (right leg), his eyesight (he has strabismus) and his speech. He has some difficulties with abstractions, but his presentation to the Commission was well organized and thought out.

[3] The Commission’s jurisdiction to review a decision of SGI is set out in section 193(7) of the *Automobile Accident Insurance Act* (“the Act”) that the Court of Queen’s Bench previously had under section 198(3), to:

- “(a) set aside, confirm or vary the insurer’s decision; or
- (b) make any decision that the insurer is authorized to make pursuant to this Part.”

[4] The Commission determined in *R.C.*¹ that its discretion to make decisions must be exercised in a judicial manner. The discretion will be exercised in favour of the applicant only if it is demonstrated that the decision of SGI (not to advance further funds) was erroneous; or based on erroneous assumptions; or at the very least, the decision was unreasonable.²

[5] In reviewing SGI's decisions to refuse funding for contact lenses, Nexium medication and a personal organizer, the legal framework is Section 110 of *The Automobile Accident Insurance Act* in effect at the time of the Appellant's accident, ("the old Act") which provides:

"110(1) In this section, 'rehabilitation' includes any or all of the following measures, programs and treatments that the insurer considers necessary or advisable to contribute to the rehabilitation of a victim, to lessen the victim's disability caused by the accident and to facilitate the victim's recovery from the accident:

- (a) physical and acquired brain injury programs and treatment;
- (b) occupational and vocational training and programs;
- (c) alterations to an victim's residence;
- (d) modification or purchase of a motor vehicle for a victim;
- (e) purchase of special equipment for a victim;
- (f) any additional prescribed measure, program or treatment prescribed in the regulations.

(2) Subject to the regulations, the insurer may take any measure it considers necessary or advisable to contribute to the rehabilitation of a victim, to lessen a disability resulting from bodily injury and to facilitate the victim's recovery from the accident.

(3) The total combined maximum benefits payable to a victim pursuant to this Division and Division 7 is \$500,000 for each accident in which the victim suffers bodily injuries arising out of an accident..³

[6] The regulations referred to include sections 12 and 13 of *The Personal Injury Benefits Regulations*, which also apply⁴:

"12 If the insurer considers it necessary or advisable for the rehabilitation of a victim, the insurer may provide the victim with one or more of the following:...

- (e) funds to reimburse the victim for acquiring any or all of the following:...
 - (iv) specialized medical supplies
 - (v) communication and learning aids;...

¹ *R.C. v. Saskatchewan Government Insurance* 2003 SKAIA 1

² *Belchamber v. Saskatchewan Government Insurance* [1997] TWL QB 97557; *Donen v. Saskatchewan Government Insurance*, [1998] TWL QB98224; *Collis v. Saskatchewan Government Insurance*, [1998] TWL QB98113.

³ Because the Appellant was injured before the current *Act* came into force, the 1995 version applies. (The current equivalent of section 110 is section 112.)

⁴ Again, these are the 1995 regulations in force until the 2002 amendments.

(viii) cognitive therapy devices;

(f) funds to pay for the victim's occupational, educational or vocational rehabilitation where the rehabilitation is consistent with the victim's skills and abilities after the accident and where the purpose of the rehabilitation is:

(i) to lessen the victim's disability; and

(ii) to facilitate the victim's recovery from an accident to improve his or her earning capacity and level of independence."

13(1) A victim shall not incur an expense mentioned in section 12 without obtaining the prior consent of the insurer.

(2) Before making a payment pursuant to section 12, the insurer may require a victim to provide the insurer with any information the insurer reasonably requires for the purposes of this section, and the victim shall provide that information."

[7] The Commission may review SGI's decisions to see if the proposed measure, program or treatment is "necessary or advisable".

[8] In most cases, what is "necessary" will be obvious to all, "advisable" less so. "Advisable" has been defined (Webster's Third International Dictionary) as: "proper to be advised or to be done; expedient; prudent".

DISCUSSION:

Contact Lenses

[9] In addition to the "necessary or advisable" test, and the determination of whether it contributes to rehabilitation, lessens disability, or facilitates recovery, the funding of contact lenses is expressly governed by Section 63 of *The Personal Injury Benefits Regulations*:⁵

"63 Where a victim did not wear eyeglasses...or contact lenses before the accident, the insurer shall reimburse the victim for any expense incurred by the victim to purchase, fit or adjust eyeglasses...or contact lenses."

[10] Before the accident, the Appellant did not need glasses, although he had worn them "to look cool". Since the accident, because of the strabismus, he does require vision correction, for example, to drive. He had been provided by SGI with glasses and replacement glasses since the accident, on July 17, 1996, June 2, 1998 and August 29, 2001. In addition, SGI provided contact

⁵ Chapter A-35, Reg. 3.

lenses on September 21, 1999 and replaced them November 4, 1999. SGI's internal memorandum confirms that it accepted that the strabismus was considered "MVA related": the sole issue was whether both contact lenses and glasses should be paid for. SGI now believes that although at one time it funded both, that decision was mistaken.

[11] The Appellant testified that he mostly wears glasses. Contact lenses are often a problem for him: putting them in, with fine motor control problems, is difficult, although he has practiced with cheap throwaway contact lenses and is achieving better results. Wind-blown dust in the outdoor activities he enjoys is not pleasant with contacts. However, he continues to go snowmobiling, and finds that his glasses fog up, behind his snowmobile visor. It is for this reason that he wishes to have contact lenses funded by SGI.

[12] We do not interpret section 63 as requiring SGI to pay for contact lenses after the accident if he did not wear them before, regardless of the reason for obtaining the contact lenses. Section 63 is clearly, in our view, subordinate to the requirements of the *Act* that the measure be necessary or advisable and that it contribute to rehabilitation, lessen disability caused by the accident or facilitate recovery from the accident.

[13] We are all of the opinion that the Appellant's request for contact lenses for use in snowmobiling is neither necessary nor advisable. The Appellant had no medical evidence in support of his claim.

[14] In addition, we considered if the proposed measure:

- (a) contributes to rehabilitation;
- (b) lessens disability caused by the accident; or
- (c) facilitates recovery from the accident.

[15] We were unable to conclude that it did.

Computer

[16] The Appellant wished to challenge SGI's policy that if a computer is required to assist in rehabilitation, it will buy one initially, but will not fund updated hardware and software. The

Commission was unable to deal with this issue since, in the Appellant's case, it arose out of a letter dated August 23, 1999, long past the point of appeal under section 191(1)(a) of the *Act*.⁶

Palm Pilot

[17] SGI's April 2, 2003 letter rejected funding for a Palm Pilot. This had been submitted as a funding request by Blaine Katzberg, an occupational therapist on the Acquired Brain Injury Outreach Team, as follows:

"Rationale

1. [The Appellant] is now involved as a volunteer with Regina's Think First program. He is finding that he is having to schedule more appointments, meet new people and is requesting funding for a Palm Pilot to assist with keeping track of appointments, making notes to himself and assisting him in staying more organized. He likes technology and feels a Palm Pilot would assist him in becoming more organized. [The Appellant] has good computer skills and would quite easily learn to operate a Palm Pilot."

[18] The Appellant's injury representative replied on April 2 rejecting the request, as follows:

"I sent a fax to Blaine advising the reasons we were unable to fund the Palm Pilot... The reasons are as follows:

- a small day planner for approximately \$10.00 would serve the same purpose as a Palm Pilot...

To further explain:

- a Palm Pilot can be a complicated piece of equipment to learn to use whereas a day planner is very simple to use and much more compact than a Palm Pilot to transport with you and financially more reasonable. Blaine has given no convincing evidence that the Palm Pilot is required for your accident related injuries and just indicates that you would like one because you like technology and you feel a Palm Pilot would assist you in becoming more organized."

[19] The Appellant filed a letter from Dr. Robert E. Capp to Dr. M. Steyn, his family physician. This letter said, in part:

"[The Appellant's] major concern today was that a request had been made to provide him with a palm pilot. According to [the Appellant] this was turned down on the grounds that it was technically beyond him. I disagree with that judgement. He has been quite computer literate for several years now and a palm pilot certainly would be a useful device for him to supplement his memory which leaves somewhat (sic) to be desired and also to help him with keeping on schedule and on task. I have no question in my mind that [the Appellant] has the skills to use such a device."

⁶ A 90 day appeal period.

[20] The Appellant testified that the use of a small day planner notebook was not feasible for him, since it is hard for him to write small. He thought that tapping keys with a stylus would work. He had obtained a quote from a store near his home in [town] for between \$400 and \$500, including a training session.

[21] We are of the view that the basis for SGI's decision is unreasonable. The opinions of Mr. Katzberg and Dr. Capp are that the Appellant would not have difficulty in learning to use a personal organizer. Both of them indicate that such a device would be useful in helping him to supplement his memory and become more organized. The SGI decision further fails to consider that if a person with fine motor control problems has to write in a notebook, that notebook is not going to be small, which adds to the inconvenience of carrying it around.

[22] On the other hand, the model of Palm Pilot requested by the Appellant seems excessively priced. For the Appellant's current needs, as he prepares for re-entry into the work force, a very basic personal organizer with calendar, contact information, and note taking functions, at a modest price would be advisable and appropriate.

Nexium

[23] SGI's letter of February 17, 2003 declined further funding for Nexium, a prescription drug, since it had been determined that he had suffered from heartburn since he was 19.

[24] SGI's medical director, Dr. Murray Flotre, considered the request February 10. He stated:

“Although it is doubtful that the motor vehicle accident directly caused [the Appellant's] gastroesophageal (GE) reflux, and therefore the need to be on Nexium, it is possible that the amitriptyline and/or Neurontin have contributed to the problem. It is also possible that the GE reflux has nothing to do with the medication. Has [the Appellant] gained a lot of weight since the accident?”

[25] He suggested temporary funding, while he contacted the family physician and Dr. Capp with respect to the relationship of the GE reflux to the accident.

[26] Dr. Flotre received prompt replies from Drs. Steyn and Capp. The former stated:

“I noticed from the notes in his chart, that his GERD symptoms are longstanding. He actually told me that he has had “heart burn” since age 19.”

[27] Dr. Capp said:

“I must confess I do not know why [the Appellant] is on Nexium. I presume his family physician prescribed that. I can see no particular relationship between that and his motor vehicle accident except I’m sure he will say it is related to the stress.”

[28] Dr. Flotre therefore concluded:

“Therefore, this is not a problem caused by the MVA, or medications being used to treat MVA-related problems. I would therefore suggest that SGI not fund further prescriptions for this medication.”

[29] After the Appellant had appealed and before the hearing, Dr. Steyn wrote two letters – one to Dr. Flotre at SGI⁷ and the other “To whom it may concern”.⁸

[30] The former stated:

“I am again writing requesting consideration for coverage of a proton pump inhibitor such as Pariet 10 mg two tablets daily for management of [the Appellant’s] gastroesophageal reflux disorder. [The Appellant] reports his symptoms are worsened with stress. Since his accident he reports he does not handle stressful situations well which in turn aggravates his GERD symptoms. Zantac does not control the symptoms. PPI’s such as Pariet provides dramatic symptomatic relief.”

[31] The latter stated:

“[The Appellant] has tried the new PPI Pariet 20 mg. mane for 10 days since March 04/03. He needed to take antacids while on this drug. A trial of Nexium 40 mg. daily gave him complete relief. For unexplained reasons this drug seems to be superior to the other PPI’s.”

[32] The Appellant testified that before the accident, he did indeed have heartburn but it was under control with antacids like Tums and Roloids. He said that indeed the additional stress of living with his injuries has worsened his condition. While the evidence linking the increased GE reflux to the snowmobile accident is not great, it is significantly stronger than Dr. Flotre had available to consider in February. Moreover, we were impressed by the fact that with Nexium he obtains complete relief, as opposed to the failure of the trial with Pariet.

[33] For this reason, the Commission sets aside SGI's decision not to fund prescriptions for this drug, and directs it to do so. If SGI can demonstrate that the increased severity of the Appellant's GE reflux symptoms is attributable to something other than stress from the injuries incurred in the motor vehicle accident, then it may bring an application to vary this decision.

Indexation Income Replacement Benefits

[34] The Appellant has been receiving an income replacement benefit since 1996. SGI provided a printout of income replacement benefits received by him showing six CPI adjustments on August 5 of each year, the "determination date". These increases are as follows:

Income Replacement and Death Benefit Summary

<u>Version No.</u>	<u>Date</u>	<u>Gross Income</u>	<u>Ongoing Bi-weekly IRB</u>
1	February 29, 1996	\$X	\$880.42
6	August 5, 1997	\$X	\$710.57
7	August 5, 1998	\$X	\$719.06
8	August 5, 1999	\$X	\$738.42
9	August 5, 2000	\$X	\$756.96
11	August 5, 2001	\$X	\$814.58
14	August 5, 2002	\$X	\$846.12

[35] It should be noted that the Appellant has since August, 1996 received a Canada Pension Plan benefit of approximately \$230 bi-weekly, which is to be added to SGI's ongoing bi-weekly IRB.

[36] Division 10 of the *Act* deals with indexation of benefits in accordance with the "all-items" Consumer Price Index for Saskatchewan as published monthly by Statistics Canada.

[37] The Appellant argued that the industrial average wage should have been the measure for indexation. He had worked as a long distance truck driver because it provided him income that kept him ahead of the pack.

⁷ April 2, 2003,

⁸ April 15, 2003.

[38] The old *Act* does use the industrial average wage in adjusting “maximum yearly insurable earnings” under section 138 (2)⁹. When income replacement benefits were introduced in 1995, the maximum an insured could receive was \$50,000. This has been indexed to the industrial average wage.¹⁰

[39] The Appellant’s objection was to the policy behind the legislation, rather than non-compliance with the legislation. The Commission can only deal with the latter. We confirm SGI’s decision with respect to indexation of benefits.

COSTS:

[40] As the Appellant has succeeded on two of the grounds for appeal, he is entitled to his costs of the hearing including the application fee, travel expenses to and from the hearing at \$0.3503 per kilometre and any expenses incurred in procuring medical reports.

SUMMARY:

[41] SGI’s decision of February 17, 2003 not to pay for further prescriptions for Nexium is set aside. SGI is directed to pay for Nexium prescriptions in future.

[42] SGI’s decision of February 19, 2003 refusing to pay for contact lenses is confirmed.

[43] SGI’s decision of April 2, 2003 rejecting funding for a Palm Pilot is set aside. The Commission recommends, but does not order, funding for a suitable entry-level personal organizer.

[44] SGI’s decision of April 4, 2003 with respect to the indexation of the income replacement benefit is confirmed.

[45] The Appellant is to have his costs of this appeal as set out above.

⁹ In the current *Act*, it is section 136.

¹⁰ The industrial aggregate average weekly earnings for all employees in Saskatchewan as published monthly by Statistics Canada: section 137(1) of the *Act*.

Dated at Regina, Saskatchewan, on July 23, 2003.

Ann Phillips, Q.C., Chair

Beverley Cleveland, Commission Member

Mukesh Mirchandani, M.D., Commission Member